Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NCUBE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM

Introduction and Procedural History

1. The Applicant joined the Office for Coordination of Humanitarian Affairs (OCHA) as a National Professional Officer in Zimbabwe in 2007. On 11 July 2010, OCHA deployed him to Afghanistan on a one-year fixed-term appointment as a Humanitarian Affairs Officer at the P3 level. His appointment was extended through 20 March 2012, and not renewed thereafter.

2. On 11 May 2012, the Applicant filed the present Application with the United Nations Dispute Tribunal (UNDT) in New York challenging OCHA's decision to separate him from service on grounds of unsatisfactory performance.

3. On 18 June 2012, the Respondent filed his Reply to the Application.

4. On 1 November 2013, the UNDT in New York issued Order No. 281 (NY/2013) transferring this case to the UNDT in Nairobi.

5. On 28 November 2013, the UNDT in Nairobi issued Order No. 258 (NBI/2013) advising the Applicant that representation by counsel would assist him and the Tribunal in the conduct and management of this case. To this end, the Tribunal directed the Registry to serve the Order on the Office of Staff Legal Assistance (OSLA) to facilitate the process.

6. On 3 December 2013, the Applicant formally enlisted the services of OSLA.

7. On 13 December 2013, counsel for the Applicant filed a motion for leave to amend the Application.

8. The Respondent filed his submissions in response to the Motion on 23 December 2013.

9. On 15 January 2014, the Tribunal issued Order No. 005 (NBI/2014) allowing the Applicant to amend his Application and adjusting the timeline for the Respondent to file his reply.

10. The Applicant filed his amended Application on 16 January 2014.

11. The Respondent replied to the amended Application on 26 February 2014.

12. On 4 November 2014, the Tribunal issued Order No. 244 (NBI/2014) directing counsel for both Parties to file joint submissions on the facts and issues in this case, and to indicate their position on the need for an oral hearing.

13. On 2 December 2014, the Parties filed their joint submissions.

14. Both Parties indicated that an oral hearing was necessary in this case.

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20. On 8 April 2015, the Tribunal issued Order No. 113 (NBI/2015) denying the Respondent's motion to have the hearing rescheduled and directed the Respondent to make the necessary arrangements for the matter to proceed as scheduled.

21. On 9 April 2015, the Respondent filed a Response to Order No. 113 (NBI/20

moved to withdraw the witness and close his case given the "oral testimony presented to the Tribunal and the written evidence on record".

28. On 24 April 2015, the Tribunal issued Order No. 122 (NBI/2015) granting the Respondent's Motion and set a deadline for the filing of the Parties' closing submissions.

29. This matter was heard on 3, 4 and 5 February 2015; 15, 16 and 21 April 2015.

30. The Applicant gave evidence on his behalf and called one witness, Mr. Megbaru Alawe. The Respondent called Mr. Andrew Willie, Ms. Jessica Bowers and Mr. Joseph Inganji.

FACTS

31. The Applicant is a citizen of Zimbabwe. On 11 July 2010, he was assigned to a P-3 fixed-term post of Humanitarian Affairs Officer with OCHA.

32. He assumed his functions with OCHA on 11 July 2010.

33. On 27 September 2010, the new Head of Office of OCHA for Afghanistan, Mr. Tim Pitt, re-assigned the Applicant to the Donor Relations Section. His position title remained the same.

34. The Applicant had almost completed one year of continuous service as Humanitarian Affairs Officer when, on 3 July 2011, he was asked to attend a meeting with Mr. Pitt, Mr. Inganji, Deputy Head of Office, and the Finance Officer. The Applicant was informed that his contract would not be renewed because of poor performance.

35. In August 2011, the Applicant was rated as "partially meets expectations" and he filed a rebuttal against that appraisal of his performance.

42. The Applicant heard no more about this performance review until 23 January 2012, when he was summoned to a meeting with the Head of Office, Mr. Wyllie, to discuss his contract which was due to expire on 10 February 2012. The Head of Office asked the Applicant for "a solution and a way forward given the adverse performance reports".

43. On 8 February 2012, the Management Evaluation Unit (MEU) decided that since the Applicant's contract was to be extended through 15 March 2012, his request for review was "moot". There was sufficient time, they said, for the Applicant to "receive the outstanding performance appraisal document from [his] supervisors and follow up as appropriate".

44. On 12 February 2012, the new Head of Office, Mr. Aidan O'Leary, informed the Applicant that his performance would be re-appraised, and that a single assessment would be conducted for the period 11 July 2010 to 21 January 2012. Ms. Bowers was assigned as his FRO for the purposes of this omnibus appraisal.

45. The omnibu.16 410(")23(a)3( )-190(s)8(o)-41(l)37(ut)-22(i)37(ET Q qrg 0.9981 0 0 1 135.363

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48. On 23 March 2012, the Applicant filed his second request for management evaluation. MEU found against the Applicant on 9 May 2012.

SUBMISSIONS

Applicant

49. Upon his entry on duty, the Applicant was never designated an FRO. He attempted to ascertain who in the office he was to report to, but there seemed to be n(h)19(e)3(r)-7(e)3( )-1

an eighteen-month and twenty-one day omnibus assessment, which was intended to justify separating the Applicant from service. This assessment was not based on any work plan or mid-point review mandated under ST/AI/2010/5.

54. The Applicant's dismissal took place without the Administration having undertaken a Performance Improvement Plan (PIP), a necessary requirement pursuant to section 10 of ST/AI/2010/5, before dismissing the Applicant on grounds of poor performance.

55. As part of any decisions regarding separation or renewals on the basis of unsatisfactory performance, account must be

58. During the 18-month period that he served in both capacities the Applicant was provided with a final performance assessment on two occasions.

59. The first performance assessment was prepared by the Deputy Head of Office, Mr. Inganji in regard to the functions of the Applicant as Humanitarian Reporting Officer for the period 11 July 2010 to March 2011. The Applicant successfully rebutted that performance evaluation.

60. A second performance evaluation was prepared on 12 February 2012 that addressed the Applicant's performance as Humanitarian Reporting Officer for the period 11 July 2010 to March 2011 and, as a Humanitarian Affairs Officer for the period 1 March 2011 to 31 January 2012. The performance therefore covered the

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was whether, in substance, the Applicant's performance from March 2011 to March 2012 met performance expectations.

CONSIDERATIONS

64. The Tribunal will begin by considering and determining whether the proper procedure was complied with in the appraisal of the Applicant's performance.

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months but no longer than 18 months[1]. When a staff member takes up new duties upon reassignment or transfer, the e-PAS or e-performance document shall be completed by the staff member and his/her supervisor for the period between the beginning of the performance period and the date of reassignment, transfer or separation[2].

68. The Applicant was deployed to Afghanistan in July 2010 from Zimbabwe. The performance cycle in his case started on 1 April 2010 when he was still in Zimbabwe. When he was reassigned to Afghanistan in July 2010, his performance should have been completed by the Zimbabwe office for the period April 2010 to July 2010. This was mandatory as the Applicant started occupying a different function in Afghanistan; having moved from being a National Professional Officer in Zimbabwe since 2007 to Humanitarian Affairs Officer on 11 July 2010.

69. While noteworthy, the Tribunal is not however concerned with this aspect of the performance cycle. What is relevant for present purposes are the events that unfolded from July 2010 until the Applicant's contract was not renewed.

70. When the Applicant moved from Zimbabwe to Afghanistan, a work plan had to be established. This is a requirement under section 3.3 of ST/AI/2010/5, which reads

> When a staff member takes up new duties upon recruitment, transfer or assignment in the course of the performance year, an individual work plan shall be established within the first two months of assumption of the new function.

71. It is obvious that the framers of ST/AI/2010/5 intended the establishment of a new work plan within the first two months to be a mandatory requirement. The rationale and underlying philosophy is only logical. Without a work plan a staff

[1] Section 3.1 ST/AI/2010/5
[2] Section 3.3 ST/AI/2010/5

member would be at a loss as to the precise nature of his/her duties and functions and the corollary is that without a work plan

> allowing for individual variations, where appropriate performance expectations may be collectively developed, while allowing for individual variations, where appropriate […]

74. The presence of a first reporting o

section 3.3 and section 4.2 of ST/AI/2010/5. This mandatory requirement was violated.

80. The Respondent's allegation as to the Applicant's behaviour in March 2011 is irrelevant for the purposes of the cycle ending March 2011. To appraise his performance, and any shortcomings in his deliverables, a work plan had to have been established. The Administrative Instruction provides for situations in which a staff member does not comply with his/her responsibilities within the Rule. Section 4.2 provides that:

> Non-compliance with the terms of the present instruction by a staff member shall be recorded in his/her individual e-PAS or e-performance document and reflected in his/her overall rating. If the staff member does not take the required action on time to advance or complete the e-PAS or e-performance document, then the evaluation process may proceed outside the electronic application.

81. The Respondent argues that between July 2010 to 10 March 2011, the Applicant was working under the direction of Mr. Pitt and fell short of performance expectations there.

82. The Applicant had almost completed one year of continuous service as Humanitarian Affairs Officer when on 3 July 2011 he was asked to attend a meeting with Mr. Pitt. The Applicant was informed that his contract would not be renewed, as "we [OCHA management] are not happy and you [the Applicant] are not happy, so you must go". The Applicant was extremely surprised by this, particularly e(s)810( )-210(pa)3(r)-7(t)-

Willie that the paper work on the Applicant's performance, including his appraisal, had not been

assigned to Afghanistan. Mr. Pitt was allowed to leave in such circumstances and in disregard of section 3.4 of ST/AI/2010/5 that reads

> To ensure timeliness of completion of the e-PAS or e-performance document, if supervisors leave the United Nations, it is their responsibility to complete the Performance Management and Development System duties required of them prior to the date of separation. Separation procedures and processing of final entitlements of supervisors may be delayed until the evaluations for which they are responsible are completed.

93. From these facts and the conversation that Mr. Pitt had with Mr. Willie as outlined above, it is clear that when Mr. Pitt told Mr. Willie that the Applicant was under performing he was bent on the Applicant being separated from OCHA Afghanistan without a complete appraisal and in clear violation of the rules and procedures governing performance evaluations within the United Nations system. Alea iacta estor the die, it seems, was already cast for the Applicant as subsequent events will show.

94. Mr. Inganji, who was Deputy Head of Office at the time, completed the Applicant's e-Pas for the period 21 September 2010 to 31 March 2011. Mr. Willie stated that he had asked Mr. Inganji to complete the e-Pas on the advice of the OCHA Human Resources in Geneva. He added that Mr. Inganji was aware of the performance issues from the conversation he had with him. Mr. Willie conceded, in

and SRO, and agreed that having different persons acting as FRO and SRO constituted a check and balance mechanism.

96. Mr. Inganji told the Court that he wore both the FRO and SRO hats as a result of a "mutual agreement" between the Applicant and himself. For his part, the Applicant denied any such agreement and, instead testified he was devastated by this turn of events.

97. Mr. Inganji agreed that this was not the correct procedure, but curiously seemed to have labored under the belief that the rules could be overridden by private agreement. Mr. Inganji also disagreed with the Rebuttal Panel's finding that the appraisal was fraught with irregularities and told the Court that, "nothing had been explained to the panel. The panel should have looked at the whole picture".

98. On 9 September 2011, the Rebuttal Panel concluded that in view of a number of irregularities in the completion of the e-Pas it was unable to evaluate the contents of the e-Pas. The Panel found it unacceptable that Mr. Pitt left the mission without completing the e-Pas. The Panel also pointed out that while Mr. Pitt was the FRO, it was an officer subordinate to him who was the SRO in breach of section 5.3 of ST/AI/2010/5. The e-Pas initiated by Mr. Inganji listed him both as FRO and SRO in breach of the provisions of section 5 of ST/AI/2010/5. The Panel also concluded that the FRO had failed to comply with section 5.1 of ST/AI/2010/5 which reads:

> A first reporting officer shall be designated for each staff member at the beginning of the performance cycle. The first reporting officer is responsible for:
>
> (a) Developing the work plan with the staff member;
>
> (b) Conducting the midpoint review and final evaluation;
>
> (c) Providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
>
> (d) Advising, supporting and coaching the staff member on professional development and in the development of a personal development plan;

as a new performance cycle had started for him as from March 2011. His first reporting officer Ms. Bowers should, in compliance with section 7.2 of ST/AI/2010/5 have conducted a midpoint review that is usually six months after the creation of a work plan.

103. Instead, an Action Plan was developed to "assist" the Applicant to improve his performance. But this was done on the basis of the Applicant having allegedly fallen short of performance expectations at the Humanitarian Reporting and Donor Relations Sections , which appraisal the Applicant successfully challenged. Indeed, the record clearly shows that the Applicant had not been properly appraised prior to his reassignment to the CCU.

104. Sections 8.2 and 8.3 of ST/AI/2010/5 provide

> 8.2 [P]rior to to the end-of-cycle discussion between the

107. Ironically Ms. Bowers who had never been the Applicant's FRO between July 2010 and 10 March 2011 evaluated him for the period 11 July 2010 to 31 January 2012 "concentrating on the period she was the Applicant's FRO, from March 2011 to February 2012". Mr. O'Leary, the new Head of Office, and Mr. Inganji also contributed to the e-Pas in which the Applicant was rated as not meeting performance expectations.

108. The correct approach would have been to evaluate the Applicant on whether he had improved since leaving the Humanitarian Reporting and Donor Relations Sections, and the FRO was obligated to prepare a written performance improvement plan in consultation with the Applicant as required by section 10.2 of ST/AI/2010/5. This was not done and the Rebuttal Panel that decided on the rebuttal against the 11 July 2010 to January 2012 appraisal pointed out that this was an irregularity.

109. Mr. O'Leary was not the Head of Office from July 2010 to March 2011, but still placed his observations on the Applicant's performance during that period in the appraisal. Ms. Bowers stated in that respect that Mr. O'Leary was informed verbally about the performance of the Applicant. He had no participation in the monitoring or appraisal of the Applicant. He just "commented and signed off".

110. Ms. Bowers conceded that she understood the importance of a work plan but stated that this could not be done in spite of meetings with the Applicant.

111. The Applicant denied that Ms. Bowers had tried to finalise a work plan with him. He told the court that after being assigned to the CCU, Ms. Bowers and he met in May 2011 to discuss his functions. The Applicant also denied that he did not cooperate with Ms. Bowers to finalise a work plan. He was taking instructions on a day to day basis from her, he said.

112. The Applicant's witness, Mr. Megbaru Ayalew told the Tribunal that Ms. Bowers never communicated with people. She would not talk to anybody.

113. The Tribunal had the opportunity to hear both Ms. Bowers and the Applicant. When analysed in the context of all the irregularities that attended the whole appraisal process, the Tribunal finds the Applicant's version of events more credible.

114. When faced with an uncooperative staff member, the Tribunal finds that it remains open to the Respondent to take appropriate action as provided by section 4.2 of ST/AI/2010/5.

115. This provision seems to have been overlooked by the Respondent. The e-Pas for the period 11 July 2010 to January 2012 refers only to improvement and not to initial performance. There was no midpoint review six months after the initiation of a work plan at the CCU. Ms. Bowers in her testimony at the hearing admitted that there was no midpoint review but testified that there were numerous discussions with the Applicant.

116. As the Rebuttal Panel that reviewed the second e-Pas observed

> This PAS seems to have been compiled as a performance appraisal by the FRO/SRO, without first agreeing on a work plan, then performing a mid-year review, and finally performing an evaluation in collaboration between the S/M [Staff Member] and FRO.

117. The Tribunal will here refer to what the Appeals Tribunal held in the case of Das[3]

> It is in the reporting cycle immediately after the attention of a staff member has been brought to his unsatisfactory performance and given an opportunity to improve his performance that the performance of the staff member should be assessed to determine whether there has been an improvement. If the staff member does not fully meet expectations for the second time in succession, then the appointment may be terminated for unsatisfactory performance.

[3] 2014-UNAT-421.

118. In his testimony, Mr. Inganji who acted as SRO in the second appraisal stated that he became the Applicant's FRO after the departure of Mr. Pitt. He conceded that the appraisal he did on the Applicant's performance was limited to information the Applicant provided. He added that he had first-hand knowledge of the Applicant's responsibilities because they were in constant discussion and that he supervised the Applicant for three months after the departure of Mr. Pitt. He claimed that he had a lot of experience in conducting appraisals and therefore the appraisal of the Applicant was properly done. When asked whether a "few things" would be enough to conduct an appraisal his answer was "yes".

Conclusion

119. This is an interesting case in which, despite repeated and consistent violation of the rules and regulations governing performance management and appraisals, the Respondent persisted with spirited arguments to defend the impugned decision.

120. The process of managing and appraising the Applicant's performance was fraught with irregularities from the onset of his appointment with OCHA Afghanistan. The Respondent, through successive heads of office and other staff members who assumed supervisory roles, then decided through convoluted and murky processes of evaluation that the Applicant should be separated from service for poor performance.

121. When a decision not to renew a contract is taken on grounds of non-performance, the process of establishing that a staff member has not performed must scrupulously comply with the legislation governing performance management. It is of equal and paramount importance that the rules made by the Secretary-General or under his delegated authority be complied with. Anything short of careful and considered compliance with the relevant rules and regulations would make a mockery of the authority of the Secretary-General to prepare and issue administrative instructions or bulletins.

122. In the case of Tadonki[4], the Appeals Tribunal held

> The objectiveness, transparency and legality of a performance evaluation stems primarily from the procedures indicated in the applicable Administrative Instruction, which were established in a detailed manner to ensure that these objectives are reached, that the staff member acknowledges the faults or reasons for his or her under-performance, and that the managers properly guide, advise and supervise their staff, provide adequate performance improvement goals and communicate goals to be achieved.
>
> If the Administration does not follow the clear norms which apply to evaluate staff members' performances, it risks arbitrariness and bears the burden of proof that an evaluation reached after an irregular procedure is nonetheless objective, fair and well based.

123. In Rees[5], UNAT held

> In the absence of a PAS to verify the views of management about the performance of a staff member in compliance with ST/AI/2002/3, the Administration's decision of non-renewal of contract based on non-performance or under-performance may be successfully contested.

124. The first e-Pas was successfully rebutted by the Applicant. The Rebuttal Panel also found "multiple irregularities" in the second appraisal. Curiously, the Panel - comprising the same members – decided not only to maintain the performance rating, but went on to recommend that the Applicant's contract not be renewed!

125. The Panel was clearly misguided both in its final decision and its recommendation. It is quite surprising that the Panel, having found almost the same type of irregularities in the second e-Pas, chose to maintain the rating and recommend that the Applicant not be extended.

126. When a staff member's appraisal is so fraught with irregularities, that staff member has been denied due process to which he/she is entitled. It is rudimentary

[4] 2014-UNAT-400.
[5] 2012-UNAT-266.

that a breach of due process taints decisions that follow from a flawed or irregular process.

127. It is not the role of the Dispute Tribunal to review de novo the Respondent's rating of the Applicant. The Tribunal should not place itself in the role of the decision-maker and determine whether it would have renewed the contract, based on the performance appraisal. This is not the role of a reviewing tribunal under the UNDT Statute as was held in Said[6]. The role of the Tribunal is to determine whether the proper procedures had been applied. In this case it was not; and a finding based on an irregular procedure cannot be acted upon.

128. The Panel also erred when it recommended that the contract of the Applicant should not be renewed. Section 15 of ST/AI/2010/5 explains the duties and responsibilities of a rebuttal panel. In particular section, 15.4 of ST/AI/2010/5 states:

> The rebuttal panel shall prepare, within 14 days after the review of the case, a brief report setting forth the reasons why the original rating should or should not be maintained. In the event that an overall rating or comments should not be maintained, the rebuttal panel should designate the new rating or modify the narrative on performance evaluation. The report of the rebuttal panel shall be placed in the staff member's official status file as an attachment to the completed e-PAS or e-performance document and communicated to OHRM, or the Field Personnel Division of the Department of Field Support, as appropriate.

129. Nowhere is there mention that a rebuttal panel has the power to make recommendations on the extension or termination of a staff member's contract. The mandate of the rebuttal panel is limited to determining whether the rating obtained by a staff member is the correct one due regard being had to the procedural requirements

objectivity and therefore lack of impartiality. That conclusion may well have influenced the decision maker in not renewing the contract of the Applicant.

130. In Rangel[7]

explained the distinction between articles 9.1(a) and (b) of the Statute of the Appeals Tribunal [Articles 10.5(a) and (b) of the UNDT Statute]:

> This compensation [for humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the Administration, and it is regulated in Article 9(1) (b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling.

139. In Eissa[12], the Appeals Tribunal made similar observations:

> An award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages for the fundamental breaches of Mr. Eissa's rights not to be unlawfully terminated from service and to be automatically transitioned to the post of UNMISS Spokesperson. It is not the same remedy and does not serve the same purpose.

140. Article 10.5(b) was amended by the General Assembly in December 2014. The new article reads:

> Compensation, for **harm, supported by evidence** which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision (emphasis added).

[11] 2013-UNAT-387.
[12] 2014-UNAT-469.

141. With or without the amendment both the UNDT and UNAT have invariably assessed evidence of harm on evidence given either viva voce or inferred from documentary evidence. In Asiarotis[13] the Appeals Tribunal held:

> To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach e

142. In the light of the principles laid out above, the Tribunal awards the Applicant 12 months' net base salary, for wrongful termination of his contract, in lieu of rescission of the impugned decision.

143. In addition the Tribunal awards him USD10,000 as moral damages for harm suffered as result of a breach of his fundamental right that resulted from a denial of due process.

(Signed)

Judge Vinod Boolell

Dated this 7th day of June 2016

Entered in the Register on this 7th day of June 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi