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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/023/R1

Judgment No.: UNDT/2023/077

Date: 25 July 2023

Original:

## Background

1. On 26 February 2019, the Applicant filed an application challenging the rating of his 2016 Performance Report. The Applicant argued that the rating was unfair and that he had been discriminated against on the basis of his race and ethnicity.
2. The Respondent filed a reply on 1 April 2019 in which it was argued that the Applicant's rating was based on objective criteria and that there was no evidence of discrimination.
3. On 27 July 2020, the Tribunal issued Judgment No. UNDT/2020/127 in which it dismissed the application as irreceivable.
4. The Applicant appealed the said Judgment to the United Nations Appeals Tribunal. The Appeals Tribunal issued Judgment No. 2021-UNAT-1135 in which it set aside Judgment No. UNDT/2020/127 and remanded the case as receivable, to the UNDT for hearing.
5. The case was assigned to the present Judge on 4 April 2022.
6. The Tribunal held oral hearings on



15. On 24 April 2017, the Country Director convened a meeting to inform the Applicant about the outcome of the TMRG process. At this meeting, the Applicant was informed that the TMRG: (1) noted areas where he performed well; (2) recognized that there were some areas which required improvement in his performance; (3) decided to maintain improvement in

## Submissions

### *The Applicant*

23. The Applicant argues that his supervisor, Ms. Perez, did not assess his performance based on evidence and actual performance, but rather based on her dlcuqf "r gtuqpcnr gtegr vqp0Vj g'cuuguuo gpv'y cu'o cf g'vq"öqwuö"j kó "htqo "j ku'lqd0His PMD assessment was completed on 6 February 2017 and his contract extension was made on 9 February 2017 only for six months. Therefore, there is a clear link between his performance and contract extension. To extend his contract for six months, his supervisor assessed his performance as partially satisfactory intentionally.

24. A few of his functions were taken away from him and attached to the newly etgcvgf "öI tcpw"O cpci go gpv" Wpkö0' Gxgpwcm{ ."j ku" r qukkqp" y cu" cdqrkuj gf "y kj" effect from 31 December 2018. The abolition of his post was not implemented after he challenged the decision.

25. His mid-term evaluation was assguugf "cu" öQp-Tracnö and there was no reminder from his supervisor concerning his performance after the mid-term assessment. This is more evidence that the performance assessment was made intentionally to make him an underperformer and to eventually remove him from his position.

26. Qpg"qh"j ku"ng{ "tguwmu"öXcwg"ht"O qpg{ ö"y cu"cuuguugf "d{ "j ku"uwg gtxkuqt"cu" not achieved while this was achieved and still the agreed tools/indicators were being used by ZRBF/UNDP. This further demonstrates that his performance was not assessed objectively.

27. Kp'tgur gev"vq"vj g'i qcn'qh"öUj ctkpi "qh'npqy rnf i g"cpf "npqy rnf i g"dwrkf kpi ö- his supervisor wrongly blamed him for the delivery of products with wrong specifications, which in fact he and another colleague detected.



- c. compensation for the loss of his job since the date of his separation from UNDP; and
- d. compensation for his emotional injuries.

*The Respondent*

35. The Respondent submits that the *Crr rdecvøu* supervisor conducted a fair *crr r tckucn'qh'vj g"Crr rdecvøu'r gthqto cpeg.*

a. *Vj g"vguko qp{ "cpf"y kpguu"ucvgo gpv'qh'vj g"Crr rdecvøu"uwr gtxkuqt."* Ms. Andersen, refer to multiple instances where the Applicant showed performance shortcomings in 2016, including lack of attention to detail and deficiencies in the quality of deliverables, lack of timeliness or delays in the submission of work products, lack of understanding of key issues within his area of responsibility and lack of initiative to follow-up on areas relevant to his area of expertise.

b. During her testimony, Ms. Andersen illustrated shortcomings in the *Crr rdecvøu hpcpekn' tgr qt vpi " cpf" hpcpekn' cpcn'ku" cpf" o cpci go gpv."* including deficiencies in relation to grantee contracts and value for money tracking.

c. Ms. Andersen indicated that: the Applicant submitted work which was partially completed, not at the necessary standard of quality and which lacked accurate information. Ms. Andersen referred to specific examples of lack of attention to detail in financial reporting. Financial reports needed to be corrected and reworked, and finalization of work required extensive support.

In this regard, Ms. Andersen stated that the *Crr rdecvøu* *y qtm'tgs wkgf "emug"* supervision, deliverables were submitted to her for review very close to the deadline with many outstanding issues and inconsistencies and she had to

invest a considerable amount of time revisiting "y g" Cr r kcp w financial reports.

d. Ms. Andersen affirmed that the Applicant's work required significant follow-up, it lacked sufficient analytical work or financial analysis and the Applicant failed to meet deliverables. Ms. Andersen provided various examples where the Applicant showed lack of proactiveness in his role as Finance Specialist.

e. The Applicant also failed to admit that he had made the same claim -



(öRRö) and Ms. Verity Nyagah, Country Director (öCDö) - considered the information provided by the Applicant during his meeting of 9 March 2017 with the RR and the CD. The witnesses confirmed that the minutes of the meeting where the Applicant explained the basis for his disagreement with the performance rating were shared with the TMRG that reviewed his case. In addition, the TMRG reviewed supporting documentation provided by the Applicant to the RR and CD and other relevant documents, such as the

b. Ms. Ynessu and Mr. Mukanganise affirmed that the TMRG also considered inputs from the Applicant's supervisor, particularly numerous e-mails regarding the Applicant's shortcomings, including delays in the delivery of work products and deficiencies in the quality of deliverables. Ms. Ynessu explained that she observed deficiencies regarding the Applicant's

uw r gtxkuqt "eqpf wevgf "cp"qdlgevkxg" gxcnwcvkp"qh"j g"Cr r rncpva"r gthqto cpeg" in accordance with the factors that were set out in the policy to assign a partially satisfactory rating.

37. The Rebuttal Panel conducted a lawful rebuttal process.

a. The testimony of Ms. Rubian confirmed that the Rebuttal Panel conducted the review of the Cr r rncpva"ecug"kp" hwn"eqo r rncpeg"y kj "ku" Terms of Reference and the procedure prescribed in the PMD Policy.

b. Ms. Rubian explained that the Rebuttal Panel

e. Ms. Rubian found that the Applicant's supervisor had fully complied with the mandated requirements of the performance process and that the Rebuttal Panel had a sufficient body of evidence to substantiate the rating. Ms. Rubian also attested to the unanimity of the Rebuttal Panel in maintaining the partially satisfactory rating, which had concluded that the Applicant had been treated with fairness and had been afforded due process.

f. During her testimony, Ms. Rubian referred to the nature and relevance of the evidence considered by the Rebuttal Panel in reaching its conclusions. The witness also clarified the role of the Rebuttal Panel, its composition and the requirements necessary to become a member, which did not include having expertise in the thematic area, but having managerial experience, a good performance record, and upholding values of integrity and impartiality.

### Considerations

39. This application presents the following issues.
- a. Whether the assessment of the Applicant's 2016 work performance by his supervisor complied with UNDP's PMD Policy.
  - b. Whether the review of the Applicant's 2016 work performance by the TMRG and the Rebuttal Panel complied with UNDP's PMD Policy.
  - c. Whether the assessment of the Applicant's 2016 work performance by his supervisor was tainted by bias or improper motives.
  - d. Whether the review of the Applicant's 2016 work performance by the TMRG and the Rebuttal Panel was tainted by bias or improper motives.

*Whether the assessment of the Applicant's 2016 work performance by his supervisor complied with UNDP's PMD Policy.*

40. The Applicant's principal contention relates to his 2016 work performance. He claims that his supervisor did not give him any feedback about the alleged unsatisfactory performance before the impugned rating, he does not dispute the fact that the other aspects of the PMD process were complied with during his assessment.

41. The Tribunal will not delve into issues touching on the merits and demerits of the impugned rating, including the justifications for it, since it cannot *repeal* the rating *novo*.

applied.<sup>3</sup>

42. The PMD process has three mandatory elements: goal setting (which needs to be discussed in a meeting between the supervisor and supervisee); the midterm review between the supervisor and supervisee; and the annual performance review (the end of the PMD cycle for that particular year). Continuous interactive processes between supervisor and supervisee are a best practice.<sup>4</sup> That the Applicant and his supervisor agreed on four key results and 10 indicators for his PMD from 21 February 2016 to 31 January 2017, and that several discussions were held between them to formulate these, is not contested. Ms. Andersen testified that improvements were made in terms of making the indicators more measurable.<sup>5</sup> Her evidence is corroborated by that of the DRR, that goals and key result areas were agreed between Ms. Andersen and the Applicant.<sup>6</sup> The Applicant does not dispute these facts.

43. Based on the above the Tribunal finds that the first step in the PMD process (goal setting) was complied with.

44. The Applicant claims that a formal midterm review was not held. The DRR's evidence that she noticed that dates in the system relating to the midterm review were logged in much later corroborates this complaint.<sup>7</sup>

45. Ms. Andersen explained that she would meet with the Applicant to talk through the missing elements or elements that needed to be corrected or improved. Further, that both during meetings and in written feedback via e-mail, she emphasized and acknowledged good performance, whilst also addressing issues of deficient quality and lack of timeliness to prevent any potential set-back in the achievements of the work. She added that the Applicant participated in all Steering Committee and

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<sup>3</sup> *Said* 2015-UNAT-500, paras. 40-41. See also *Jennings*

donor meetings, as well as in all internal staff meetings. In these meetings, he was an equal partner around the table and participated.<sup>8</sup>

46. Ms. Andersen's evidence is corroborated by that of Ms. Ynessu, who stated that available documents indicated that throughout the midterm review, the Applicant had bi-weekly meetings with his supervisor, through which there were a lot of interactions regarding performance. These bi-weekly interactions, which she states are very much part of a PMD cycle, provided plenty of opportunity for discussions about achievements, deliverables, shortcomings, and actions that had to be taken to correct the course.<sup>9</sup>

47. The Applicant does not contest the evidence that bi-weekly meetings took place. His complaint is that no **formal** mid-term review was conducted.

48. The PMD policy provides in relevant parts as follows.

11. The process includes: annual performance planning; regular performance discussions, including performance monitoring, feedback and coaching during the performance year; **the mid-term review**; and the annual performance review.

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220<sup>ö</sup>**The mid-term performance review** and its record in the on-line PMD tool will be mandatory for all UNDP staff members who have worked for UNDP or in the current role for at least three months prior to the time of the mid-term review.ö

49. The Tribunal's understanding of the above provisions is that the mandatory mid-term performance review is meant to be a formal exercise. The regular performance discussions (like those held by the parties) are specifically referenced in paragraph 11 and were not legislated to be held as an alternative to the mandatory mid-term performance review. The Tribunal therefore agrees with the Applicant that there was no formal mid-term review.

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<sup>8</sup> O'Connell's page 2, paras. 8-10.

<sup>9</sup> Ms. Ynessu's hearing transcript, page 15, lines 1-16.









66. It has been established that the Applicant was not given an opportunity to make presentations, oral or otherwise before the TMRG in contravention of paragraph 48 of the UNDP PMD policy. And, unlike his supervisor, the Applicant was not given an opportunity to be physically present at the TMRG. He was therefore not afforded an equal opportunity to make his case. And, the TMRG considered presentations which had not been prepared for the TMRG process, and submissions relating to one KRA. Based on the above, the Tribunal finds that the TMRG review r tqeuu"fk "pqv'eqo r n{"y kj "WP F Røu"PMD Policy.

### **The Rebuttal Panel**

67. The Applicant contends that the Rebuttal Panel upheld the TMRG decision without considering the materials he submitted before them as evidenced by their email of 31 July 2018.<sup>17</sup> Further that the rebuttal report bore incorrect information which he had challenged, yet his concern was not addressed.

68. The above claim omits vital information such as the stated reason for rejecting the documents, which was that the Panel had already closed the case and issued a final report. k{"j g"Vtkdwpçu"xlgy ."his was a valid reason for the Rebuttal Panel's refusal to accept the evidence which the Applicant sent them at that stage. Review processes should not be allowed to go on indefinitely.

69. The final Rebuttal Panel report indicates that the Panel reviewed a wide range of issues in the assessment process and based their



74. The Applicant contends that his supervisor, Ms. Andersen, did not assess his performance based on evidence and actual performance, but rather on her biased personal perception, with a view to ousting him from his job. He cites eight acts/omissions he attributes to his supervisor, to buttress the assertion that she was biased and with improper motive.

75. He claims that his PMD assessment was completed on 6 February 2017 and his contract extension for only six months was made on 9 February 2017. This to him establishes a clear link between his poor assessment and the contract extension. He asserts that his supervisor deliberately assessed his performance as partially satisfactory for her to extend his contract for only six months.

76. The Applicant does not however substantiate this claim beyond what he states above and did not even put the assertion to his supervisor in cross examination to get her response.

77. On the contrary, Ms. Andersen was clear that her intention in assessing the Applicant's performance was to follow the relevant instructions, and to give him all

80. The Applicant claims that a few of his functions were taken away from him and attached to another position, and that his position was eventually abolished with effect from 31 December 2018, though the abolition was not implemented after he challenged the decision.

81. Ms. Ynessu however explained that the decision referred to was taken in 2018 outside of the 2016 PMD period. Further, that the decision was not about

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and ensure that any additional and relevant KRA was adequately recorded.

104. Since financial reports are to be done by the financial specialist, Ms. Ynessu did not see anything special or out of the scope of a finance specialist. If the Applicant did the work, he delivered on his key result areas.<sup>43</sup>

105. Ms. Rubian emphasises the fact that all members of staff do activities and performance deliverables that are beyond their *stricto sensu* area of work, but if there





