



Before: Judge
Registry: Nairobi
Registrar: Abena Kwakye-Berko

KELAPILE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Sandra Baffoe-Bonnie, OES/ECA

Notice: This Order has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 15 July 2015, the Applicant, a D1 Chief of Staff in the Office of the Executive Secretary (ES) of in the United Nations Economic Commission for Africa (UNECA), filed an Application with the Dispute Tribunal seeking suspension of the implementation of the decision to transfer him from his current post to the African Peer Review Mechanism (APRM) on the basis of alleged performance shortcomings following the cancellation of his Performance appraisal (“e-PAS”) evaluation for 2014/2015.

2. The Application was served on the Respondent who filed his Reply on 17 July 2015.

Background and facts

3. The Applicant has served as the Chief of Staff at the D1 level for UNECA since 1 August 2014.

4. The Applicant designated Mr. Carlos Lopes, ES/UNECA, as his First Reporting Officer (FRO) and Second Reporting Officer (SRO) despite his reservations concerning Mr. Lopes’ dual role.

5. Between August and September 2014, the Applicant was designated Officer-in-Charge of the Division of Administration pending the finalization of the recruitment of the Director. The new Director of Administration assumed the office on 6 April 2015.

6. According to the Respondent, in October 2014, the ES began to note performance shortcomings on the part of the Applicant.

7. On or around the end of March 2015, the Applicant was requested by his FRO/SRO to initiate the work plan covering the reporting period 2014/2015.

8. By the end of April 2015, the Applicant was assessed by his FRO/SRO for the eight month reporting period. The overall rating given to the Applicant was one of partially meeting performance.

9. On 26 April 2015, the Applicant acknowledged receipt of the e-PAS evaluation providing accompanying comments and remarks and, on 8 May 2015, the Applicant filed a rebuttal to challenge the outcome of the 2014/2015 e-PAS. The request for the establishment of Rebuttal Panel was made by the Applicant to Mr. Lopes as ES of UNECA.

10. According to the Applicant, despite his repeated requests to the Human Resources Services Section to provide ongoing updates regarding the timing of the establishment of the Rebuttal Panel, no information was forthcoming.

11. On 28 May 2015, the Applicant was notified through Inspira that his 2014/2015 evaluation had been cancelled. At the same time when reviewing his e-PAS he noticed that it had indeed changed. Whilst the work-plan and FRO's comments on his performance remained in the document, all additional commentary with regard to the Applicant's feedback on performance under the staff member acknowledgment section had been deleted. According to the Applicant, this was despite the fact that the evaluation process had been concluded and that the Applicant had already initiated a rebuttal request.

12. On 28 May 2015, the Applicant contacted the Unite Service Desk to enquire as to how his e-PAS had been cancelled.

The Interoffice Memorandum went on to state that because of the Applicant's seven months in post the:

Executive Secretary has decided to cancel the incomplete ePAS evaluation for 2014/2015 performance cycle. However, to address the performance shortcomings discussed with you by the Executive Secretary and in the spirit of section 10.1 of ST/AI/2010/5, the Executive Secretary has decided to take the necessary remedial measures by transferring you to more suitable functions... African Peer Review...effective 5 August 2015.

15. On 30 June 2015, the Applicant filed a management evaluation request challenging the decision of the Administration both with respect to the unlawful cancellation of his e-PAS and the transfer to APRM.

Parties' contentions

16. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

17. The decision is prima facie unlawful:

d. The Applicant's FRO/SRO was the same person. Such a dual function is expressly prohibited under ST/AI/2010/5. The Applicant submits that in *Gehr* UNDT/2015/019, the Tribunal concluded that the first and second reporting officers must be two different individuals and that allowing the blending of both functions in one person would defeat the underlying purpose of having two independent minds reviewing the staff member's performance and, ultimately, would render meaningless the system of checks and balances.

e. The mid-point review, de

h. Pursuant to section 3 of ST/AI/2010/5 it is permitted that at the commencement of the Performance Cycle, the period of evaluation may be extended for a longer or shorter period, the minimum being six months and the maximum eighteen months.

i. However, having entered into an agreed work plan, mid-point review and final evaluation in April 2015 suggests that the intention of the Administration had been to provide an eight month e-PAS. The Applicant's request for rebuttal on 8 May 2015 and the subsequent cancellation of the e-PAS on 19 June 2015 can only be interpreted as the Administration changing its mind concerning the evaluation. Indeed, it should be noted that this change of mind by the Administration took place more than one month after the Applicant had submitted his rebuttal. The suggestion being that the Applicant's filing of a challenge led the Administration to pursue a different approach vis-à-vis the Applicant's employment specifically his unlawful transfer.

j. The unlawful cancelation of the e-PAS, therefore, was related directly to the subsequent decision of his transfer to APRM. The decision to transfer him to APRM was not based o

l. The Applicant submits that there appears to have been no pre-planning or thought regarding his transfer. He was never made aware in advance that such an option existed. This lack of information suggests that no real consideration of the Applicant and his skills were taken into account in determining the need for transfer. The only consideration appears to be one relating to the necessity to remove him from his current post.

m. The Applicant further submits that the decision to undertake remedial measures was made after the unlawful cancellation of his e-PAS. This document being the sole repository within which performance is measured and remedial measures taken.

n. The Applicant submits that the approach adopted by the Administration in this regard led to adverse and misguided conclusions. If issues of performance were recognized by the Administration, then a valid e-PAS needed to exist to document the alleged deficiencies. Moreover, if the Administration were to accept the existence of the e-PAS, it would then be obligated to undertake the rebuttal procedure in order to validate the finding of alleged performance shortcomings and the remedial measure of transfer.

o. The Applicant submits that a confirmation of a finding of performance shortcomings by the rebuttal panel would have been unlikely, in the circumstances in which he averaged 'B' in his evaluation. On the other hand, if the Administration concluded that no e-PAS exists, then it would seem arbitrary to transfer the Applicant on the basis of alleged performance shortcomings, when no evaluation mandated by ST/AI/2010/5 has taken place.

p. The Applicant submits that the reasoning given by the Administration relating to alleged performance shortcomings is misleading. Rather, the Applicant contends the ultimate decision to transfer him was made for reasons not connected with performance but as a result of a workplace divergence between himself and Mr. Lopes. Such a

decision based on performance shortcomings was therefore arbitrary and consequently unlawful.

Irreparable harm

q. In *Calvani* UNDT/2009/092, the Tribunal found that damage to professional reputation and career prospects falls within the definition of irreparable harm.

r. In this case, a well-respected senior member of the United Nations being forced to transfer from his post of Chief of Staff, on the basis of allegations of performance shortcomings, will inevitably have a detrimental impact on the Applicant's career and reputation. Considering the Applicant's previous professional experience as Chairman of the Advisory Committee on Administrative and Budgetary Questions (ACABQ), such a transfer would, it is respectfully submitted, undermine his credibility and possible promotional avenues.

s. Once such a transfer takes place the damage is done. The Applicant would submit that at that stage his reputation would be undermined, at the minimum it would be reflected in his Personal History Profile that he only performed the role of Chief of Staff for less than eight months into a twenty-four month contract.

t. The Applicant submits that the position that he is to be transferred to in no way equates to his current high profile role of Chief of Staff to the UNECA. Therefore in circumstances in which the Applicant is unlawfully transferred, any future job application he may choose to make would not include substantive experience as Chief of Staff but rather relate to the mediocre post of "Senior Technical Advisor". At the same time the

deferred pending the outcome of the management evaluation, there is no imminent danger of an impending transfer to warrant a treatment of the matter as urgent.

g. In any case, the Respondent has on his own volition extended the effective date of the reassignment to 28 August 2015 pending the outcome of the management evaluation. This extension would allow the parties to benefit from the guidance of the management evaluation.

h. For this reason, the UNECA management has extended the effective date of the reassignment by 23 days and to the extent that the decision will only be implemented two weeks after the deadline within which a management evaluation decision is expected. The request for suspension of action is therefore moot and no longer urgent.

Considerations

Unlawfulness

19. The Tribunal will start by referring to the pronouncements of the Appeals Tribunal that dealt with reassignment of staff members to the extent that such reassignment was related to alleged performance shortcomings.

20. In *Kamunyi*¹ the Appeals Tribunal held that it is within the Administration's discretion to reassign a staff member to a different post at the same level and such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member. However, this discretion is not unfettered as the Appeals Tribunal held in *Abdulla*².

...managerial discretion is not unfettered and the jurisprudence of the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

¹ 2012-UNAT-194

21.

Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

24. This Mr. Lopes did not do. Instead, he decided to cancel the rating and still maintained his decision to reassign the Applicant to South Africa. To the extent that the decision to reassign was based on alleged performance shortcomings, the transfer was still premised on that reason and nothing had changed in the situation created by Mr. Lopes when he initially decided to transfer the Applicant.

25. Mr. Lopes seems to have underestimated the value and purport of an e-PAS notwithstanding the authoritative pronouncements of the Appeals Tribunal on the matter. In *Simmons*⁴ the Appeals Tribunal held,

Importance of annual e-PAS reports cannot be under-estimated. These reports are important for the staff member because they inform the staff member of how well or poorly she has performed and how her performance has been judged by her reporting officers. This gives the staff member an(h)9()(c)-3(0)-7(r)-(h)31(e)-3(y1(e)-3(r)-(e)17(m)-1-11(p)-1(t

27. The Tribunal underlined the importance of the e-PAS requirements in *Noguiera*⁶.

From a reading of the relevant provisions relating to the PAS, it cannot be disputed that this mechanism exists in the interest of staff members, management and of the Organization. For staff members, e-PAS procedures ensure that the members of the staff are rated fairly, guided in case of shortcomings and have an opportunity of challenging a rating that they do not agree with. For Management, e-PAS procedures enable it to enhance the work of its respective departments or sections by placing on them the onus of devising a work plan and making sure that the highest standard of efficiency is achieved through guidance and dialogue. For the Organization, e-PAS procedures ensure that the aims and purposes of the Organization as set out in art. 101.3⁷ of the Charter are complied with.

28. Mr. Lopes also overlooked the importance of a rebuttal panel. In *Das*⁸ the Appeals Tribunal held that an effective rebuttal mechanism is an integral part of a performance evaluation process and that a staff member cannot be deprived of a meaningful opportunity to file a rebuttal. In *Gehr*⁹ the Appeals emphasized the fundamental importance of a rebuttal process and the duty of the Administration to ensure that the process is adhered to. This is what the Tribunal stated:

...an employee has a fundamental right to put his/her case, in response to an employer's assessment of his/her performance¹⁰.

29. The denial to the Applicant of the right to rebut his performance appraisal, in the view of this Tribunal, offended a basic tenet of justice, namely the principle of *audi alteram partem*.

30. In *Rees*¹¹, one of the issues was whether there had been compliance with the performance appraisal obligations. Shaw J. held:

While in hindsight, the Director of RRDD's meeting with the Applicant on 10 March 2008 to discuss a work plan might be

⁶ UNDT/2009/088.

⁷ The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

⁸ 2014-UNAT-421.

⁹ 2012-UNAT-253.

¹⁰ At para. 10.

¹¹ UNDT/2011/156.

construed as the development of an improvement plan as contemplated by the PAS, this was not conveyed to her at the time. **Further, the Applicant was not asked to provide a review of her own performance that could be discussed at the meeting. She had no formal opportunity to comment on or to seek a rebuttal of the opinions that had been reached about her performance** (Emphasis added).

31. The Appeals Tribunal UNAT approved this finding and held that,

The UNDT correctly found that Ms. Rees had been informally criticised and humiliated based on inconsistent and subjectively-held biases. She was never given an opportunity to comment on or rebut the negative opinions that her supervisors purportedly held¹².

32. It is clear that the Administration in the present case did not comply with

and without giving the Applicant a meaningful opportunity to rebut the rating¹⁸ and was therefore a wrong exercise of discretion. This is supported further by the decision in *In Rees*¹⁹ where the Appeals Tribunal held,

The Appeals Tribunal recalls the jurisprudence that it is imperative that the Administration adheres to the rule of law and standards of due process in its decision-making. Given that Ms. Rees' performance was the principal reason for the decision to reassign her, the Administration was required to provide a performance-related justification for its decision. This could have been properly done with the PAS, in accordance with ST/AI/2002/3²⁰.

35. The Tribunal notes that Mr. Lopes was wearing two hats when evaluating the performance of the Applicant. He was acting both as the first and second reporting officer of the Applicant. This was clearly in breach of ST/AI/2010/5. Section 5 makes provision for two reporting officers whose functions and duties are quite distinct. Section 5.1 of ST/AI/2010/5 lists out the functions and duties of first reporting officers:

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 workplan 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;
- (e) Developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable;
- (f) Ensuring that all e-PAS and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.

36. The duties and functions of second reporting officers are set out in sections 5.3 and 5.4 of ST/AI/2010/5:

¹⁸ *Das* 2014-UNAT-421.

¹⁹ 2012-UNAT-266.

²⁰ Abolished and Replaced by ST/AI/2010/5.

it is appropriate to take into account that the Applicant has been in the employ of the United Nations for more than 20 years and that, as Director of UNICRI, he holds a highly responsible and visible position. It can therefore be said that the contested decision causes him an irreparable moral prejudice in terms of the damage to his reputation.

42. In *Tadonki*²³ the Tribunal held:

The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

43. The Tribunal finds that this requirement has been met.

Urgency

44. The Applicant has not expressed in precise terms whether the implementation of the decision is imminent. The Respondent submits that,

a. He has informed the Applicant that the implementation of the reassignment decision has been deferred pending the outcome of the management evaluation, there is no imminent danger of an impending transfer to warrant a treatment of the matter as urgent.

b. In any case, the Respondent has on his own volition extended the effective date of the reassignment to 28 August 2015 pending the outcome of the management evaluation. This extension would allow the parties to benefit from the guidance of the management evaluation.

²³ UNDT/2009/016.

- c. For this reason, the UNECA management has extended the

accounted for at any stage of the proceedings. It is obvious that a remedy at the earliest possible stage would serve the interest of both the Organization and the staff member.

48. The Tribunal endorses the above view and refers Mr. Lopes to the Secretary General for possible action to enforce accountability for:

- a. Openly flouting the e-PAS

Entered in the Register on this 23rd day of July 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi