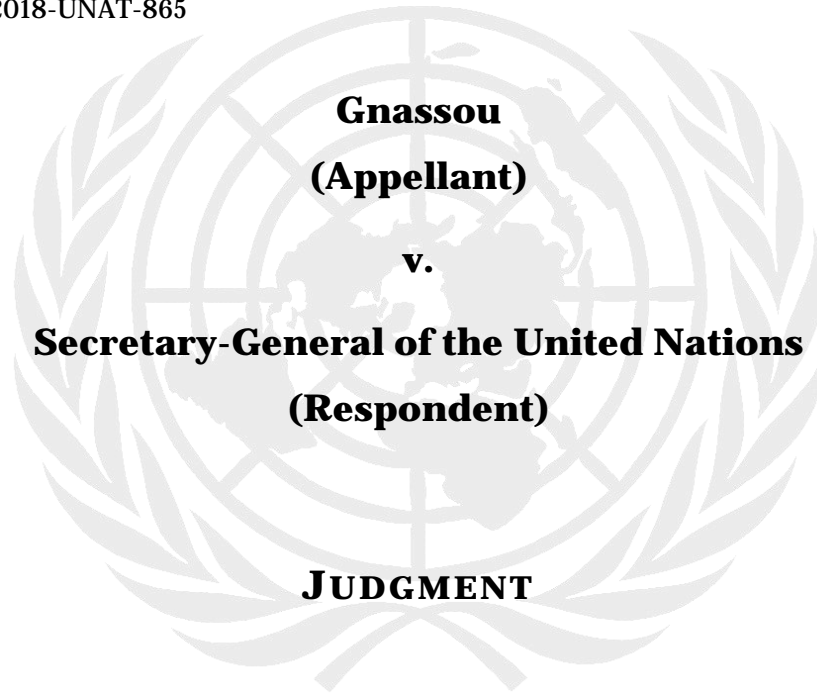




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-865



Before:	Judge Martha Halfeld, Presiding Judge Richard Lussick Judge Deborah Thomas-Felix
Case No.:	2018-1155
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Ms. Gnassou:	Monika Bileris
Counsel for Secretary-General:	Francisca Lagos-Pola

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/010, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 29 January 2018, in the case of *Gnassou v. Secretary-General of the United Nations*. Ms. Laure Gnassou filed the appeal on 30 April 2018. The Secretary-General filed his answer on 12 June 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... ..

... On 1 July 2004, the Applicant commenced employment with [the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)] on a fixed-term appointment as an Economic Affairs Officer at the P-4 level in the Political Affairs Division (“PAD”). She worked in PAD until her separation from service on 31 August 2015.

[On 12 September 2014, Ms. Gnassou was informed by interoffice memorandum from the Special Representative of the Secretary-General (SRSG) that she had been selected for transfer to his office as Economic Affairs Officer. Ms. Gnassou declined the position on 21 September and 22 October 2014.]

... On 1 July 2015, the Applicant’s first reporting officer (“FRO”) assessed her overall performance for the 2014-2015 performance evaluation cycle as “does not meet performance expectations”.

... By an email dated 14 July 2015, the Applicant sought guidance from the Chief of the MONUSCO Human Resources Section (HRS) on the rebuttal of her 2014-2015 e-PAS.

... On 15 July 2015, the Applicant submitted her rebuttal request to the Chief HRS. The request comprised of two tables of 25 pages and 32 annexes of 713 pages (...). On the same day, the Chief HRS requested that the Applicant provide a copy of her e-PAS that had been signed by all parties.

... By email dated 22 July 2015, the Office of the DMS requested that the Applicant’s [FRO] respond to the Applicant’s rebuttal statement within 14 days (by 5 August 2015). The FRO did not respond so the Office of the

¹ Impugned Judgment, para. 9.

Director of Mission Support (DMS) sent a reminder on 5 August 2015. The FRO responded the next day that he was on emergency medical evacuation.

... On 23 July 2015, the Applicant sent an email to the DMS again requesting a rebuttal of her 2014-2015 e-PAS. Subsequently, she provided the DMS with her partially signed performance appraisal and the 32 annexes.

... The Applicant received a hard copy of her signed e-PAS on 28 July 2015.

... The Applicant was separated from service on 31 August 2015.

... The Applicant's FRO returned to the duty station on 21 December 2015. On 5 and 28 January 2016 and 2 February 2016, the DMS' office took follow up action in relation to his reply to the Applicant's rebuttal statement, which he submitted on 23 February 2016.

... The Applicant received a copy of the FRO's reply to her rebuttal statement on 25 February 2016.

... The Rebuttal Panel interviewed the Applicant on 3 March 2016.

... On 14 March 2016, the Rebuttal Panel completed its report, changing the Applicant's overall performance rating from "does not meet performance expectations" to "partially meets performance expectations".

... The Applicant received a copy of the rebuttal panel report from MONUSCO on 29 March 2016 and was informed that a copy of the report would be placed in her [Official Status File (OSF)].

3. By letter dated 30 May 2016, Ms. Gnassou requested management evaluation of the decision of the DMS to accept the rebuttal report and place it in her OSF. By letter dated 11 July 2016, Ms. Gnassou was informed that her request for management evaluation was rejected. On 5 October 2016, Ms. Gnassou filed an application before the UNDT contesting the findings of the rebuttal panel concerning her 2014-2015 performance appraisal and MONUSCO's decision to place the report of the rebuttal panel in her OSF.

4. On 29 January 2018, the UNDT issued Judgment No. UNDT/2018/010, dismissing Ms. Gnassou's application. As to Ms. Gnassou's first claim in relation to the rebuttal report, the UNDT rejected Ms. Gnassou's contention that the delay in this case constituted an error of procedure. While it found that the delay in finalizing the report was far in excess of the period contemplated under Administrative Instruction ST/AI/2010/5 (Performance Management and Development System), it accepted the reasons given for the delay, i.e. the absence of the Director of PAD on medical leave and his responsibility to deal with the inter-ethnic crisis in South Lubero, Democratic Republic of the Congo (DRC), on his return in late December 2015.

The UNDT further rejected Ms. Gnassou's challenge to the assessment and findings of the rebuttal panel on the ground that she had not shown that the findings of the rebuttal panel together with her final performance appraisal resulted in an administrative decision to her detriment.

5. The UNDT emphasized that Ms. Gnassou's claim challenging her separation from the Organization was subject to a different application and was disposed of in Judgment No. UNDT/2018/011.

6. Turning to Ms. Gnassou's second claim, the UNDT held that it was clear from Section 15.4 of ST/AI/2010/5 and the Appeals Tribunal's holding in *Oummih*,² that the Administration was obliged to place the report of the rebuttal panel in a staff member's OSF. Accordingly, the act of placing the rebuttal report in Ms. Gnassou's OSF was an administrative requirement and not an appealable administrative decision. The manager concerned did not exercise discretion which could have been judicially reviewed. The UNDT therefore rejected the application in its entirety.

7. By Order No. 313 (2018) dated 14 March 2018, the Appeals Tribunal granted Ms. Gnassou an extension of time to file her appeal, which she did in accordance with that order on 30 April 2018. By Order No. 319 (2018), the President shortened the Secretary-General's 60-calendar day time limit to answer to 40 calendar days in light of the fact that the case was on the docket for the 2018 summer session to start on 18 June 2018. The Secretary-General filed his answer on 12 June 2018. The case was placed on the docket for consideration by the Appeals Tribunal at its 2018 summer session. The panel assigned to the case subsequently decided to postpone its consideration of the case to the Appeals Tribunal's 2018 fall session.

Submissions

Ms. Gnassou's Appeal

8. The UNDT incorrectly applied Section 15.7 of ST/AI/2010/5 and the Appeals Tribunal's jurisprudence and erred in law in concluding that no administrative decision stemmed from Ms. Gnassou's performance appraisal. In the technical sense, no administrative decision resulted from Ms. Gnassou's final performance appraisal pursuant to Section 15.7 ST/AI/2010/5 because

² *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420.

she had already been separated from service by the time the rebuttal panel met to discuss her case and its report was accepted. However, at least one administrative decision did result from Ms. Gnassou's initial appraisal: MONUSCO relied on her negative e-PAS to order her to undergo a Performance Improvement Plan (PIP) as a condition for her continued employment before completing the rebuttal process, which in turn eventually led to her separation from service. As such, there was a legal consequence to her terms of appointment.

9. The UNDT erred in relying on the Appeals Tribunal's jurisprudence in *Ngokeng* and *Staedtler*³ to conclude that no administrative decision stemmed from Ms. Gnassou's performance appraisal. In both cases, the staff members received satisfactory performance appraisals which were therefore not rebuttable and no administrative decisions were made on the basis of those appraisals. Conversely, Ms. Gnassou received a negative appraisal and went through the proper channels to rebut it, but before the completion of the rebuttal process, the Administration ordered a PIP based on the negative appraisal.

10. The UNDT ignored certain facts in determining that there were procedural defects resulting in a flawed rebuttal panel report. Specifically, the delay caused by the Director of PAD in completing his comments on Ms. Gnassou's e-PAS rebuttal was procedurally irregular and caused Ms. Gnassou prejudice, resulting in injury. Ms. Gnassou received "D" ("does not meet performance expectations") ratings in both the 2013-2014 and 2014-2015 e-PAS. However, she was not put on a PIP after her first D rating for the 2013-2014 e-PAS, which therefore gave the impression that the PIP ordered following the 2014-2015 e-PAS cycle was ordered in retaliation for Ms. Gnassou's refusal to accept the post with the SRSG's office.

11. Ms. Gnassou submitted her 2014-2015 e-PAS rebuttal on 14 July 2015. The Director of PAD failed to submit his comments as required within the two-week deadline, then left on medical leave without assigning the task to someone else, which was within his authority to do, according to Section 15.3 of ST/AI/2010/5. He returned to the Mission on 21 December 2015, but did not submit his comments until 23 February 2016, more than two months after he returned to work and seven months since the original deadline. The rebuttal panel issued its report on 14 March 2016, changing Ms. Gnassou's rating to "partially meets performance expectations", proving that there was no basis for the PIP. At the very least, the Organization

³ *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546.

should have extended her contract through March 2016, when the rebuttal panel issued its report.

12. In concluding that the PAD Director's medical leave and the need to deal with a civil crisis in South Lubero was a satisfactory justification for failing to complete his administrative duties, the UNDT failed to consider certain facts, including the fact that there was no explanation as to why the PAD Director could not have completed his comments on the rebuttal within the initial 14-day deadline, when Ms. Gnassou had submitted her comments on 14 July 2015 and he only went on medical leave in early August 2015; the fact that he never explained why he could not have assigned another supervisor/manager to respond to Ms. Gnassou's rebuttal; and the fact that his claim that he was too busy to manage administrative duties due to an alleged confrontation in the DRC must fail, given that he was able to manage other administrative tasks.

13. The UNDT also failed to consider how the Administration's self-created delays prejudiced Ms. Gnassou and that she was not able to rebut her performance appraisal before the expiration of her contract. Had the e-PAS been completed in a timely manner, she could have rebutted it within two months and avoided the issue of the PIP. The UNDT also failed to consider the fact that Ms. Gnassou's contract had been renewed using a "C" ("partially meets performance expectations") rating and that she had received two consecutive e-PAS appraisals within six months during the same 2014-2015 cycle calling into question the accuracy, integrity and motivations behind this process. Finally, had the Director of PAD submitted his comments on Ms. Gnassou's rebuttal in time, the rebuttal would have been completed within a reasonable period of time. Based on the rebuttal report, the Administration would have likely not ordered a PIP and her contract would have been renewed.

14. Ms. Gnassou does not contest the UNDT's determination that the placement of a rebuttal report in a staff member's file is not a discretionary matter. She however requests that the Appeals Tribunal order the removal of her 2013-2014 and 2014-2015 e-PAS on an exceptional basis. In the alternative, she requests that an explanatory note be put in her file to supplement her e-PAS.

15. Ms. Gnassou requests that the Appeals Tribunal vacate the UNDT Judgment; award moral damages in the amount of USD 90,000 for damages she suffered as a result of the Organization's errors; and order such other remedies as the Appeals Tribunal deems just and fair.

The Secretary-General's Answer

16. The Secretary-General submits that the UNDT correctly dismissed Ms. Gnassou's challenges to the findings of the rebuttal panel as not receivable. In accordance with the Appeals Tribunal's established jurisprudence in the context of performance evaluations, it is the final adverse administrative decision arising from the performance appraisal that is challengeable whereas preliminary or intermediate steps are not subject to appeal. The decision challenged by Ms. Gnassou to place her on a PIP constitutes an intermediary step within a series of steps in the performance appraisal process provided for in ST/AI/2010/5 and may, therefore, only be challenged in the context of a final decision. Ms. Gnassou has further failed to discharge her burden of proof to show that her placement on a PIP was a result of retaliation or otherwise motivated by improper considerations. The fact that she had not been placed on a PIP following the 2013-2014 performance cycle where she had also received an unsatisfactory performance is insufficient proof of retaliation. Moreover, Ms. Gnassou has not previously challenged her placement on a PIP, neither in her management evaluation request nor in her application before the UNDT. Her argument, therefore, amounts to an "attempt[] to bypass the established procedure of the internal justice system" and should be dismissed on this basis alone.

17. The Secretary-General further asserts that Ms. Gnassou's arguments about alleged delays in the rebuttal process provide no legal basis to reverse the UNDT's ruling on receivability. In accordance with its jurisprudence, the Appeals Tribunal should affirm the UNDT Judgment despite the fact that the UNDT's findings on the merits were unnecessary once it had deemed the application not receivable. At any rate, the conclusions reached by the UNDT were correct in that there was no unreasonable delay on the part of the Administration. In addition, the delay in finalizing the rebuttal panel report did not have any impact on the rating contained therein and Ms. Gnassou has failed to demonstrate any harm occurring from the delay.

18. Contrary to Ms. Gnassou's assertion, the Administrations was under no obligation to extend her appointment through March 2016 when the rebuttal panel report was issued: Section 15.6 of ST/AI/2010/5 only contemplates a renewal of an appointment until the completion of the rebuttal process where unsatisfactory performance is the basis for the non-renewal decision. Ms. Gnassou's separation, however, was due to her refusal to sign her letter of appointment despite repeated attempts by the Administration and not to her unsatisfactory performance as such.

19. Moreover, the UNDT correctly dismissed Ms. Gnassou's challenges to the placement of the rebuttal panel's report in her OSF. The placement was in full accord with Section 15.4 of ST/AI/2010/5 and, pursuant to the Appeals Tribunal jurisprudence in *Oummih*,⁴ it does not constitute a challengeable adverse administrative decision. The placement of a staff member's performance documents in his or her OSF is mandatory under Section 15.4 of ST/AI/2010/5 and according to Appeals Tribunal jurisprudence. Ms. Gnassou has failed to demonstrate any exceptional circumstances warranting a deviation from this rule.

20. In light of the foregoing, the Secretary-General requests that the Appeals Tribunal dismiss Ms. Gnassou's appeal in its entirety and affirm the impugned Judgment.

Considerations

21. The issues for consideration and determination in this appeal are whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it found that i) there was no error of procedure stemming from the delay in completing the comments on Ms. Gnassou's rebuttal statement; and ii) Ms. Gnassou's claim regarding the assessment and findings of the rebuttal panel together with Ms. Gnassou's final performance appraisal did not result in a challengeable administrative decision. The Appeals Tribunal will assess these two issues in turn.

The delay by the Director of PAD in submitting his reply to Ms. Gnassou's rebuttal statement

22. The UNDT concluded that the delay by the Director of PAD in responding to Ms. Gnassou's rebuttal statement was justified, resulting in no error of procedure. It found that the absence of the Director of PAD on medical leave and his responsibility to deal with the crisis in South Lubero, DRC, on his return justified this delay.

23. Having reviewed the record and the parties' contentions, we find no explanation as to why the Director of PAD could not have completed his comments within the 14-day mandatory deadline. Pursuant to Section 15.3 of ST/AI/2015, "[a]fter receiving a copy of the rebuttal statement, the head of department/ office/mission, or his or her representative, *shall*, within 14 days, prepare and submit to the rebuttal panel a brief written statement in reply to the rebuttal statement submitted by the staff member".⁵ The reasons provided by the

⁴ *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420, para. 18.

⁵ Emphasis added.

Administration for the delay do not concern the relevant 14-day time span, but the seven months following the expiration of the time limit. Since no explanation was provided for the initial and relevant delay, we find that the UNDT erred in concluding that the reasons given by the Administration constituted a satisfactory explanation, and that the excessive delay was a violation of Ms. Gnassou's rights.

24. However, the violation of Ms. Gnassou's rights does not, of itself, entitle her to an award of damages. The Appeals Tribunal has consistently held that not every violation of a staff member's right will give rise to an award of compensation and that a staff member is entitled to compensation only where the staff member has suffered damage as a result of the violation.⁶

25. Ms. Gnassou argues that had the Director of PAD submitted his reply on time, the rebuttal process would have been completed on time. She contends that based on the rebuttal panel report, the Administration would not have ordered a PIP given Ms. Gnassou's decade-long positive track record and her contract would have been renewed without any incident. Even if the Administration had found it necessary to order a PIP following the rebuttal, she could have complied with it accordingly, had she agreed with the findings.

26. We note that the non-renewal of Ms. Gnassou's appointment is addressed and disposed of in a separate UNDT judgment that is also under appeal.⁷ We therefore need not further consider this argument here.

27. There is no evidence in the present case that Ms. Gnassou suffered any harm as a result of the above violation and accordingly there are no legal grounds that can justify an award of compensation.

The rebuttal panel report and the final performance appraisal

28. The UNDT found that Ms. Gnassou had not shown that the findings of the rebuttal panel together with her final performance appraisal resulted in a challengeable administrative decision. The UNDT found that the case was not distinguishable from *Staedtler* and *Ngokeng*,⁸ where the staff members had received a positive rating of "consistently exceeds" or "successfully meets"

⁶ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-697, para. 26 and references therein.

⁷ See *Gnassou v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-866.

⁸ Impugned Judgment, para. 15.

performance expectations in their respective performance appraisals and therefore had no right to initiate a rebuttal pursuant to ST/AI/2010/5.

29. On appeal, Ms. Gnassou contends that the UNDT erred in so finding since the order to place her on a PIP stemmed directly from her performance appraisal.

30. We note the Secretary-General's contention that Ms. Gnassou has never previously challenged her placement on a PIP, neither in her management evaluation request nor in her application before the UNDT. We agree with the Secretary-General and this ground of appeal is therefore not receivable.

31. Even if the ground of appeal was receivable, the order to place Ms. Gnassou on a PIP is not an appealable final administrative decision. Pursuant to ST/AI/2010/5, the PIP is merely a preliminary step instituted to address a staff member's shortcomings during a performance cycle. ST/AI/2010/5 sets out a series of steps which may ultimately lead to a reviewable final administrative decision. The Appeals Tribunal has held that such preliminary steps or actions are not administrative decisions subject to appeal.⁹

The removal of the 2013-2014 and 2014-2015 e-PAS from Ms. Gnassou's Official Status File

32. The UNDT found that placing the rebuttal panel report in Ms. Gnassou's OSF was an administrative obligation resulting from Section 15.4 of ST/AI/2010/5 and ST/AI/2010/5/Corr. 1. It held that this action did not amount to an administrative decision, but rather to an administrative requirement and that, since there was no exercise of discretion, the application was not receivable on that ground.

33. In her appeal, Ms. Gnassou acknowledges that the placement of a rebuttal panel report in a staff member's OSF is not a discretionary matter; she nevertheless requests the removal of her 2013-2014 and 2014-2015 appraisals "on an exceptional basis". As an alternative, she requests the placement of an explanatory note to supplement them.

34. We agree with the UNDT's decision not to order the removal of the above documents from Ms. Gnassou's OSF; we, however, differ on the reasoning. Contrary to what the UNDT and the parties suggest, an appealable administrative decision does not require an element of

⁹ *Nguyen-Kropp & Postica v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-509, para. 34; *Ishak v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-152, para. 29.

discretion. In this regard, the UNDT misconstrued the Appeals Tribunal's holding in *Oummih*.¹⁰ In *Oummih*, the Appeals Tribunal found that “[u]nder the applicable legislative framework as set out in ST/AI/2002/3 and ST/AI/2010/5, it was mandatory for the Administration to keep in the personnel file both the impugned appraisal and reports, and the rebuttal outcome”.¹¹ It concluded that the Administration was therefore correct in so doing. The Appeals Tribunal found the application receivable, but dismissed it on the merits.

35. In the present case, Ms. Gnassou's appeal against the decision to place the above-mentioned documents in her OSF was receivable before the UNDT. The Appeals Tribunal is however satisfied that the Administration acted in accordance with ST/AI/2010/5 when it placed the rebuttal report and Ms. Gnassou's performance appraisals in her OSF. Section 15.4 clearly stipulates that “[t]he 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”.

36. Ms. Gnassou merely makes an unsupported request for relief and has not demonstrated any exceptional circumstances justifying the removal of the above documents from her OSF. Her request is therefore denied.

¹⁰ *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420.

¹¹ *Ibid.*, para. 16.

Judgment

37. For the foregoing reasons, the appeal is dismissed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar