



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/137

Judgment No.: UNDT/2010/078

Date: 30 April 2010

Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MIYAZAKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Bart Willemsen, OSLA

Counsel for respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The applicant is a former staff member who was employed on a fixed-term contract. Prior to concluding her service, her performance was appraised by way of a Form P.10-E Report on Short-Term Staff (the Report), which she considered incorrect and adverse to her interests.

2. The applicant filed an application with the UN Dispute Tribunal under article 8 of its Rules of Procedure, contesting the administrative decision that she was not entitled to a rebuttal of the Report. At the same time, she launched an application by way of a motion for temporary relief, for the removal of the Report from her personnel file (the File) pursuant to article 10.2 of the Tribunal's Statute and article 14.1 of its Rules of Procedure.

3. The hearing of the motion for temporary relief was held on 11 November 2009, subsequent to which the applicant was granted the interim relief sought (Judgment UNDT/2009/076). This resulted in the Report being removed from her File pending the outcome of the substantive proceedings.

Facts

4. The applicant entered the service of the Organisation on 25 November 2008. From this date until the end of March 2009 she worked as a Budget Officer with the Mission Support Unit of the Peacebuilding Financing Division (PFD), at the conclusion of which she was evaluated by way of a Form P.10-E Report on Short-Term Staff. This report gave her an overall rating of "good" and noted her as being suitable for reemployment at the same level.

5. From 30 March to 11 June 2009 she served as a Finance and Budget Officer with Section III of the PFD, and thereafter with the Mission Support Unit of the same Division, concluding her service there on 3 July 2009. Prior to concluding her

service, on 22 June 2009, the Section Chief and Director of PFD both signed the Report, evaluating her performance as unsatisfactory. Amongst other things, the Report had a box checked noting the applicant's proficiency in general as "below average", with another checked in relation to whether the staff member would be considered for re-employment, as "[n]o, not at all". The Report was placed on her File on 23 June 2009.

6. The applicant stated that she was unaware that the Report was placed on her File on 23 June 2009 and that she was not shown the Report until 2 July 2009 (the penultimate day of her appointment), and further that she did not receive a copy of the Report at all. The respondent, however, stated that on 23 June 2009 the Assistant to the Section Chief personally delivered a copy of the Report to the applicant, thereafter delivering a copy to be placed on the applicant's File with a third copy being delivered to the Section Chief for placement on the PFD file. In light of the interim relief already granted to the applicant, I do not consider that the outcome of the current proceedings rests on an assessment of this evidence to determine which version of events appears more likely.

7. After concluding her service, on 7 July 2009 the applicant received an Offer of Appointment for another temporary position of three months' duration within the Office of Programme Planning, Budget and Accounts, Department of Management, to commence 9 July 2009. The day prior to commencement, on 8 July 2009, the applicant's former Section Chief, unbeknown to the applicant, wrote to the Assistant Secretary-General (ASG) of the Office of Human Resources Management advising the ASG of the adverse assessment of the applicant's performance and of the Section Chief's opinion that the applicant was unsuitable for re-employment with the Organisation. Upon arriving to report for duty on 9 July 2009 the applicant was advised that there were difficulties with her contract and on the same date received a letter from the Chief of Section, Human Resources Services, Department of Management, advising her that her Offer of Appointment was withdrawn.

8. On 20 August 2009 the applicant, of her own initiative, forwarded her comments in response to the Report to the ASG. She was advised by way of response on the ASG's behalf on 24 August 2009 that there were no formal rebuttal procedures on short-term reports (such as the Report), but that her objections would be placed on her File. On 8 September 2009 the applicant requested management evaluation of the decisions not to allow her a rebuttal of the Report on her File and to withdraw her Offer of Appointment. On 14 October 2009 the applicant received the Secretary-General's endorsement of the findings and recommendations of the Management Evaluation Unit (MEU). These findings and recommendations were that the applicant should be paid an amount equal to three months' net base salary; that the Report should remain on the applicant's File, and that any comments made by the applicant in response to the Report should also be placed on the File. The applicant, dissatisfied with fact that the MEU response would result in the Report remaining on her File, subsequently filed the application for interim relief, hereinbefore mentioned.

Relevant instruments

ST/AI/292

9. The parties were in agreement that *ST/AI/292*, dated 15 July 1982, which provides measures in relation to the filing of adverse materials in personnel records, was applicable in relation to the placement of the Report on the applicant's File.

10. *ST/AI/292* (para 1) states that its purpose is to "establish interim guidelines...pending completion of a comprehensive review...of the system of personnel records", in relation to the implementation of the Secretary-General's decision that "anything that is adverse to the staff member should not go on a confidential file unless it has been shown to the person concerned". The instruction explains further in para 2, stating that—

[a]dverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon. It shall be handled and filed in accordance with the procedures set out below, depending upon its source.

11. At para 5, ST/AI/292 states, in relation to the type of material in question in the present case—

[a] third category of adverse material may relate to an appraisal of the staff member's performance and conduct. Under the existing system, all performance reports, special reports and other communications pertaining to the staff member's performance are a matter of record and are *open to rebuttal* by the staff member. The reports and the rebuttal, if any, as well as the final appraisal by the head of the department or office are placed in the official status file. This file constitutes the sole repository of documents relating to the contractual status and career of the staff member. It is available for inspection by the staff member once a year before the annual promotion review and in other circumstances specified in the administrative instruction ST/AI/108 on application to the staff member's personnel officer [emphasis added].

ST/AI/2002/3

12. Administrative instruction ST/AI/2002/3 governs the United Nations Secretariat's performance appraisal system (PAS). It states in sec 1 that it—

shall apply to all staff members who hold appointments of at least one year under the 100 series of the Staff Rules ... staff employed under the 200 or 300 series of the Staff Rules, and temporary staff employed for less than one year under the 100 series of the Staff Rules *may* also be appraised under the provisions of the present instruction where appropriate, taking into consideration the nature and duration of the functions and the supervisory structure in place in the work unit [emphases added].

13. This administrative instruction provides for a full rebuttal process if a staff member disagrees with the given performance rating. It is also applicable to

temporary staff employed for less than a year if such staff member has undergone the appraisal process. To summarise some of the salient features of the PAS process as promulgated in ST/AI/2002/3, performance expectations are agreed in the work planning phase (sec 6) and at the end of the performance period the first reporting officer and staff member meet to discuss the overall performance (sec 9.1). After this has been done, the first and second reporting officers and the staff member sign the PAS via which the staff member's performance is evaluated and rated (sec 10), without prejudice to the staff member's right to initiate a rebuttal process (sec 9.4). The evaluation is placed on the staff member's official status file and appears in the Integrated Management Information System (sec 11.5). Where a staff member disagrees with the performance rating given at the end of a performance period, they may submit a written rebuttal statement in accordance with and pursuant to sec 15. This statement is placed on the staff member's file, as is management's written reply to it. Thereafter, a rebuttal panel considers the matter and provides a written report, with reasons, on whether the original appraisal rating should be maintained or not. The rebuttal panel makes a binding determination of the appropriate performance rating and its notation is made on the final appraisal section of the PAS form, with a notation of any change in the rating as a result of a PAS rebuttal. The rebuttal panel's report is also placed on the staff member's file.

Applicant's submissions

14. The applicant submits that the respondent's offer to place the applicant's comments in response to the Report on her File together with the Report was not an adequate remedy. She contends that the failure to provide rebuttal procedures for short-term staff is discriminatory and violates the rights of all staff to due process. Further that all staff members, temporary or short-term, are entitled to a procedure which accurately reflects their performance, which is not provided for by ST/AI/292. The applicant did not specify the precise procedures under ST/AI/2002/3, or any

other procedures, that she wished to be applied in her situation, but simply sought a more comprehensive process of rebuttal than that offered by the respondent.

15. The applicant noted that ST/AI/2002/3 entitles staff, pursuant to sec 16.1, to institute the rebuttal procedures where there is any “disagreement” as to ratings. She stated that these rights were provided due to the fact that the Secretary-General was aware that it would be an inadequate remedy to allow staff to merely place their comments on top of those of their supervisors, as it might, if the definition of “adverse” is first satisfied, be the only remedy provided for by ST/AI/292. Further, an arbitrary or strict definition of “adverse” in itself may lead to absurd results such as where a staff member considers their performance as outstanding, but is only assessed as average or good, yet may have no right to even place their comments on their file since the words “average” or “good” do not necessarily connote an adverse comment.

16. The applicant also argued that it is problematic that ST/AI/2002/3 “may” be used for temporary staff “where appropriate”, but that no guidance is given as to when this will be the case.

17. The applicant sought to reinforce her arguments in noting that, contrary to her understanding of the respondent’s assertions that short-term staff have lesser rights than long-term staff, they should be accorded at least as great a safeguard in relation to the appraisal of their performance, as a single adverse evaluation could effectively end their chances of obtaining or maintaining a career within the Organisation.

Respondent’s submissions

18. The respondent stated that it had complied with its own rules and procedures, which were not discriminatory or in violation of the applicant’s rights and which formed part of the applicant’s terms of employment. Specifically, the preparation of reports on short-term staff was mandated by the Organisation’s rules, and this was done. As a temporary staff member, the applicant had those rights which apply to

short-term employment and which are commensurate with its non-permanent nature. In the case of adverse performance appraisal, a short-term staff member's rights are limited to the process afforded by ST/AI/292; they are entitled to be made aware of and to contradict or "rebut" the adverse material in writing, which is then placed on their personnel file along with the adverse material. In this regard, the respondent noted that an adverse PAS report prepared in accordance with ST/AI/2002/3 also remains on the staff member's file, regardless of the outcome of the rebuttal process. Specifically, ST/AI/2002/3 does not apply to short-term staff and nor are the rights provided under this instruction afforded to such staff.

19. The respondent contends that the comprehensive rebuttal process provided by ST/AI/2002/3 would be inappropriate to apply to short-term staff, as it does not only require an assessment at the end of a period, but rather an ongoing interactive process of performance management, from the formulation of a work plan, to mid-point consideration, to final assessment. The report on short-term staff is entirely different and is prepared to ensure good management and that the respondent's obligations under staff rule 1.3(a) are thereby fulfilled. Further, there is no strict definitional difference between "rebuttal" in its ordinary sense and the sense that it is used in the ST/AI/2002/3—a right to rebuttal is a right to contradict. The applicant's own comments in response to the Report to the ASG, of 20 August 2009, are titled "Rebuttal".

20. The respondent also contends that temporary staff are necessary to provide an efficient staffing solution for the Organisation's human resources needs and legitimate policy reasons underscore the differentiation in treatment of temporary and permanent staff. This differentiation does not amount to discrimination. The reason that temporary staff are given rights which may be less than those afforded to other staff is that to give them more substantial rights would take away from the very reason they exist, i.e. to provide flexibility and efficiency to the Organisation's staffing needs. Therefore, the applicant's arguments form a criticism of policy which has no basis in law. Furthermore, the applicant's arguments relating to a failure of

due process did not specify what rights of due process had been violated, or where these rights came from.

Considerations

21. The respondent concedes that ST/AI/292 provides the only mechanism by which a short-term staff member will be able to challenge an assessment of “adverse” performance, where the option to appraise a short term staff member is not exercised and where the provisions of ST/AI/2002/3 are not selected for application. That is, a staff member who is not selected for appraisal under ST/AI/2002/3 and who receives an adverse short-term staff report (such as in the applicant’s case) will simply be informed of this material and will be entitled to have his or her comments placed on their official status file. This will be the only rebuttal procedure available to them. Subject to the comments made in my Judgment UNDT/2009/076 in this case, I am satisfied that such a procedure would satisfy the requirements of ST/AI/292.

22. The applicant, to succeed, must therefore show that the procedure under ST/AI/292 and the framework it creates is more than merely inadequate in a general sense; she must show that the policy itself, as the respondent contends it operates, is in noncompliance with the terms of her appointment. That is, she must show that, as a short-term staff member, she is entitled to something more in terms of a rebuttal process than the placement of her comments on top of the adverse report.

23. I must at the outset point out that the applicant’s contention that there is no guidance given as to when temporary staff should be appraised under ST/AI/2002/3 is not entirely correct. Clearly ST/AI/2002/3 provides that staff employed for less than one year under the 100 series of the Staff Rules “may” be appraised where appropriate, “taking into consideration the nature and duration of the functions and the supervisory structure in place in the work unit”. To my mind, this makes perfect sense as one would no doubt wish to appraise a short-term staff member the longer the duration of the function, the more strategic the nature of the function and the more

supervisory duties that may be required to be performed. In this regard I also agree with the respondent that the very nature of short-term arrangements is to provide flexibility and efficiency to the Organisation's staffing needs and that rights accruing to such contracts should be commensurate with their non-permanent nature. I do not believe it could be rationally argued otherwise. The question however is how far these rights should be abridged in comparison to other, in any given situation?

24. I must at first make a number of background observations regarding ST/AI/292 and the framework it creates. The instruction itself is dated 15 July 1982—almost three decades ago. While old law is certainly not necessarily bad law, it is not a reckless or unreasonable observation that the human resources and management environment and policies of the Organisation, and indeed of the world at large, have changed radically over this time. Further, the instruction states (at paragraph 1) that—

[t]he purpose of this instruction is to establish *interim* guidelines in implementation of that decision, pending completion of a comprehensive review, in consultation with the staff, of the system of personnel records. [emphasis added]

These were only intended to be “interim” guidelines regarding the placement of adverse material, twenty-seven years ago.

24 On 28 November 1984, ST/AI/240/Rev. 2 was issued to clarify the Organisation's provisions on the performance evaluation system, including rebuttal panels. In section 3, this instruction stated that reports would be made on all staff, temporary or permanent, below the D-2 level. Where desired by the staff member, the staff member was able to avail him or herself of a rebuttal procedure involving independent evaluation of the assessment and the staff member's rebuttal, by a panel (sections 10–15). Further, staff with appointments of less than six months to departments other than their own could also request evaluation by way of a “special report” (sec 17), to which the rebuttal procedure also applied (sec 18).

25. In light of the fact that instructions governing the performance appraisal system of the Organisation appeared relatively soon after ST/AI/292 (which governed placement of a broader class of “adverse material”), it would seem reasonable to infer, in the absence of a reference to ST/AI/292 or a note as to its supersession in those later instructions, that the later instructions were intended to cover different subject matters to the former. It is unclear whether the revised instruction applied to all short-term personnel or simply to those under permanent, regular, fixed-term, probationary or indefinite appointments who have been assigned for a period of less than six months in another department, office, section or unit. Indeed, the parties were in agreement (and I also agree) that ST/AI/292 is still currently operative, meaning that it has not been superseded. While of course one could consider an unwelcome performance appraisal as adverse material, for this specific type of adverse material greater protections (including more detailed and independent rebuttal procedures) have been afforded to staff members, including short-term staff (see discussion below).

26. The respondent argued that detailed rebuttal procedures were not meant to apply to short-term staff as they were part of the PAS system, which incorporated performance assessment based on the formulation of agreed plans, mid-point reviews etc.—a complex mechanism of which the actual appraisal was the ultimate outcome. However, I note that the PAS system, which was to apply to 100 series staff with appointments of at least one year, was not established until 1995 by ST/AI/411. Therefore, it is clear that the detailed rebuttal procedures and the rights they afforded staff preceded the PAS system; they were not introduced by it. Accordingly, the contention that such rights are inextricably linked to and based on the PAS system is not true.

27. Subsequent to ST/AI/411 and the PAS procedures it established, other instructions maintained this framework in similar terms. Then, in 2002, ST/AI/2002/3 was promulgated and, unlike the instruction it superseded, included a statement that “200 or 300 series [staff], and temporary staff employed for less than

one year under the 100 series of the Staff Rules may also be appraised” under it. It does not provide sufficient direction as to when the discretion implied by the word “may” is to be exercised, or by whom; assumedly, it would have been a first reporting officer’s discretion in most cases, although this is not clear. Where this discretion was not exercised, it would mean that the only protection short-term staff would have in relation to any appraisal made of them would be pursuant to ST/AI/292—as the respondent contends is appropriate in this case.

28. The discretion inherent in ST/AI/2002/3 means that the rebuttal procedures it provides will be available to some short-term staff (when used, which use is discretionary), but not others, the latter of whom will only have the limited protections of ST/AI/292. Therefore, in the context of staff rule 101.3 which states in mandatory terms that “[s]taff members shall be evaluated for their efficiency, competence and integrity through performance appraisal mechanisms”, some short-term staff members will be treated differently, and adversely, to others. The effective creation of two classes of short-term staff, based on the opaque and whimsical discretion of management, with unclear and inadequate guidelines, is clearly not fair. Where the provisions of ST/AI/2002/3 are applied to some short-term staff and not others, this violates the doctrine of equal treatment in like circumstances (for application of this doctrine see e.g. UN Administrative Tribunal Judgements No. 268 *Mendez* (1981); No. 1243 (2008)). Although the respondent argued that the Organisation was entitled to discriminate between short-term and longer term staff for policy and expediency reasons, he did not advance any argument as to why this discrimination should exist in a seemingly arbitrary manner between different classes or categories of short-term staff members. A lack of adequate, cohesive and consistently applied practices and procedures can lead to arbitrary and irrational decisions.

29. The PAS system provides that staff members who do not agree with the assessment of their performance may provide written comment which goes on their file; the same process as ST/AI/292 provides. However, under the PAS system, the

staff member's comments in rebuttal are assessed by an impartial panel that follows a prescribed process, including hearing both sides (and potentially, relevant witnesses) before the panel provides a reasoned assessment based on a consideration of both management's and the staff member's views. It is this part of the process that the procedure for short-term staff lacks—there is no final assessment, indeed reassessment, which takes into account the staff member's comments in rebuttal and which may be influenced by the staff member's comments. In other words, no decision is rendered, thus making an effective review impossible. Thus, although the ST/AI/292 procedure goes some way to satisfying the staff member's right to be heard, this right is less than meaningful in the circumstances described. Moreover, there is also a problem in relying on ST/AI/292 solely, in that it does not provide a definition of "adverse", thereby failing to clearly define under what circumstances staff have access to the rebuttal procedures the respondent contends it affords. For example, a staff member who receives a rating of "good" on the report on short-term staff but believes her or his performance to be much better would potentially be unable to challenge or rebut this rating (or indeed, even be informed of it) if the Administration determined that it did not constitute "adverse material".

30. I have discussed the unfairness of having short-term staff subject to potentially different rebuttal rights, as well as the problem with merely relying on ST/AI/292 to provide the rebuttal process for short-term staff. The particular relevance of the failures of the system is found in an examination of its consequences, to which I now look. When a subsequent manager or human resources official looks at a short-term staff member's file and sees an adverse performance report on short-term staff, with the staff member's comments in response placed on top, there is an appreciable risk that the former manager's findings will be given precedence over the staff member's response. Therefore, although ST/AI/292 ostensibly provides, in at least some circumstances, a right to be heard (that is, to raise comments in response), there is a significant risk for short-term staff members that one bad performance appraisal (which does not include a comprehensive right to rebuttal—particularly, to

correct a potentially improper evaluation) may severely limit that staff member's future career prospects with the Organisation. Evidence of this risk is found in the present case, where one adverse Report (after at least one preceding good performance evaluation) was enough to cause the withdrawal of the applicant's subsequent employment offer. Arguably, the risk posed to short-term staff members by adverse performance evaluations is potentially greater even than that posed to longer-term staff, who, ironically are afforded greater protections.

31. After the rebuttal process of ST/AI/2002/3 is finalised, there is no further appeal against the performance rating allowed (see sec 15.4), including to the Dispute Tribunal. It might be argued that a short-term staff member retains the right to appeal a short-term assessment to the Dispute Tribunal, therefore their rights remain protected. However, consistent jurisprudence (see e.g. UN Administrative Tribunal Judgement No. 943 *Yung* (1999), ILOAT Judgment No. 724 *In re Hakin*, and subsequent citations) has held that the Tribunal (or its equivalent) does not substitute its views for management's reasonably exercised discretion. Thus, if an appeal to the Tribunal were the only recourse for a short-term staff member to challenge an adverse performance assessment, the type of review and how much it concerned the actual merits of the staff member's arguments would be very limited. This would leave sub-standard appeals procedures for short-term staff in comparison with other staff, violating principles of natural justice, and would also serve to increase the Tribunal's caseload, when the performance evaluation process should essentially be a management process in which judicial review plays a limited role.

32. In the instant case, the applicant's "proficiency" was marked in the Report as "below average" and her suitability for re-employment within the Organisation as "no, not at all". How does one rebut such an adverse and potentially life altering comment by the mere placing of a written objection on the file? The drastic results of such a comment bore fruit in the withdrawal of the Offer of Appointment at the last minute, no doubt causing great distress and humiliation to the applicant. If the applicant was unemployable, how then did she secure the second appointment which

was later withdrawn? On the other hand, it may well be that in reality, the applicant's performance was unacceptable for the purposes of her continued employment within the Organisation; but there is no way of testing this in the light of the existing applicable procedures. Clearly the process undergone in this instance did not produce a satisfactory result.

Additional matters

33. The applicant's case has illustrated that having policies which are almost thirty years old and which require the Tribunal to examine a historical narrative of legislation to interpret them cannot make a common task such as the appraisal of staff easy for managers to perform, thereby making the performance of the task inefficient and imprecise.

34. The Secretary-General may consider, in light of the changed staffing practice of the Organisation, in particular the increased usage of short-term staff, and the lessons learnt from this and similar cases, that further guidance should be issued on comprehensive policies to be availed to short-term staff, including on rebuttal processes, if any.

35. Therefore on the particular facts and circumstances of this case, on the basis of the above reasoning, and noting the recent decision of Adams J in *Beaudry* UNDT/2010/039, I make the following Order:

Order

1. I order that the applicant be permitted to undertake a rebuttal process as provided for in ST/AI/2002/3, with the Report treated as the PAS appraisal. The ASG/OHRM is put on notice to make the necessary arrangements, including granting any extension of time required, in order to allow the rebuttal procedure to be completed. With regard to the interim measures I have already granted, as discussed

above, the Report will be placed back on the file and will be treated as the PAS appraisal.

2. In light of the relief already ordered to the applicant, I decline to order any further relief on the basis that I do not identify any other compensable loss on her part.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 30th day of April 2010

Entered in the Register on this 30th day of April 2010

(Signed)

Hafida Lahiouel, Registrar, New York