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Judgment No. 2020-UNAT-1044/Corr.1



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I take note of the comments and ratings given by the two colleagues who served successively as FROs over this reporting period and consider them as not adequate to describe the professional performance and the behaviour displayed by Mr. Simon Handy. Even before he resumed his duties with the Division, while on sick leave, Mr. Handy sent at least one aggressive message to colleagues. His frequent infringement of rules, his difficulty in working with others, in sharing office space, in sharing vehicles in the car-pool, his disrespect for simple rules such as being present on time for work, observance of curfew hours, attend compulsory meetings including meetings he is supposed to chair, in my view do not correspond to a satisfactory completion of work. Moreover his aggressive remarks openly directed against people he considers as foreigners would have justified unsatisfactory ratings in professionalism, integrity and respect for diversity. During this reporting period alone Mr. Handy has caused at least three incidents, one of them being on 9 (t)-2.b he c

13. In Judgment No. UNDT/2020/030 dated 27 February 2020, the Dispute Tribunal found Mr. Handy's application receivable, concluding that it had jurisdiction to consider the merits of the application, because the negative overall comments in Mr. Handy's 2016-2017 ePAS constituted an administrative decision, as they detracted from the favorable overall rating and had direct legal consequence on Mr. Handy affecting his right to rebut his ePAS and his right to a fair and balanced performance evaluation, and causing him adverse career consequences. The UNDT concluded that Mr. Handy's 2016-2017 ePAS was unlawful and ordered that it be amended so that the overall comments no longer detract from the overall rating, and that Mr. Handy have all his due process rights protected. But, the UNDT left it to the decision-makers to decide as to how this could be achieved.

14. The Secretary-General appealed the above UNDT Judgment on 27 April 2020, and Mr. Handy filed an answer on 26 June 2020.

#### Submissions

ST/AI/2010 /5, Mr. Handy did not have a right to rebut his 2016-2017 ePAS because he had received a “B” overall rating. Receiving comments about the need to improve was part and parcel of Mr. Handy’s terms of appointment and the regulatory framework governing performance management. While comments in a favorable ePAS cannot be rebutted, Mr. Handy was not without a remedy as he could have lodged a ST/SGB/2008/5 complaint against his supervisors if he had believed that he had been unfairly treated.<sup>1</sup> If a favorable ePAS were to become unfair by virtue of inclusion of disparaging comments, then every comment about the need to improve in an ePAS would become an administrative decision subject to judicial review. Such an interpretation would enormously change the rationale of the performance appraisal system an

20. Mr. Handy submits that the Dispute Tribunal did not err in law nor did it exceed its jurisdiction in finding that his application was receivable. It correctly concluded that the contested ePAS was improper. The Dispute Tribunal correctly distinguished his case from the Appeals Tribunal's leading cases of Ngokeng and Staedtler. The Dispute Tribunal appropriately extended the logical reasoning of Ngokeng to a situation where the comments were so much more disparaging that the cases became almost different in kind.

21. Mr. Handy states that the UNDT did not err in finding that the negative ePAS comments had direct legal consequences on his terms of employment. In this regard, Mr. Handy draws the attention of the Appeals Tribunal that the Secretary-General has deconstructed the Appeals Tribunal's finding in Staedtler by stressing the direct legal consequences rather than the extent that the comments detracted from the satisfactory performance appraisal. The UNDT correctly understood that each part of the Staedtler finding was crucial in determining a case's justiciability. The more disparaging comments fail to equate with a satisfactory ePAS overall rating, the more direct legal consequences exist for the concerned staff member. Contrary to the Secretary-General's fallacious argument about the availability of the ST/SGB/2008/5 recourse, the filing of a harassment complaint by Mr. Handy against his FRO and SRO is a totally inappropriate method to address the incongruity between the comments and the final evaluation.

22. Mr. Handy maintains that the Secretary-General's concerns about the alleged chilling effects from subjecting an ePAS like his to judicial review on managers are misplaced. The best way for the Administration to avoid litigation over ePASes is to ensure that managers give fair and reasonable comments that equate to final evaluation. Only in a case like Mr. Handy's would there be a need for judicial oversight.

23. Mr. Handy states that should the negative comments be allowed to remain in his ePAS, he will suffer adverse career consequences. In fact, he has already suffered the consequences from submitting his 2016-2017 ePAS in his job applications; he has not been selected for any of the posts for which he has applied.

Considerations

24. The issue on appeal is whether the UNDT was correct in finding Mr. Handy's application contesting the negative comments incl216.9 (g0 T Twe9c -0)-14.184m-102T:0 9.4TJ 0. [ (i)-12.5 8



decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

28. In the case at hand, as per the documents on file and the record established by the UNDT Judge, while Mr. Handy received, in his 2016-2017 ePAS for the performance period from 1 April 2016 to 31 March 2017, an overall end-of-cycle rating of “successfully meets performance expectations”, this rating was accompanied by comments of the FROs and the SRO set forth therein, which in

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39. According to the UNDT's assessment,

even the gist of the FROs' narrative comments did not necessarily reflect an overall rating of 'successfully meets expectations'. When reading these comments, they were predominantly critical of [Mr. Handy 's] performance, especially regarding his attitude and behavior, although the quality of his work did receive some praise. This is particularly so with regard to the rating of 'fully competent' in the core value of integrity as all remarks regarding his performance in the three core values were negative.<sup>8</sup>

40. The Secretary-General challenges the UNDT's decision on the grounds that it erred in law and exceeded its jurisdiction in finding Mr. Handy's application to be receivable. He argues that the UNDT applied the wrong legal st



Secretary-General's arguments to the contrary and the same goes concerning his claim that the fact that Mr. Handy continues to be employed by the Organization at the exact same position he has had since the completion of his 2016-2017 performance appraisal, enjoying the same employment status that he had before, shows that the alleged disparaging comments have not affected him.

44. The Secretary-General expresses concerns about the far-reaching ramifications of such a jurisdictional approach, which could possibly open litigation to grievances over negative comments in performance appraisals with an overall satisfactory rating; this could also lead the UNDT and the UNAT to become the ultimate arbiters of the extent to which FROs and SROs are permitted to provide negative, factual comments on, or constructive criticism o

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50. Accordingly, the appeal fails.

Judgment

51. The appeal is dismissed and Judgment No. UNDT/2020/030 is affirmed.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2020.

(Signed)

Judge Raikos, Presiding  
Athens, Greece

(Signed)

Judge Neven  
Brussels, Belgium

(Signed)

Judge Sandhu  
Vancouver, Canada

Entered in the Register on this 24<sup>th</sup> day of November 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar