



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/009/
JAB/2007/108
Judgment No.: UNDT/2009/028
Date: 5 October 2009
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

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v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Andreas Ruckriegel, UNFPA

Introduction

5. Following this, the applicant received two performance reports for 2005 and 2006 which she considered unsatisfactory and not providing an accurate picture of her performance. Following rebuttal process, which essentially maintained the supervisor's evaluation of the applicant's performance in 2005 and 2006, the administration decided to reassign the applicant to a different post in UNFPA, effective 2 July 2007. The applicant was notified of this decision by memorandum dated 26 June 2007.

6. On 23 July 2007, less than one month after her reassignment to the new post, the applicant was loaned to the United Nations Secretariat in New York.

Applicant's submissions

7. The applicant contends that after she declined to comply with her supervisor's requests to mark the absent staff members as present in the office, she suffered retaliatory behaviour which resulted in her reassignment to a post that was scheduled to be abolished. According to the applicant, her supervisor gave her poor performance assessment reports for 2005 and 2006 in retaliation for her unwillingness to comply with his requests.

8. The applicant further asserts that her supervisor failed to follow proper performance evaluation procedures and that he was allowed to retroactively add information to the mid-year review section of her 2006 performance evaluation report. She also alleges that the Rebuttal Panel was biased against her and its report on her 2005 performance report was not well-reasoned and contained errors of fact. Finally, the applicant claims that the respondent abused its discretionary authority when assigning her to a post that was going to be abolished as part of the restructuring of UNFPA.

9. She claims the following relief:

- a. compensatory damages for emotional suffering and stress;

- b. compensation for legal consultation expenses of \$2,500;
- c. reinstatement in her post or a similar post with UNFPA at the same or higher grade level and security, that is to a post not in danger of being abolished;
- d. replacement of her 2005 and 2006 Performance and Appraisal Development (PAD) reports with reports that accurately reflect both her performance and her supervisor's non-adherence to the PAD process; and
- e. the expunging of the 2005 Rebuttal Panel report from her records.

Respondent's submissions

10. The respondent replies first that the applicant's appeal must be deemed to be abandoned because the applicant failed to file the complete statement of appeal within the prescribed time period.

11. In the event that the appeal is receivable, the respondent claims that the actions of UNFPA were lawful, within its rights and for the good of the fund and the applicant.

12. The respondent submits that the performance evaluation procedures were followed both in 2005 and 2006 and the applicant had two consecutive poor performance reviews. The rebuttal review

entire period. 12.

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23. Staff Rule 111.2(a) provided:

“A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing”.

24. Article 8 of the Statute of the United Nations Dispute Tribunal provides that an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation, where required.

25. While the applicant’s appeal was commenced before the Statute of the United Nations Dispute Tribunal came into force, Article 8 of the Statute reiterates the necessity for this prerequisite preliminary step. I note that the Organization’s system of internal justice contained a similar requirement prior to 1 July 2009. The United Nations Administrative Tribunal on a number of occasions held that the matters submitted to appeal must comply with the procedure laid down in Staff Rule 111.2(a). The Administrative Tribunal stated that claims that did not form part of the initial request for administrative review are non-receivable.¹

26. I therefore find that the applicant’s appeal is limited to the decision to reassign her to another post within UNFPA and the underlying circumstances that led to that decision. In order to assess the lawfulness of the reassignment decision it is necessary to traverse the relevant history leading up to that decision. The relevant matters include the conduct and outcome of the 2005 and 2006 PAD procedures and the subsequent review of those by the Management Review Group (MRG) and a Rebuttal Panel.

27. The applicant’s appeal raises a number of factual and legal issues which will be dealt with in turn. The following is the background to those issues.

¹ United Nations Administrative Tribunal Judgment No. 1196, p. 8 (2004); United Nations Administrative Tribunal Judgment No. 1171, p. 8 (2004).

31. The respondent does not dispute these facts. It accepts that the supervisor allowed for staff members working under his authority to use their annual leave in excess of the allowable 60 days after 1 April 2005. The respondent states that these staff members wanted to take their annual leave in March 2005, before the cut-off date of 1 April 2005, to ensure they did not lose any leave days in excess of the limit of 60 days. However, because of the inventory exercise ongoing at the time, they were “exceptionally allowed” by the then Chief of FMU to retain the unused annual leave in excess of 60 days and take it after 1 April 2005. The applicant’s supervisor had assured the staff members of this at a staff meeting where the applicant was present. The supervisor said he had checked with DHR, who did not want to set a precedent by formally allowing the lost days to be carried forward, and, as a senior manager, he made a decision to permit those leave days to be used unofficially.

32. The respondent submits that the supervisor was trying to do the right thing by honouring an arrangement promised to staff by his predecessor. The respondent says that the supervisor has since been told by the administration that the language of Staff Rule 105.1(c) does not permit flexibility and must not be subject to deviation.

33. The respondent also submits that the a

applicant's strongly held commitment to maintaining correct procedures. As a result, the applicant took steps to avoid being complicit in this episode. Her supervisor has been advised by the administration that such agreements are against the rules of the Organization. To that extent, the applicant's actions had an adverse effect on her supervisor. However, the principal question in this case is whether this resulted in the negative ratings she received in her next two PAD cycles, the upholding of these reviews by the MRG report and the Rebuttal Panels and, ultimately, the reassignment of the applicant to another post.

Relevant policies

37. UNFPA's guidebook, "Performance Appraisal and Development (PAD)", states that PAD is an integral and key part of UNFPA's human resource strategy that "supports UNFPA's transformation into an open, transparent, results-oriented organization". Effective management of the PAD system is critical to its success. Supervisors are responsible for applying the system in a timely manner and following the procedures outlined in the guidebook. It is the responsibility of supervisors to identify performance deficits in the mid-year review.

38. The PAD system is divided into three main parts: performance planning, mid-year progress review and end-of-year appraisal. PAD reports are completed electronically by staff members and their supervisors and each then clicks a "finalised" tab. Once all performance appraisal reports have been completed they are reviewed by the MRG which meets in March and April to conclude the performance cycle. The MRG undertakes a detailed review of the staff members' performance only in cases where questions of fairness and consistency are brought to its attention either by the staff member or by the office of human resources. It has the power to make a limited range of assessments, including addressing poor performance. Staff members who consider their performance appraisal to be unfair or inconsistent or not in line with the PAD processing procedures can request a review of the performance appraisal by the MRG. Following an investigation, the MRG can hold a supervisor

- a. the 2005 PAD procedure was undertaken in only one month and she had had no prior notice of the alleged deficiencies in her performance and no opportunity for improvement or training to address any such deficiencies;
- b. her former supervisor colluded with the supervisor who took over in April 2005 by providing negative and unjustified comments about her, which in turn led to the inclusion of incorrect information in the applicant's 2005 and 2006 PAD reports.
- c. the correct procedure for mid-year reviews were not followed in 2005 and 2006; and
- d. her supervisor illegally accessed her 2006 PAD report after it had been finalised and added adverse comments without her having the opportunity to review those comments and reply to them.

44. The respondent denies any irregularities in the 2005 and 2006 PAD procedures. In summary its submissions are:

- a. the 2005 PAD report had a performance plan which shows that her performance had been addressed;
- b. it is not the case that the appraisal process for 2005 was carried out in only one month. The planning phase was announced and initiated in May 2005 and the year-end appraisal phase was initiated in January 2006;
- c. the appellant had the right to rebut her performance appraisal ratings and exercised this right for her 2005 PAD report; and

performance. A copy of that letter was not exhibited among the many annexures to the parties' submissions, but they corresponded about it. They met briefly in February 2006 and then again in March 2006 to discuss the year-end appraisal of her 2005 performance.

49. The supervisor's summary appraisal in the 2005 PAD report was almost completely at odds with the applicant's self-appraisal. Whereas she assessed her performance as having fully achieved outputs and being fully proficient in all competencies, her supervisor outlined a number of specific criticisms of the applicant's performance. These were in communications support, administrative assistance, and the organization of time management and protocol. In two areas of performance she received the second lowest performance ratings. In the other areas he found the applicant had fully achieved her outputs and was fully proficient.

50. In her extensive comments in response to the supervisor's assessment, the applicant said that the supervisor had never informed her verbally or in writing of any weaknesses or of the unsatisfactory performance he had outlined in the PAD report. These were first brought to her attention by letter on 4 January 2006. She said he should have brought these matters to her attention.
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52. In the PAD report he also said the leave monitoring function had been taken away from her because of her lack of timeliness and accuracy. He said her inability or unwillingness to deal directly with several staff members when clarifying leave issues resulted in conflicts and lengthy email exchanges on what should have been routine and straightforward matters.

53. After her supervisor had finished his final comments, the applicant made additional comments. Her 2005 PAD report wa

complete it. She was at work in June and July 2006 and was on sick leave from 21 August to 11 October 2006.

57. More importantly and seriously, she alleged that her supervisor had been given access to her PAD report to manipulate it to her disadvantage.

58. The respondent has produced evidence from the administrator of the PAD system that the mid-year review section was closed after it had been finalised in September 2006. The administrator says that if the applicant's allegation that it had been reopened after that date were correct, a much later date would have appeared, but this was not the case.

59. The applicant's end-of-year PAD report produced similar results to those in 2005. There were still areas of underperformance identified by her supervisor.

Conclusions on the 2005 and 2006 PAD processes

60. I find that the supervisor made reasonable attempts to complete a mid-year assessment in 2005 but failed because the applicant, through no fault of her own, was not available in August and September 2005. The supervisor was away on mission until December 2005. I find that the failure to complete the assessment was not because of a refusal on his part but because of an unfortunate set of circumstances. The end-of-year assessment took place for over several months, beginning with a letter to the applicant from her supervisor in early January 2006 which, in the applicant's words, raised "at least 16 areas of unsatisfactory performance".

61. The 2006 mid-year assessment may have been similarly disrupted by the applicant's absence, but given the previous year's experience the supervisor could have reasonably been expected to make a special effort to manage what was now clearly a fraught relationship by closely adhering to formal policies and procedures.

62. I am not satisfied that the supervisor made any unauthorised additions to the mid-year review section of the 2006 PAD report. The evidence from the respondent

indicates that this would have been impossible without detection. In any event, the comments are not adverse to the applicant but a neutral statement that she was absent due to illness, a fact not denied by the applicant.

63. I conclude, however, that her supervisor failed to deal with his concerns about the applicant's performance in a fair and transparent manner.

64. First, it was incumbent on the supervisor to give her formal notice of the 2005 performance issues which in his view were serious and had to be addressed. The lack of written evidence of the substance of the performance deficiencies being brought to the attention of the applicant at the time they occurred has led to a dispute about whether or not they were raised and the substance of the specific allegations. This lack is due in part to the breakdown of the mid-year review process which meant that the applicant and her supervisor never met formally during 2005 to have a substantive discussion of the alleged deficiencies.

65. Even if, as alleged by the respondent, these deficiencies were raised verbally with the applicant on a number of occasions, there is no evidence about what, if any, steps were put in place to address them in the best interests of the branch and of the applicant. The performance plan in 2005 did not address the specific concerns of the supervisor and is not evidence that any proper plan addressing the supervisor's concerns with the applicant's performance had been discussed with and agreed upon by the applicant.

66. Second, the supervisor should have advised the applicant of the reasons for the removal of her responsibilities for leave monitoring. Where such change in responsibilities is made because of alleged performance problems, fairness and due process require that a staff member be told in advance of the reasons and be given an opportunity to comment on them. In this case the lack of this fair process gave rise to the applicant's suspicions that the decision was made to mask the breach of policy in the granting of leave about which she had been critical.

67. I conclude that there is no objective evidence that the administration's handling of the 2005 and 2006 PAD procedures amounted to retaliation or persecution of the applicant. However, the combination of the two factors mentioned above exacerbated the applicant's perception of unfairness and explain her belief that there was a link between her criticism of her supervisor and the subsequent actions by the administration.

Issue 2: The MRG report

68. The applicant alleges that the MRG report on her 2005 PAD report was influenced by her supervisor who had a conflict of interest.

69. The respondent submits that the role of the MRG is not to act as a panel to review challenges, rebuttals or appeals against the supervisor's ratings but to serve a management tool which does not have the power to change supervisor's ratings. According to the respondent, it is not the role of the MRG to second-guess the supervisor.

70. Following the 2005 PAD report the matter was considered by the MRG. The applicant's supervisor was one of three members of the MRG and he signed off on its comments which were dated 14 August 2006. These were:

“As reflected in the PAD for the 2005 review period, the MRG notes [the applicant's] partial output achievement; it also notes [the applicant's] developing proficiency in core competencies and full proficiency in functional competencies. The MRG notes with concern that [the applicant's] various performance related issues as reflected in the 2003 PAD and other documented evidence have not improved. The MRG also notes that the staff member did not submit a PAD for 2004. The MRG asks [the applicant] to pay due attention to immediately address the performance related matters. As requested by the divisional MRG, the PRG has reviewed [the applicant's] 2005 PAD and shares the concerns expressed by the divisional MRG[.] The PRG recommends that DHR speak with [the applicant] regarding the above, her performance, and the consequences if her performance does not improve”.

a thorough investigation. Its report, although brief (as required by its mandate), addressed the main issue before it, namely whether the combined rating in the PAD report should be maintained. Because of the extent of the rebuttal filed by the applicant it was bound to note that there were issues in the Branch that needed to be addressed but which fell outside the scope of a rebuttal. The only criticism which the applicant correctly makes is that the Rebuttal Panel took account of a letter which it mistakenly dated a year earlier. In the absence of that letter there is no written evidence that the supervisor did raise any performance issues with the applicant other than verbally and informally, a matter which has been dealt with above.

77. In light of the correctness of its constitution and the manner in which the Rebuttal Panel conducted its investigation and prepared its report, there is no basis for impugning its substantive findings, namely that the performance ratings of the applicant by her supervisor were substantiated. The only valid criticism of the Panel is its delay in issuing its report. The applicant does not specify how that adversely affected her.

Issue 4: The change of post

78. In June 2007 the applicant was reassigned to a new post which was marked to be eventually abolished in the forthcoming reorganization of UNFPA.

79. The applicant alleges that this removal from a secure post to one that is being abolished was an abuse of UNFPA Administration's authority because it was done on the basis of fraudulent and untrue 2005 and 2006 PAD reports and there had been misrepresentation of vital evidence (i.e., the letter of 28 July 2006) by the UNFPA Rebuttal Panel.

80. The respondent accepts that the applicant was reassigned and that the post was going to be abolished but submits that the administrative decision was proper and, in fact, necessary at the time it was taken.

The facts

81. The applicant was sent a letter from an Officer-in-Charge at DHR, dated 26 June 2007. The letter stated:

“On 21 June 2007, the Performance Review Group (PRG) met to review the 2006 PAD reports of UNFPA

that this was a “good and necessary practice” in human resources management;

- c. he accepted the new post

review body. There is nothing before the Tribunal to warrant a finding contrary to that of the Rebuttal Panel. The MRG panel should not have included the supervisor of whom the applicant was so critical but the review by the Rebuttal Panel mitigated any prejudice to the applicant as a result of this. UNFPA was therefore justified in its finding of underperformance in 2005 and 2006.

87. The decision to take a proactive approach in an attempt to resolve the performance issues of not only the applicant but another underperforming staff member was, on the face of it, a sensible and rational response to what had been identified by the Rebuttal Panel as a difficult employment situation.

88. Had the administration explained all these matters to the applicant before or at the time of the reassignment she could have had no legitimate complaint about what occurred. However, the letter advising her of the reassignment without these explanations did not adequately explain the reasons to her and no doubt contributed to the applicant's belief that the decision was abrupt and unfair. The reasons were not given to the applicant until she sought a review of the decision. In this regard the previous failings of the PAD process referred to above are relevant. The failure to explicitly address and deal openly with difficult issues when they arose was repeated at the time of the reassignment.

89. I find therefore that although UNFPA was substantively justified in taking the decision to reassign the applicant, the manner in which it conveyed this decision to her was inadequate and in breach of its obligation as an employer to treat its staff fairly. It failed to give her any proper reason for the assignment at the time it was made and this reinforced the applicant's belief that she was being treated in an underhand manner in order to retaliate against her actions over the leave issues in 2005. I find that she was misguided in this belief but the way UNFPA handled her situation did little to alleviate her concerns and, in fact, caused her unnecessary stress and anxiety.

Order

101. The respondent is ordered to pay the applicant the equivalent of one-month net base salary calculated at her salary level at the date of this judgment.

(Signed)

Judge Coral Shaw

Dated this 5 day of October 2009

Entered in the Register on this 7 day of October 2009

(Signed)

Hafida Lahiouel, Registrar, New York