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Case No.: UNDT/NY/2010/095

Judgm

Original: English

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**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

SAMUEL THAMBIAH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON RECEIVABILITY**

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**Counsel for Applicant:**  
Edward Patrick Flaherty  
Ford Shanahan

**Counsel for Respondent:**  
Jorge Ballesterro, UNICEF



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21. On 31 January 2011, the Applicant, after having obtained leave from the Tribunal, filed comments on the Respondent's reply regarding the issue of receivability.

22. On 4 June 2012, the undersigned Judge was assigned to the present case.

23. On 14 September 2012, the Tribunal issued Order No. 189 (NY/2012) requesting that the Applicant identify "each single and specific administrative decision that he intends to appeal" and that he respond to each of the specific contentions on receivability raised by the Respondent. The Applicant filed his submission on 9 October 2012 and the Respondent filed his response on 17 October 2012.

24. On 11 December 2012, the Tribunal held a hearing for the purpose of discussing facts at issue in this case. The hearing was attended by both counsel for the Applicant and the Respondent as well as the Applicant himself.

*Receivability ratione temporis*

25. The Applicant filed his motion for an extension of time to file a submission with the Tribunal on 14 October 2010, a week prior to the expiration of the 90 day time limit for him to appeal the 21 July 2010 decision that his request for management evaluation was not receivable. The Applicant's appeal before the Tribunal was submitted within the applicable time limits and will be considered by the Tribunal.

## **Consideration**

### *Applicable law*

26. Chapter 7: Performance Appraisal System, Policies and Procedures Manual, UNICEF states in part:

#### **SECTION 2: GENERAL GUIDELINES**

##### **Guidelines on Work Planning**

##### *Explanations or Rebuttals*

7.2.38 Once the supervisor and the staff member sign Part 8.1 of the PER, the PAS process is complete and the PER is entered into the staff member's official status file unless the staff member indicates in Part 8.2 that he/she intends to submit either a statement of explanation or a formal rebuttal (under the criteria described in paragraph 7.2.38)). In either case, the staff member must submit the explanation or rebuttal within 30 calendar days of signing Part 8.1 of the PER. ...

7.2.41 The proper procedure for completing a PER under dispute must be followed. All staff must be made aware that their signatures on PERs do not imply agreement as to the content. It is still the responsibility of all staff to complete and sign their PERs on a timely basis. If the PER, as well as the procedures for filing a disagreement, have been shared with the staff member but the staff member chooses not to respond and refuses to sign the PER because he/she disagrees with its content, the PER can still become a part of the staff member's official status file. In this instance, the PER should be officially transmitted to the staff member and should include a note of the attempts made to bring to his/her attention his/her responsibility for completing and signing the PER. In such cases, the requirement that the PER be brought to the staff member's attention has been met and non-action on the staff member's part



Nations Secretariat or separately administered United Nations funds and programmes;

(iv) Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

*Contested decision(s)*

28. As part of his reply, in addition to the issue of the receivability of the application as a whole, the Respondent submitted that the scope of the case before the Tribunal should be limited to the Applicant's desire to contest his PER relative to his tenure with UNICEF.

29. The Tribunal recalls that under art. 8.1(c) of its Statute, the scope of an application is limited to the decisions that were subject to request for management evaluation initially submitted by the Applicant (see, *Ibekwe* UNDT/2010/159, *Neault* UNDT/2012/123, *Syed* 2010-UNAT-061 and *Ibekwe* 2011-UNAT-179).

30. A review of the Applicant's 14 July 2010 request for management evaluation indicates that the purpose of his request was that he "wish[ed] to contest [his] PER in full for the said period", namely 22 October 2007 to 31 October 2008. However, as part of the factual background provided within his request for management evaluation, the Applicant also stated that "UNICEF failed to comply with the terms of appointment and contract of employment in giving [him] a fair chance to prove [his] ability and therefore shattered the reasonable expectation of extension and/or future employment".

31. In response to Order No. 189 whereby the Tribunal requested that the Applicant identify the contested decision(s) the Applicant responded:

2.a. Decision: Performance Evaluation Report (PER) issued to [the] Applicant

32. However, in response to that same Order's request that the Applicant respond to each of the specific contentions on receivability raised by the Respondent, the Applicant stated:

4. ... it became clear to him in June 2010 ... that the decision to not renew his contract was directly related to the inaccurate information in the PER...

5. ... It wasn't until the Applicant received the full report did he become aware of the prejudice that was likely linked to the decision to not renew his contract, prompting the need to rebut the PER. ... The Applicant finally contents that his right to contest the PER extends to the decision to not renew his contract as an extension of a pattern of prejudice ... .

33. When an applicant is represented by counsel, and following a direct order on that subject, there should no longer be any doubts as to the decision being contested. Nevertheless, in the present case, the Applicant, after specifically only identifying the contested decision as that related to his PER, appears to submit that the issue of the non-renewal of his contract is directly related to his PER and therefore properly before the Tribunal.

34. While the Tribunal considers this link tenuous, it will nevertheless address it in order to remove any uncertainty regarding the issue.

*Non-renewal*

35. As evidenced from the documents provided to the Tribunal, the Applicant was informed of the decision to not renew his contract on 27 October 2008 and that, as stated by his second supervisor on 30 October 2008, the cause for his non renewal was the "serious weaknesses in his performance".

36. Based on the above, and irrespective of the Applicant's contention that "his right to contest the PER extends to the decision to not renew his contract as an extension of a pattern of prejudice", he was fully aware upon his separation from service that the decision to not renew his contract was directly linked to the views of his second supervisor regarding his performance. Consequently, any request for

administrative review of the decision to not renew his contract should have been filed within 60 days from the 27 October 2008 notification of the contested decision, namely by 26 December 2008.

37. Consequently, even if the Tribunal was to entertain the proposition that the Applicant's request for management evaluation attempted to also contest the decision not to renew his contract, it finds that such a claim is out of time and not receivable.

*Informal process*

38. The Tribunal notes that the Applicant copied the Ombudsman on an email whereby he requested that its recipients intervene with regard to the non-renewal of his contract. However, there are no documents before the Tribunal that would support the contention that the Applicant actively pursued any type of informal resolution of this decision which could have resulted in the applicable time limits for him to file a request for administrative review of the non-renewal of his contract being suspended.

39. The use of the informal conflict resolution process should not prejudice an applicant's right to pursue a matter using the formal judicial process. The fundamental human right to have free access to the judicial system must be an effective right without being absolute and 2heApp(tte(al j.1(l)s )Tj/TT28.4(i(aixt)Tj- period nfo445 0 TD19

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the decision to not renew his contract was directly related to the inaccurate

49. A review of the PER, which the Applicant received on 24 August 2009,



58. The Tribunal considers that the 15 June 2010 transmittal of the OIA investigation report, while potentially providing the Applicant with additional information regarding two entries within his PER, did not extend the Applicant's time limit to contest its content or the potentially related non-renewal of his contract. The Applicant therefore failed to exercise his right to file a request for management evaluation within the imparted time limits.

59. As stated in *Costa* UNDT/2009/051, the Tribunal "has no jurisdiction to waive the time limits for requests for management evaluation requests of requests for administrative review". In accordance with art. 8.1 from the Statute of the Dispute Tribunal, for an application before the Tribunal to be receivable the applicant must formulate, as a first step, a request for management evaluation within 60 days from the date on which the staff member or, as in the present case, the former staff member, received notification of the administrative decision.

60. The Applicant's request for management evaluation was correctly deemed to be time-barred and the present application is therefore not receivable *ratione materiae*.

*Nota bene*

61. The Tribunal regrettably notes that in the present case the actions of both parties with regard to the requirements of initiating, discussing and completing the PER were not respected. After receiving a copy of his PER, on 24 August 2009, the Applicant did not respect his obligation to sign it. Furthermore, he neither completed sec. 6 of the PER, nor did he identify the rating comments with which he disagreed. Finally, he did not address within sec. 8 of his PER whether he wished to submit an explanatory statement or rebut its content within 30 days of receiving it. More importantly, the extensively delayed completion of the PER, which was never signed by the Applicant, resulting in it being actually considered incomplete, as well as its drafter's knowledge and direct references to potentially non-relevant facts

regarding the Applicant's performance, raises serious questions regarding the objectivity of its drafter.

62. The Applicant complained about the findings of his first supervisor to the senior supervisor who, instead of respecting his duties as a second supervisor who should have tried to mediate the matter, wrote to the applicant and to other colleagues that there is no point in further discussing the Applicant's contract and PER as it was clear since January 2009 that his contract would not be renewed. The PER was not completed prior to the Applicant separation from service and the second supervisor never signed off on its content prior to it being added to the Applicant's OSF.

63. The Respondent submitted to the Tribunal that as a result of the Applicant's separation from service prior to the conclusion of OIA's investigation, no further action was taken by Human Resources regarding the findings of the OIA investigation report. The Respondent further stated that the case was considered closed and that no references to the report's findings were maintained in the Applicant's OSF. However, by directly referring to the findings of the investigation report, the PER incorporated the report and its findings by reference into the Applicant's OSF.

64. A PER can only contain information which is sustainable by official documents. Per a contrario, no findings from the investigation report should be contained in the PER and therefore, by reference, in the OSF.

65. The Tribunal therefore strongly recommends that the Respondent consider, in order to be consistent with their high standards and best practices, redacting any references to the findings of the investigation report which have no connection with the Applicant's performance during his appointment with UNICEF.

**Decision**

66. In view of the foregoing, the Tribunal DECIDES:

67. The application is rejected.

*(Signed)*

Judge Alessandra Greceanu

Dated this 3<sup>rd</sup> day of April 2013

Entered in the Register on this 3<sup>rd</sup> day of April 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York