





Applicant's FRO also advised the Unit Chiefs including the Applicant to develop their individual workplans.<sup>1</sup>

6. On 7 October 2020, the Applicant's FRO reminded the Unit Chiefs including the Applicant to submit their individual and Unit draft workplans for approval by 14 October 2020. The Applicant submitted the Supply Unit's draft workplan for review on 8 October 2020.<sup>2</sup>

7. On 13 October 2020, the Applicant's FRO informed her that he had reviewed her Unit's draft workplan and that whilst he agreed with the goals, the Key Related Activities and Success Criteria needed some revision. The FRO also attached samples of the previous year's Applicant's draft individual workplan and the one for LSS for her use in case she had no access to them as she was on leave.<sup>3</sup>

8. On 16 December 2020, the Applicant informed her FRO that the Unit workplan he queried was based on the previous year's workplan which meant that it could not have been that far off the mark for approval.<sup>4</sup> She did not make any changes.

9. On 14 May 2021, the Applicant's FRO requested the Applicant to fill in and submit her workplan in *Inspira*. The FRO informed her that he had returned the workplan she had submitted because she had deleted all the goals and it had no core competencies or managerial competencies selected.<sup>5</sup>

10. On 24 May 2021, the Applicant's FRO requested her to complete her workplan in *Inspira* and submit it for approval by 31 May 2021.<sup>6</sup> The Applicant did not respond.

11. On 16 June 2021, the Applicant's FRO sent the Applicant an email containing an attachment titled: Ms Hawa HAYDAR PM Offline Evaluation Form.<sup>7</sup>

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12. In her response of the same day, 16 June 2021, the Applicant informed her FRO that she was unwell and on sick leave.<sup>8</sup>

13. Between 24 and 27 August 2021, the Applicant who was still away from the Mission on sick leave, and her FRO exchanged emails concerning her electronic performance appraisal (“ePAS”) for 2020-2021 (specifically, on who was responsible for the late approval of her workplan and on the way forward); the e-PASes for staff in the Supply Unit; and leave plans for the LSS Section.<sup>9</sup>

14. In the email of 24 August 2021, forwarding the offline performance appraisal to the Applicant, the FRO advised her to fill in her comments by 27 August 2021.<sup>10</sup>

15. On 8 September 2021, the Applicant and her FRO met via Microsoft Teams to discuss her offline workplan. The Applicant submitted her offline workplan on 8 October 2021.

16. The Applicant’s FRO and SRO finalized and signed off the Applicant’s 2020-2021 offline performance appraisal on 29 November 2021.<sup>11</sup> The Applicant was rated as having successfully met expectations. However, the majority of the FRO’s narrative comments, endorsed by the SRO, were negative.

17. On 30 November 2021, an email with the attached offline performance appraisal from the FRO was sent to the Applicant, copied to the SRO and three other individuals.<sup>12</sup> The email advised the Applicant to complete her part and return the performance report by 14 December 2021. There was no offer of a discussion.

18. The Applicant did not complete the section in the performance appraisal that required her comments by the time the matter was declared a dispute.

19. On 28 January 2022, the Applicant requested management evaluation of the

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<sup>8</sup> Reply, annex R/10; Trial bundle at page 105.

<sup>9</sup> Reply, annex R/11; Trial bundle at pages 107-110.

<sup>10</sup> *Ibid.*, Trial bundle at pages 109-110.

<sup>11</sup> Application, annex A/5; Trial bundle at pages 20-27.

<sup>12</sup> Reply, annex 21; Trial bundle, page 240.

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prepared. When the Section workplan was finally ready, the Applicant was given an October deadline to submit her Unit workplan, which she did shortly before she went on leave. However, immediately she departed the Mission an email was sent to her stating in general terms that she needed to revisit the draft workplan.

e. She responded to that message two months later when she returned from sick leave in December 2020, but did not hear back from her FRO until May 2021 when she again was on leave. That means that in the 14 months since the performance cycle began, management was responsible for delaying the process by a total of 10 months. The Applicant was responsible only for four months of the delay and that was only because she was out sick.

f. Her FRO, however, blamed her for the delays. He did not discuss and agree on the workplan with her, there was no mid-term review, there was no proactive assistance given to her with respect to any performance shortcomings, yet her ePAS states that development is needed in six of the 11 attributes evaluated. The FRO evades the rebuttal procedure by rating her as “successfully meets expectations”.

g. Section 9 of ST/AI/2010/5 (Performance Management and Development Systems) stipulates that a rating of “successfully meets performance expectations” should be considered in cases where the staff member has fully achieved the defined success criteria and/or performance expectations for most of the goals/key outputs during the performance cycle.

h. The ePAS issue was only a “red herring” because the real reason the Applicant and her FRO were not cooperating from December 2020 to June 2021 was about the arrival in the mission of Ms. S, a new United Nations Volunteer (“UNV”) recruit about whom the two disagreed. The Applicant learned about Ms. S’s arrival on 4 November 2020 while she was still away. The Applicant addressed an email to AR484005 performance shortcomings,

for an UNV Supply Officer and that none should be imposed on her. The FRO took umbrage with that.

i. Management's response to the email was to strip the Applicant of her role, as Chief, General Supply Unit. Her SRO, Mr. Jamanca, testified that the Applicant and her FRO disagreed over the recruitment and assignment of two female staff members into the Applicant's Unit. While the decision to strip the Applicant of her supervisory responsibilities was announced on 5 December 2020, this change was already underway as early as the beginning of November 2020. Once the Applicant was informed of these changes, she challenged the decision through the normal dispute resolution channels set up by the United Nations causing her FRO to take offence.

j. To her FRO and SRO, the dispute that ensued was the non-cooperation that led to the offline ePAS but her and her FRO were not in dispute about that issue at all during the performance cycle under review. They were in dispute because the Applicant wanted her supervisory responsibilities restored. This dispute escalated and was filed with the UNDT. In the meantime, her FRO never raised the issue of the ePAS until 14 May 2020, six weeks after the end of the performance cycle, and his emails were simply "self-saving".

k. On the issue that the Applicant refused to complete the evaluation of a subordinate, the SRO testified that the Applicant had refused to assign work to a staff member reporting to her during the Covid-19 pandemic. The real story was that the staff member concerned was in New York during the Covid-19 pandemic and the request was that that staff

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m. The allegation that she took leave without the approval of her

evaluation had no impact on the substance and validity of the Applicant's performance evaluation. To be considered an appealable administrative decision, a decision must have a direct impact and not the potential of a future harm. The Applicant's claim to the contrary is unsubstantiated. Although the Applicant testified that the offline performance evaluation negatively impacted

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## Considerations

24. The Respondent urged the Tribunal to find that the application is not receivable on three grounds. Firstly, that the Applicant did not timely request management evaluation of the decision to conduct her performance evaluation offline and secondly, that the offline performance appraisal did not have any legal consequences on the Applicant's terms of appointment.

25. The third ground of the Respondent's defence of receivability was that the Applicant did not request management evaluation of the comments or substance of the performance appraisal document. He argued that the Tribunal does not have a basis to construe the Applicant's management evaluation request to include the alleged disparaging comments.

26. The Tribunal, after reviewing the application and the reply, and after conducting a case management discussion with the parties, concluded that some part of the application was receivable. The

## ***Receivability***

### *The Impugned Decision*

29. Before this Tribunal is a situation where the Tribunal must exercise its discretion to define the administrative decision based on the material before it because the impugned decision and the decision before the MEU seem different.

30. The text of the impugned decision that was subject for management evaluation is as follows:

... deliberate delays in conducting the performance on timely manner starting each year from [M]arch 31 to April 30 and Use of e-performance to penalize staff member who speaks out against accountability and integrity.

31. The alleged contested decision presented by the Applicant for this Tribunal's review reads as follows:

The FRO prepared a EPAS offline instead of doing it in INSPIRA as is normally the case and did it in a manner that reflected negatively on the s/m [staff member] despite the fact she was not the cause of the delay. He rated her "successfully meets performance expectations", the comments and the majority of the individual elements rated make that rating a 'sham', only used to evade a rebuttal.

32. During the case management discussion, it was understood that the claim before the Tribunal, although not couched as such in the documentation both for management evaluation and before this Tribunal, is that the Applicant is aggrieved by the decision of the Respondent dated 29 November 2021 in which her performance appraisal report for the period 2020-2021 was by its nature and contents used to penalize her. As a result of the negative comments in her performance appraisal without recourse to rebuttal, her terms and conditions of employment were violated.

33. The reliefs sought were described as:

a. That the offline e-performance be cancelled and that a new one that conforms to the applicable rules be done in *Inspira*;

- b. That the workplan be discussed and agreed upon according to the rules governing ePASes;
- c. That inaccurate statements by the FRO that portray her in a bad light be retracted; and
- d. That she be awarded commensurate damages for repeated violations of her due process rights.

34. It is settled jurisprudence that the Tribunal has discretion to interpret the application broadly in light of numerous factors including the relief or remedies sought by the Applicant.<sup>15</sup> To this effect the United Nations Appeals Tribunal (“UNAT”) has held that;

[i]t is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties’ contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”.<sup>16</sup>

35. Consistent with the above requirement, the Tribunal finds that the impugned decision relates to the use of the performance appraisal to penalize the Applicant. The negative comments without recourse to rebuttal were in essence the penalization. The





40. The application relates to the procedure that was utilized to conduct a performance appraisal which is governed by ST/AI/2010/5. The performance appraisal was conducted and completed with a successfully meets expectations rating by the Applicant's FRO and endorsed by her SRO. This was a unilateral decision made in a



expectations” performance appraisal, detract from and are inconsistent with the favourable overall rating, holding that;<sup>22</sup>

33. It is true that a good final rating, which *in abstracto* is a favourable decision, does not constitute an “administrative decision” able, by itself, to have a direct and negative impact on a staff member’s rights and, accordingly, there is no legal basis pursuant to Article 2(1)(a) of its Statute for a staff member to file an application before the Dispute Tribunal.

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that the Applicant did not timely request management evaluation of the decision to conduct her performance appraisal offline within 60 days of notification, as required by staff rule 11.2(a) and art. 8.1(c) of the Dispute Tribunal's Statute and that the decision carried no direct legal consequences on the Applicant's terms of appointment are valid.

46. The Applicant did not adduce evidence that she filed management evaluation within the 60-day deadline which began to run from 16 June 2021 when the FRO first notified her of the decision to raise an offline performance evaluation. Further, under the circumstances, the Tribunal may not attempt to determine whether the offline performance appraisal carried no direct legal consequences on the Applicant's terms of appointment.

47. The application relating to the decision to conduct an offline performance appraisal is not receivable.

### ***Merits***

#### *Presumption of regularity*

48. The general principle is that when dealing with a staff member, management is presumed to have acted regularly.<sup>24</sup>

49. This principle applies to all official acts including acts relating to performance appraisals. If the Administration can show that it acted regularly in dealing with the staff member the presumption of law is satisfied. Thereafter the burden of proof shifts to the staff member to show through clear and convincing evidence that the Administration did not act fairly, justly o



recognizes that all performance reports, special reports and other communication pertaining to the staff member's performance are matters of record. The final appraisal by the head of office is 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. Therefore, it is imperative that negative comments in a performance appraisal report should be handled justly, fairly and transparently in accordance with ST/AI/2010/5.

56. The Respondent, through the Applicant's FRO and SRO took time to move the Tribunal that the negative comments were a true reflection of the Applicant's conduct during the period under the

58. The purpose of these proceedings is not for the Respondent to give justifications for the negative comments. The justification for the negative comments is what would have happened had the Applicant been given an opportunity to rebut the performance appraisal or to discuss and explain the comments with her supervisors before the report was signed off. Therefore, the evidence of the SRO and FRO attempting to justify their negative comments was irrelevant for purposes of these proceedings.

59. The Applicant's evidence that she could not avail herself to the rebuttal system<sup>36</sup> was supported by section 15.1 of ST/AI/2010/5. The issue is whether this in itself was irregular.

*The Applicant complained that she had no access to rebuttal because her rating was successful.*

60. The relevant section of ST/AI/2010/5 provides that:

15.1 ...Staff members having received the rating of "consistently exceed performance expectations" or "successfully meets performance expectations" cannot initiate a rebuttal.

61. This provision does not allow the Applicant to file a rebuttal because her rating was successful. The fact that the Applicant had no access to the rebuttal procedure did not preclude her from seeking resolution elsewhere concerning her final performance appraisal. Under ST/AI/2010/5, the Applicant had the option to institute informal or formal dispute resolution mechanisms. The provision states:

15.7 The rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms.

62. Since the negative comments complained of reflected adversely on the Applicant, as a matter of principle, such material may not be included in her personnel file without her being afforded an opportunity to comment on them.<sup>37</sup> Therefore, the

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Applicant may have a remedy by way of offering her own comments explaining or challenging the negative comments before the final appraisal by the head of office was filed. Sections 2 and 5 of ST/AI/292 provide that:

2. Adverse 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.

3 ...

4 ...

5. 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.

63. It is based on the ST/AI/2010/5 as read with ST/AI/292 that this Tribunal finds that in itself, the exclusion from filing a rebuttal is not an irregularity as the Applicant had under the Administrative Instructions protections and avenues for securing a resolution to the dispute, including submitting comments in her defence to counteract the negative comments, seeking informal resolution of the dispute or filing a complaint with the internal justice system.

*Due process rights in*

programmes by optimizing performance at all levels, which it will achieve by: “recognizing successful performance and addressing underperformance in a fair and equitable manner”.

65. A fair and equitable performance appraisal system entails assessing a staff member transparently, objectively, independently and impartially. This would involve allowing the staff member an opportunity to view and to discuss negative comments and offer feedback to any negative comments before signing off<sup>38</sup>. The Applicant was not given this opportunity.<sup>39</sup>

66. The Respondent contended that under section 8.3 of ST/AI/2010/5 he was obliged to evaluate and comment on the manner in which the Applicant had



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Administration should look into these issues objectively, as the Applicant feels let down by the HR office<sup>50</sup>, to allow for a harmonious work environment.

*Compensation for repeated violation of due process rights*

81. In reference to her previous ePASes, the Applicant adduced evidence to show that her FRO was in the habit of commenting negatively on her performance appraisal reports without giving her an opportunity to explain her side.<sup>51</sup> The Applicant conceded that she did not make any formal complaint about these previous acts.<sup>52</sup> Therefore, they are outside the scope of this judicial review for purposes of determining compensation.<sup>53</sup> The claim is disallowed.

**Judgment**

82. The application is partly granted. The filing of the Applicant's 2020/2021 performance appraisal in the Applicant's personnel or other records is rescinded to allow the MINUSCA Administration to give the Applicant an opportunity to be heard on the negative comments before an independent, impartial and objective panel to ensure that the performance rating of successfully meets expectations is consistent with the comments.

83. No damages are awarded for alleged repeated violations of due process rights.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 30<sup>th</sup> day of March 2023

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<sup>50</sup> Hearing transcript, 21 February 2023, page 53.

<sup>51</sup> Hearing, 21 February 2023, at pages 54-55.

<sup>52</sup> *Ibid.*, at page 55.

<sup>53</sup> *Simmons* 2012-UNAT-222, paras. 19 -20, **distinguished**.

