

▼

Judgme

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment NobJud1

... On 17 October 2003, Ms. LB provided the Applicant with a Mid-year Performance Appraisal Report (“PAR”) and feedback from the matching exercise, as follows:

As [the Applicant’s] supervisor, I informed her that I felt that she was capable of high quality work and respected her guidance in relation to the country situation and programme. I advised her that she did not however always apply herself and her performance had been quite uneven. I identified areas in her performance that needed attention[.]

...

The SM acknowledged my concerns mostly without comment. She noted that she had undergone considerable stress working under the former UNFPA Representative. ... Although, we had a discussion on this when I first took up my post, the SM explained that she had not fully recovered from the past situation and explained that her performance had suffered as a result of it. She noted that she would make every effort to address the concerns discussed.

I then informed her of the outcome of the matching exercise. The review panel had recommended that she be conditionally confirmed to the post of AR and assessed after a period of one year against meeting specific performance goals. Based on our discussion, I informed her of following specific goals:

...

... On 30 October 2003, Ms. LB sent a letter to the Applicant titled “Results of exe.]AR ofPTD.Oba19 T1ngoai-.26(exercise) o7 Tc.2ssed af5988a period of

without either one of them entering any comments. On 20 May 2005, the Applicant and her supervisor signed-off on her year-end 2004 appraisal. The Applicant was provided with the following overall ratings: “Partially Achieved Outputs” for the section “Work Plan Outputs[”]; “Developing Proficiency” for the section [“]Core Competencies”; “Developing Proficiency” for the section “Functional Competencies[”]; and “Partially Achieved Output” for the section [“]Development Outputs”. The Management Review Group (“MRG”) signed-off on the PAD on 10 October 2006.

... The Applicant filed a rebuttal of her 2004 PAD. On 8 September 2006, the Rebuttal Panel recommended that:

2. The MRG statement that “the staff member did not appear to take the feedback she has received over the years as seriously as warranted...” should be [struck] and reworded to state “the staff member did not appear to take the feedback she has received over the past 2 years as seriously as warranted...”
3. In view of adequate documentation of the staff member’s performance issues with the supervisor the Panel does not agree that the alleged poor performance rating was beyond the staff member’s control.

2005 PAD

... On 8 February 2006, the Applicant finalized the Performance Planning for her PAD for the 2005 performance period. The mid-year progress review was signed off by both the Applicant and her supervisor on 30 September 2005, without either one of

for the section “Development Outputs[”]. The MRG signed off on the PAD on 21 May 2007.

2007 PAD

... On 29 June and 10 July 2007, the Applicant and her supervisor finalized the Performance Planning for her PAD for the 2007 performance period. The mid-year progress review was not-signed-off on by either the Applicant or her supervisor. Similarly, neither party signed off on her year-end appraisal which provided her with the overall ratings of “Partially Achieved Outputs” for the section “Work Plan Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Partially Achieved Output” for the section “Development Outputs”.

2008 PAD

... On 11 April 2008 and 3 July 2008, the Applicant and her supervisor, respectively, finalized the Performance Planning for her PAD for the 2008 performance period. The mid-year progress review was signed off by both of them on 13 and 14 October 2008, with both their comments. On 6 and 9 April 2009, they signed off on the year-end appraisal. The Applicant was provided with the overall ratings of “Did Not Achieve Outputs” for the section “Work Plan Outputs”; “Not Proficient” for the section “Core Competencies”; “Developing Proficiency” for the section “Functional Competencies”; and “Did Not Achieve Outputs” for the section “Development Outputs”.

... On 11 July 2009, the Applicant filed a rebuttal of her 2008 PAD. On 16 February 2010, the Rebuttal Panel issued its report which stated:

A. Decision

...the supervisor’s overall ratings for workplan outputs and on core and functional competencies have been substantiated mainly through feedback provided by the multiple reports and discussions between [the Di[vis]ion for Human Resources] and Management of the Asia and Pacific Division. In light of this information the Rebuttal Panel decided that:

The Overall rating for workplan outputs is maintained as [“]Did Not Achieve” the Overall Rating for core competencies is maintained as “Not Proficient[”] and the Overall rating for Functional competencies as “Developing Proficiency”.

...

D. Conclusion

3. On the basis of the above, [the Applicant] falls within the scope of

... On 29 June 2010, the Applicant sent a letter to the Executive Director, UNFPA in response to a request that she provide any observations regarding the recommendation that her appointment be terminated.

... On 15 July 2010, the Executive Director addressed a letter to the Applicant entitled "Termination of your permanent appointment" where he concluded that the Applicant's appointment was being terminated subject to the conditions stipulated in the letter.

... On 23 July 2010, the Applicant was called into a meeting with the Chief, Security Advisor, United Nations Department for Safety and Security and a Representative of UNFPA for the purpose of providing her the 15 July 2010 termination letter. Prior to the meeting, the Applicant informed the participants that her lawyer had advised her to only participate in the meeting if it was being recorded. Due to the conditions set by the Applicant, the meeting ended with the Applicant "refus[ing] to accept the letter or have any further discussion ...". That same day, the DDHR sent an email to the Applicant whereby he stated that "UNFPA will count Friday, 23 July 2010, as the day on which [she received the Executive Director's letter

the decision to terminate her appointment; and (d) interim measures with regard to Ms. Weerasooriya's unsatisfactory performance should have been taken before a decision on termination.

4. In view of these conclusions, the UNDT ordered the rescission of the contested decision and Ms. Weerasooriya's reinstatement from 15 July 2010 to 31 April 2011; and compensation for her loss of earnings (net base salary and entitlements) for this period minus the termination indemnity she received. As an alternative to the rescission, the UNDT ordered payment of USD 5,000 plus the loss of earnings (net base salary and entitlements) for the period 24 July 2010 to 31 April 2011, minus the termination indemnity she received. The UNDT further ordered that Ms. Weerasooriya "is to be considered retired as of 1 May 2011 (early retirement after 20 years of service) and the [Secretary-General] is to make all necessary arrangements within 30 days for her to receive her pension awards retroactively as of 1 May 2011, including a letter of appreciation to be sent for the Executive Director's signature".²

Submissions

The Secretary-General's Appeal

5. The(D.3001 days fecretary-Gen)6.8(e)-2.1(srp-2.1(sd12 Or)-ngemenTc()Tjess)rc(-,n(i()]TJ12focre

6. The UNDT further erred in law and fact in

function”.⁴ Pursuant to the UNFPA Separation Policy, the measure of withholding a within-grade salary increment in the case of poor performance is optional and is not a mandatory step that is required to be exhausted prior to the termination of the appointment of a staff member for unsatisfactory service. With regard to a transfer to another post or function, there was no commensurate post

20. The Secretary-General correctly submits that this finding is an error of law and fact as ST/AI/2002/3 is not applicable to UNFPA. Secretary-General's Bulletin ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) expressly provides in Section 2.3 that "[a]dministrative issuances shall not apply to the separately administered funds, organs and programmes of the United Nations, unless otherwise stated therein, or unless the separately administered funds, organs and programmes have expressly accepted their applicability". Accordingly,

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2015-UNAT-571

27. The UNDT, relying on

31. We reject this finding by the UNDT. At the time the termination process was started on 16 March 2010,⁸ the three most recent consecutive appraisals were those for 2006, 2007, and 2008. The Appeals Tribunal finds it unreasonable to require the Administration to restart the termination process if a new performance appraisal is completed before a final termination decision is taken. Otherwise, it would potentially place the Administration in an endless cycle whereby it could never be in a position to terminate the appointment of a staff member.

32. Furthermore, legal certainty requires administrative issuances to be applied in a predictable manner and once the procedure foreseen in the UNFPA Separation Policy is initiated, it should be followed through.

33. From the foregoing, the appeal on this ground succeeds.

Did the UNDT err in law and fact in finding that the separation was unlawful when Ms. Weerasooriya's complaint of discrimination and her rebuttal of the 2009 PAD report were not resolved before the separation decision was issued?

34. The UNFPA Rebuttal Policy in effect at the time of Ms. Weerasooriya's letter dated 29 June 2010 set out the formal requirements for a rebuttal of a performance appraisal through the submission of a rebuttal statement. In the present case, Ms. Weerasooriya's letter did not fulfill these requirements. The letter merely conveyed Ms. Weerasooriya's response to the UNFPA Administration's invitation to submit her views on the recommendation to terminate her appointment for unsatisfactory service. At no point in this letter did she indicate that she wished to avail herself of the rebuttal process with regard to her performance appraisal for 2009.

35. Similarly with regard to the filing of a complaint of harassment by a UNFPA staff member, the UNFPA Harassment Policy in effect at the time of Ms. Weerasooriya letter dated 29 June 2010 provided for the initiation of a formal grievance process regarding allegations of harassment, sexual harassment or abuse of authority and set forth requirements with respect to a written complaint, to which the 29 June 2010 letter failed to conform. Ms. Weerasooriya did not indicate that she wished to initiate a formal grievance process regarding allegations of harassment, sexual harassment or abuse of authority. The

⁸ Impugned Judgment, para. 15.

policy also set forth requirements with respect to a written complaint and its filing. In the present case, the 29 June 2010 letter failed to conform to these requirements.

36. In view of the foregoing, we hold that the UNDT erred in finding that the separation was unlawful as there was no formal request for rebuttal or formal report of harassment to be resolved.

Did the UNDT err in law and fact in concluding that the UNFPA Administration failed to take the appropriate interim measures pursuant to Section 10.3.15 of the UNFPA Separation Policy?

37. As much as we agree with the Secretary-General that such interim measures are optional and not mandatory, we expect that poor or unsatisfactory work performance by a staff member is addressed through evaluations, the setting of performance benchmarks and improvement developmental plans assisting the staff member to improve his or her performance before any action is finally taken by the Administration.

38. In the present case, Ms. Weerasooriya was given a reasonable opportunity to improve her performance but she failed to do so. Her combined performance ratings for the three consecutive years from 2006 to 2008 fell within the scope of Section 10.3.7 of the UNFPA Separation Policy and justified her separation from service by UNFPA.

39. In the circumstances, the decision of the Executive Director to terminate Ms. Weerasooriya's unsatisfactory service constituted a reasonable and lawful exercise of her discretion in accordance with the UNFPA Separation Policy. It is not open to the UNDT to substitute its opinion for that of the Administration⁹ by stating that the Administration should have withheld her within-grade salary increment or to transfer her to another post.

40. The duty of the UNDT in this case was to consider whether UNFPA followed the procedure set out in its Separation Policy for terminating the appointment of a staff member for unsatisfactory performance. Our evaluation of the record shows that the separation of Ms. Weerasooriya was based on her unsatisfactory performance appraisal in three consecutive intervals warranting her separation from UNFPA, and due process was adhered to by the Administration.

⁹ *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 32.

41. From the foregoing, we hold that Ms. Weerasooriya's separation from UNFPA was lawful and the UNDT erred in rescinding the termination of her appointment and awarding compensation.

42. Consequently, the appeal succeeds.

Judgment

43. The appeal is allowed and the Judgment of the UNDT is vacated.

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2015-UNAT-571