



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/023

Judgment No.: UNDT/2020/127

Date: 27 July 2020

Original: English

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**Before:** Judge Rachel Sophie Sikwese

**Registry:** Nairobi

## Background

1. In this application, the Applicant is challenging the decision of the Rebuttal Panel maintaining a rating of *ör ctvcn{ ucvkucvqt{ö vj cv j g tgegkxgf k* his 2016 Performance Management and Development (*öRO F ö*) *cuuguo gpv (öj g k r wi pgf fgekukpö)*. He argues that his due process rights were not respected during the rebuttal process and seeks the relief of having his performance re-reviewed, re-assessed and rating changed. The Respondent argues that the application is not receivable and that it should be dismissed.

## Facts and Procedure

2. At the time of the impugned decision, the Applicant held a fixed-term appointment as Finance Specialist for the Zimbabwe Resilience Building Fund (*ö\ TDHö*) *rtqi tco o g, y j lej ku o cpci gf cpf uwr r qtvgf d{ vj g WPF R \ k dcdy g Eqwpt{ Qhleg (öWPF R \ k dcdy gö)* at the P-3 level.

3. The Applicant received the impugned decision on 29 May 2018.<sup>1</sup>

4. The Tribunal finds the following facts proven on the basis of the documentary evidence and taking into account the submissions of the parties:

a. On 21 February 2016, the Applicant commenced his employment as Finance Specialist in UNDP Zimbabwe. *Vj g Cr r rdecpvu* initial one-year fixed-term appointment was subsequently extended successively until 30 June 2019.

b. On 1 February 2017 and on 3 February 2017, the Applicant discussed his performance for the year 2016 with his supervisor, the Head of the ZRBF Programme Management Unit.

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<sup>1</sup> Application, annex 12.



- k. On 8 September 2017, the Applicant had an individual session with the Rebuttal Panel via Skype conference.
- l. On 29 May 2018, the Report of the Rebuttal Panel was shared with the Applicant reflecting the findings and recommendations of the Panel, including the decision to maintain his 2016 ROF rating.
- m. By e-mail dated 30 May 2018, the Applicant expressed concern that the Rebuttal Panel had not followed due process and, on 7 June 2018, he sent the Panel an extensive submission disputing its decision to maintain his 2016 rating.
5. On 26 February 2019, the Applicant filed this application challenging the impugned decision.
6. The Respondent filed his reply on 1 April 2019.

## **Submissions**

### *The Applicant*

7. The Applicant argues that his supervisor, Ms. Natalia Perez, did not assess his performance based on evidence and actual performance, but rather based on her biased personal perception. The assessment was made to oust him from his job. His PMD assessment was completed on 6 February 2017 and his contract extension was made on 9 February 2017 only for six (6) months. Therefore, there is a clear link between his performance and contract extension. To extend his contract for six months, his supervisor assessed his performance as partially satisfactory intentionally.
8. A few of his functions were taken away from him and attached to the newly created position.

he challenged the decision.

9. His mid-term review was a reminder from his supervisor concerning his performance subsequent to the mid-term assessment. This is more evidence that the performance assessment was made intentionally to make him an underperformer and to eventually remove him from his position.

10. One of his key results was not achieved while this was achieved and still the agreed tools/indicators are being used by ZRBF/UNDP. This further demonstrates that the agreed tools/indicators are being used by ZRBF/UNDP. This further demonstrates that the agreed tools/indicators are being used by ZRBF/UNDP.



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appointment.

### **Considerations**

*Preliminary Issue: Applicant's request for an oral hearing*

20. On 8 July 2020, the Applicant requested the Tribunal to organize an oral hearing of his case because there wnT/F1 12 Tf1 0 0 1 165.43 654.93-1(h)209(a)-15(ny)] TJET 4me2020,





decision not to review documents which it could not validate and to maintain the rating, this decision did not adversely affect the Applicant. The principle is that, to succeed, the Applicant must show that the decision has direct legal consequences on the conditions of service.<sup>7</sup>

27. The Tribunal has taken into account the Applicant's arguments that one adverse consequence of the performance rating was his six-month contract extension, however, on 24 April 2017, the Country Director convened a meeting to inform the Applicant about the outcome of the TMRG process where he was informed, *inter alia*, that his contract extension had been changed from six months to one year. The Applicant has not challenged this.

28. The Applicant further argues that a strong rating of three consecutive performance is of dire necessity and that this is affecting [him] to arrange his application and negative responses thereto citing his rating as the reason for not getting the job. UNAT held that:

In the absence of applications for the long-service step or the YPP exam, the Appellant cannot seek to backtrack and presume the direct negative legal consequences of a decision that might have existed but never did<sup>8</sup>.

In the absence of any provable direct legal consequences stemming from the Rebuttal of the Applicant's arguments, the Tribunal finds that the Applicant's application is not receivable. The Tribunal finds that the Applicant's application is not receivable.

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<sup>7</sup> *Ngokeng* 2014-UNAT-460, rctc. 30, 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 appeal.

<sup>8</sup> *Fairweather* 2020-UNAT-1003, para. 42.

<sup>9</sup> See for example *Fairweather* *ibid.*, at paras. 35, 40 and 42 and *Ngokeng op.cit.*, para. 30.

**Judgment**

29. The application is not receivable and is accordingly dismissed.

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 27<sup>th</sup> day July 2020

Entered in the Register on this 27<sup>th</sup> day July 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi