





5. On 24 February 2009, the Applicant received her first performance evaluation report (“PER”) covering the period from when she commenced employment with UNICEF to 31 December 2008 (“2008 PER”). The Applicant

10. On 4 May 2009,<sup>1</sup> after consulting with the joint ombudsperson's office, the Applicant submitted an amended rebuttal statement of the 2008 PER formally on the grounds of discrimination only but nevertheless cited concerns about abuse of authority and harassment.

11. In the rebuttal statement to her 2008 PER, the Applicant claimed that she had come to UNICEF highly recommended by ex-supervisors and ex-employers for technical expertise, results-oriented management skills, leadership skills and maintaining positive communication relationships with partners and colleagues. She annexed performance reviews by former employers as evidence that she had been rated highly in previous positions. Among a range of other grievances, she claimed that the "very specific manner" in which the supervisor stated her comments in the 2008 PER gave a "very strong indication of a discrimination and abuse of authority case." The Applicant's rebuttal statement went on to describe a number of specific incidents of alleged discrimination and abuse of authority and a history of complaints against the supervisor.

12. By letter dated 8 June 2009, the UNICEF Deputy Executive Director, Mr. Omar Abdi, rejected the Applicant's rebuttal, finding that the Applicant had not proved discrimination. The letter included the following comments in relation to discrimination:

That you disagree with particulars of your supervisor's management style, however, does not qualify these interactions as "discrimination," which would have to be based on specific grounds of a discriminatory nature such as, for example, gender, religion, sexual orientation, nationality or ethnicity.

13. On 9 September 2009, the Applicant filed an application to appeal the Deputy Executive Director's decision to this Tribunal. The Applicant claimed that the 2008 PER and the rebuttal procedure violated her right to due process and requested that the 2008 PER be expunged from her personal file.

14. On 28 September 2009, the Applicant completed her second PER for the period 1 December 2008 to 15 September 2009 ("2009 PER"). She received a

rating of “2” in all competency areas. Her immediate supervisor, Ms. Nadra Zaki, testified that overall there had been an improvement in the Applicant’s performance since the previous review period but there was still room for improvement.

15. On 8 October 2009, the parties filed a joint submission with the Tribunal stating that the parties were negotiating a settlement agreement and requested, pursuant to article 19 of the Rules of Procedure, suspension of the proceedings.

16. On 27 October 2009, the Applicant submitted a formal rebuttal of the 2009 PER on the grounds of discrimination but made references to issues of harassment and abuse of authority.

17. On 3 November 2009, Counsel for the Respondent submitted a settlement agreement between the Respondent and the Applicant to the Tribunal (“Settlement Agreement”).

18. The Applicant consented to the Settlement Agreement on the condition that she maintained the right to appeal the decision of the ad-hoc panel.

19. In accordance with the settlement agreement, an ad-hoc panel was set up consisting of two members from the Middle East and Northern Africa Regional Office and one member from the Jordan Country Office (“Panel”).

20. On 19 November 2009, the Registrar of the Tribunal informed the parties that based on the Settlement Agreement the Applicant’s case (UNDT/NBI/2009/45) was closed.

21. The Panel conducted a substantive review of the documentation, including statements submitted by the Applicant, the Applicant’s supervisor, the second reporting officer, the Representative, the chief of operations and members of the Egypt Country Office child protection service, as well as additional documentation relating to the Applicant’s work relevant to the performance assessment. The Panel also conducted interviews with UNICEF staff members (including former staff members), government partners, staff of other United

Nations agencies and the Applicant over the period 16 to 18 February 2010. In total, seventeen persons were interviewed by the Panel's three days in Egypt.

22. The Panel stated that its mandate and scope "includes the review of rebuttal statements issued by [the Applicant] for 2008 and 2009, with specific focus on allegations of discrimination, as well as other factors therein that may have impacted on [the Applicant's] performance, as highlighted in respective PER rebuttal documents for both years."

23. By memorandum dated 25 January 2010, the Applicant was informed that her fixed-term employment contract would be renewed until 31 March 2010 to allow the completion of the PER rebuttal procedures but that there was no expectancy of renewal beyond that date.

24. On 10 March 2010, the Chairperson of the Panel submitted to the Deputy Executive Director the "Report of the Ad-hoc panel constituted by UNICEF to review the Performance Evaluation Rebuttal Statements of [the Applicant], Child Protection Officer, Egypt Country Office in line with Settlement Agreement UNDT/NBI/2009/45" ("Report").

25. By letter dated 30 March 2010, the Deputy Executive Director wrote to the Applicant attaching the Report.

26. Based on its review, the Panel concluded that the grounds of discrimination were not substantiated. It stated at paragraph 4.2 of the Report:

[G]iven that due to personal circumstances wherein there has actually recently been a change in supervisor for [the Applicant], it has been confirmed that in relation to output and capacity, concerns related to the staff member's work vis-à-vis UNICEF reasonable expectation of deliverables of an NOB officer remain; it therefore suggest [sic] that the issues at hand go beyond personality differences and are indeed mainly grounded in performance related issues. The panel has concluded therefore that despite the staff member's perceptions that discrimination has been at play and has impacted her performance in both reporting periods, the grounds of discrimination as articulated by the staff member and based on the panel's own understanding of the term discrimination...are not substantiated.



and the Applicant's allegedly weak technical capacities and performance although "disagreement with ratings" or technical performance were not chosen as the grounds for rebuttal.

c. The Panel ignored compelling evidence from prior employees, counterparts and co-workers that called into question the objectivity of the supervisor's criticisms of the Applicant's performance.

d. The Panel failed to adhere to the principles of due process for the following reasons.

i. The Panel did not analyze the programme that had been established to monitor both the Applicant and her supervisor in 2009, which programme was later abandoned after a short time.

ii. The Panel's conclusions were based largely on personal criticism that was not vetted with the Applicant.

iii. The Representative managed the interview schedule and communications even though the Representative was involved in



viii. A reference made to one of the witnesses' statements in the

### **Consideration**

34. In *Miyazaki* UNDT/2010/078, the Tribunal observed that the performance evaluation process “should essentially be a

Sec. 15 of ST/AI/2002/3 deals with the rebuttal process and sec. 15.1 relevantly provides:

Staff members who disagree with the performance rating given at the end of the performance year may...submit to their Executive Office at Headquarters, or to the Chief of Administration elsewhere, a written rebuttal statement setting forth briefly the specific reasons why a higher rating should have been given.

38. ST/AI/2002/3 does not contain any limitations on the grounds upon which a rebuttal statement may be based. However, sec. 2 of Chapter 7 of the UNICEF Handbook, which deals with rebuttals, provides that a formal rebuttal is admissible “under one or more of the following circumstances”:

- a. if the staff member alleges discrimination in which case the formal rebuttal must be based solely on this allegation;
- b. if the staff membm

40. The Applicant sought clarification of Mr. Allen's letter on two separate occasions but received no response to her queries. She ultimately decided to base her rebuttal claim on the ground of discrimination alone but made reference to harassment and abuse of authority.

41. The above facts evidence two serious procedural flaws, both of which circumscribed the Applicant's right to challenge her performance appraisals. First, the UNICEF Handbook unduly restricted the grounds on which the Applicant could rebut her performance appraisal in a way not envisaged by ST/AI/2002/3, which merely requires a staff member to set forth briefly the "specific reasons why a higher rating should have been given". It does not limit the reasons that may be put forward. Administrative issuances have greater legal authority than policies such as the UNICEF Handbook. The Tribunal in *Villamorán* UNDT/2011/126 set out the legislative hierarchy as follows:

At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

42. To the extent that the UNICEF Handbook and ST/AI/2002/3 were inconsistent, ST/AI/2002/3 prevailed. A policy document of a single United Nations entity cannot be allowed to displace the rights and obligations agreed to at the level of the entire Organization and promulgated by the Secretary-General via an administrative issuance. To allow this to occur would result in inconsistent treatment of different staff members contrary to laws established by the Secretary-General in his capacity as the chief administrative officer of the Organization.

challenge her performance ratings on grounds other than discrimination, he prevented her from exercising her fundamental right to place before the Rebuttal Panel all her grievances flowing from harassment, discrimination and abuse of authority. Staff rule 1.2(e) provides that “[a]ny form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.” At the stage of the application for rebuttal, it was immaterial whether the Panel would have found these allegations substantiated. Mr. Allen had no right or authority to vet the application and discourage the Applicant from proceeding as she had originally intended to. By so acting, Mr. Allen placed himself in a situation of conflict. Mr. Allen should have left it to the Rebuttal Panel to determine whether the rebuttal grounded on discrimination, harassment, abuse of authority and the other grounds would be receivable or not. By misinforming the Applicant and effectively causing her to abandon the other legitimate grounds of rebuttal she had intended to rely on, he flawed the whole rebuttal process (see in this connection, ILOAT Judgment No. 2956, 2 February 2011).

*Did the Rebuttal Panel conduct the review process correctly?*

44. Even if the above procedural defects were not present, the rebuttal process itself was flawed because the Rebuttal Panel failed to address properly the sole ground on which the Applicant ultimately based her rebuttal, namely discrimination. The Tribunal also observes that the Rebuttal Panel’s Report appeared to be one-sided, giving more weight to the evidence of Ms. Zaki than that of the Applicant.

45. The Rebuttal Panel had before it an application grounded on discrimination yet failed to provide a clear definition of the concept and did not refer to any accepted legal definitions. It also appeared to conflate the concept of discrimination with those of harassment and abuse of authority. In its Report, a footnote to the word “discrimination” stated that the panel “reviewed the claim of discrimination as articulated by [the Applicant] which then includes allegations and linkages of discrimination and the realm of harassment and abuse of authority.” It is not clear precisely what is meant by this statement. In the

“Conclusions” section of the Report, the Panel referred to its “own understanding of the term discrimination” which “would require a demonstration of behaviour on the part of the supervisor which is different either on grounds or [sic] gender, religion, sexual orientation, ethnicity, or applying different standards in assessing performance among team members”.

46. The Secretary General’s Bulletin ST/SGB/2002/13, entitled “Status, basic rights and duties of United Nations staff members of 1 November 2002 was adopted by UNICEF in its Administrative Instruction CF/AI/2002-017, 20 November 2002. Discrimination is referred to in the document adopted by UNICEF as follows: “Freedom from discrimination is a basic human right. International civil servants are expected to respect the dignity, worth and equality of all people without any distinction whatsoever”.

47.



Further, it is ordered that the Applicant's 2008 PER and 2009 PER be expunged from her personnel records.

*(Signed)*

Judge Vinod Boolell

Dated this 30<sup>th</sup> day of October 2013