



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

PERROT-MAÎTRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION
FOR SUSPENSION OF ACTION**

Counsel for Applicant:
Katya Melliush, OSLA

Counsel for Respondent:
Miouly Pongnon, UNON

Introduction

1. On 21 March 2011, the Applicant sent a request for management evaluation of a decision taken by the United Nations Environment Programme (“UNEP”) not to extend her appointment beyond the expiry of her current contract, i.e. on 2nd May 2011.
2. Subsequently, the Applicant decided on 19 April 2011 to send another request for management evaluation of the same decision.
3. On 20 April 2011, the Applicant filed an application with the United Nations Dispute Tribunal in Nairobi seeking the suspension of the same decision. The application was served on the Respondent on the same day.

Facts

4. The Applicant joined the Organization on 3rd May 2009 on a one year Intermediate Term Appointment at the L-5 level, step 5, as Senior Task Manager/Sub Programme Coordinator, Division of Environmental Policy Implementation (“DEPI”) in UNEP.
5. The Applicant relocated to Nairobi to take up her assignment and worked under the supervision of the Deputy Director and Head of the Freshwater and Terrestrial Branch (First Reporting Officer) and the Director of DEPI (Second Reporting Officer).
6. On 25 November 2009, the Applicant met with her First Reporting Officer to discuss her mid-term review in respect of her 2009-2010 e-PAS.
7. On 18 March 2010, the Applicant’s Second Reporting Officer recommended that UNEP extend the Applicant’s appointment for one additional year, through 2 May 2011.

8. In March 2010, the Applicant's contract was extended for one year, until 2nd May 2011.

9. In June 2010, at a Branch meeting, the Applicant's First Reporting Officer requested all staff to complete their work plan for the 2010-2011 performance cycle which had begun on 1 April 2010.

10. On 18 June 2010, the Applicant met with her First Reporting Officer to review her performance for the period May 2009 to March 2010. The Applicant received an overall rating of "Partially meets performance expectations".

11. On 6 August 2010, the Applicant met with her First Reporting Officer to discuss her e-PAS and the need to complete her 2010-2011 work plan as well as continuing poor performance issues.

12. On 24 August 2010, the Applicant indicated to her supervisor that she had been unable to access her e-PAS for the previous four weeks owing to a failure of her password. In his reply that same day, her supervisor asked the Applicant to call the Information Technology Help Desk for assistance.

13. The e-PAS was signed off by the First Reporting Officer on 8 October 2010 followed by the Second Reporting Officer on 19 November 2010.

14. Subsequently, the Applicant wrote an email on 14 December 2010 to her supervisors expressing her concerns and surprise as to the overall rating and comments contained in the e-PAS. She asked her First Reporting Officer the reasons why the result of this assessment had not been shared with her in March 2010 at the time her contract was renewed. She also provided additional information and requested an opportunity to discuss the review of the performance assessment for the said period. She further expressed her willingness to work with her First Reporting Officer on a Performance Improvement Plan in order to avoid facing the same concerns in the next evaluation.

15. On 21 January 2011, the Applicant wrote an email to her First Reporting Officer seeking guidance on how to proceed with the outcome of her e-PAS and the preparation of a Performance Improvement Plan. The Applicant signed off her e-PAS on the same day.

16. On 3 February 2011, the Applicant's First Reporting Officer advised her that her contract would not be renewed beyond its date of expiry for 'unsatisfactory performance'.

17. On 15 February 2011, the Applicant met her First and Second Reporting Officers to discuss the appraisal of her performance for the 2009-2010 e-PAS cycle. During the meeting the First Reporting Officer indicated that the overall rating of her e-PAS would not be changed.

18. On the next day, the Applicant wrote to her First Reporting Officer indicating that her request for the development of a Performance Improvement Plan which had not been acknowledged. On 17 February 2011, her supervisor replied that he had never refused to discuss the issues of her performance and had met with her on three occasions to formally discuss the e-PAS. On 20 February 2011, the Applicant filed an incomplete rebuttal statement challenging her appraisal for the period 2009-2011.

19. On 11 March 2011, the First Reporting Officer confirmed to the Human Resources Management Services of UNON (HRMS/UNON)¹ that the Applicant's contract would not be renewed for 'unsatisfactory performance'.

20. On the same day, the Applicant uploaded her final work plan for the performance cycle ending 31 March 2011.

21. On 21 March 2011, the Applicant sent a request for management evaluation of the decision not to renew her current appointment with UNEP.

¹ UNON provides administrative support services to UNEP

22. On 8 April 2011, the Applicant met with her First Reporting Officer for the mid-term evaluation for the period 2010-2011. Her supervisor stated to the Applicant that her performance continued to warrant only a 'Partially meets performance expectations' rating. The Applicant's e-PAS for the period 2010-2011 was initiated and the First Reporting Officer reflected his views in the e-PAS system for the 2010-2011 performance cycle.

23. By an email circulated within DEPI in the month of April 2011, staff members were informed that a male colleague in the Global Programme of Action Unit in the Marine and Coastal Ecosystems Branch would take up the Applicant's functions as of 3 May 2011. This notification was confirmed on 12 April 2011 by the Division Director in a meeting of Heads of Units and Branches.

Parties' Submissions

24. The Applicant's contentions are as follows:

- a. The Applicant appreciates that fixed-term appointments do not carry expectancy of renewal and that the decision was made on the ground of unsatisfactory performance. Nevertheless in her case the Respondent did not undertake a performance appraisal 'beyond reproach' as held by the UN Dispute Tribunal and the UN Appeals Tribunal.
- b. The Applicant submits that the entire e-PAS process was irregular and flawed, in breach of section 8.3 of ST/AI/2003/2. At the time when her contract was extended for one year, the e-PAS had not been completed and there had been no discussion on her performance. The Mid-Term review was signed off without a meeting with her First Reporting Officer.
- c. Moreover, the Applicant submits that her first e-PAS did not adequately reflect her performance. In support of this position, she

argues that many of her colleagues expressed “shock and disagreement” vis-à-vis the outcome of her e-PAS.

- d. Finally, the Applicant states that she requested on various occasions a Performance Improvement Plan to no avail. She is new to the UN system in general and to UNEP in particular. The Sub Programme Coordinator positions are new and notoriously challenging. She inherited from a large and complex programme which she had to interpret and was not provided the support she expected.
- e. At the time her application was filed with the UNDT, the rebuttal process for her e-PAS covering the period of 2009-2010 was still pending. Moreover, she has tried in vain to initiate a dialogue with her supervisor after the first e-PAS was finalized.
- f. In the light of the above, the Applicant moves the Tribunal to suspend the impugned decision on the ground of a lack of due process. The Respondent, she argues, decided not to renew her appointment on the basis of a performance assessment which did not follow the established rules and other administrative issuances. Furthermore, the decision not to renew her appointment was taken on the basis of improper motives to replace her by an earmarked staff member. She argues that her so-called ‘unsatisfactory performance’ was a pretext to justify dismissal.

25. The Respondent’s reply is as follows:

- a. The Applicant was appointed without a competitive selection process against a General Temporary Assistance, project-funded post to provide technical assistance and guidance in developing the UNEP Ecosystem Management Programme; design coordination strategies for internal arrangements; establish and maintain networks and

partnerships; provide technical support in the capacity-building initiatives; and to develop a resource mobilization strategy.

- b. Her letters of appointments clearly stated that they do not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations.
- c. Evidence shows that the Applicant experienced difficulties in the discharge of her duties, as reflected in her e-PAS for the periods 2009-2010 to 2010-2011. The Applicant herself admitted that there was need for improvement.
- d. In this connection the Respondent submits that the Applicant received guidance from her supervisor as appropriate. Moreover, the Applicant was afforded with many opportunities to formally discuss issues relating to her performance. Her supervisor clearly expressed his concerns regarding her performance and the Applicant herself recognized the need for improvement. He also further extended his invitations to discuss her performance to which the Applicant never answered.
- e. The Applicant delayed the process of finalizing her e-PAS for the cycle 2009-2010 by signing it off on 21 January 2011, although the Second Reporting Officer had signed it on 19 November 2010. With respect to the e-PAS cycle for 2010-2011, the Applicant did not provide a work plan in a timely manner, claiming that she could not access the e-PAS system. However, the Applicant never documented her inability to access the system or any attempts to secure the assistance of the relevant help desk.

- f. As a result of this delay the Applicant's supervisor was unable to develop a formal performance improvement plan for the Applicant as the existence of a work plan was a prerequisite.
- g. UNEP intends to laterally move a regularized staff member who currently serves as Coordinator of the Global Programme of Action Unit at the P-5 level to discharge the duties of the Applicant.
- h. The Respondent submits that this application should be dismissed because the e-PAS rebuttal process is not yet finalized. In this connection and while preserving his right to contest the receivability of a rebuttal in respect of the 2009-2010 e-PAS, the Respondent is ready willing and able to instruct the Human Resources Services to grant administrative extensions of the Applicant's appointment to afford her the opportunity to diligently complete the rebuttal process. It is the Respondent's view that upon finalization of her 2011-2011 e-PAS, the Applicant will have fourteen days to file a request for rebuttal in respect to it and will, pursuant to Section 15.6 of ST/AI/2010/5, be entitled to an extension of her appointment for purposes of completing the rebuttal process.
- i. In view of the fact that Applicant has yet to exhaust the e-PAS rebuttal process, Respondent submits that the Tribunal should dismiss the application because it is premature and not ripe for adjudication.
- j. Furthermore, the Respondent submits that the Applicant has not demonstrated to what extent her application meets the provisions of article 2.2 of the UNDT Statute. The Respondent argues that there is no evidence suggesting that the impugned decision is *prima facie* unlawful, that it can cause her irreparable damage and that she is unable to show 'particular urgency', especially as the Applicant

unjustifiably delayed the rebuttal process in respect of her 2009-2010 e-PAS.

- k. For the above reasons, the Respondent moves the Tribunal to dismiss the application.

HEARING

26. For the purpose of the present application, the written submissions of the Parties are thorough and comprehensive and therefore the Tribunal decided that there was no need for a hearing.

WAS THE DECISION UNLAWFUL?

27. In the light of the allegation of non performance was the proper procedure relating to performance and e-PAS followed?

28. The Respondent alleges poor performance on the part of the Applicant. Under section 8.3 of ST/AI/2002/3, it is clearly stated that *As soon as performance shortcomings are identified, the First Reporting Officer should discuss the situation with the staff member and take steps to rectify the situation.* Admittedly, there is evidence to show that in instances of difficulties and/or shortcomings spotted by the First Reporting Officer or brought to his attention by the Applicant, appropriate guidance was proffered to her. In November 2009, for example, at the mid-term review, the First Reporting Officer met with the Applicant to discuss her performance. During the meeting, the First Reporting Officer advised her that improvement was needed in respect of her planning and organizational skills. Subsequently, in the months of June and August 2010, the First Reporting Officer met again with the Applicant and expressed his concerns regarding the standard of her performance. The Respondent has therefore met his obligations with regards to the e-PAS for 2009-2010.

29. Concerning the 2010-2011 e-PAS cycle, while it is clear that shortcomings continued to be brought to the attention of the Applicant is also clear from the evidence adduced that the process was not conducted in a timely manner. The mid-point review, for example, took place on 8 April 2011 quite after the end of cycle report. The Respondent cannot escape responsibility for the delays that took place by casting all the blame on the Applicant for the absence of a work plan and the delay in signing her e-PAS during the relevant reporting period. The suggestion that the absence of a workplan was solely the fault of the Applicant cannot be sustained. Section 7.4 of ST/AI/2002/3 reads as follows: *Timely implementation of all aspects of the PAS and compliance with the spirit and the letter of the process, including completion of the PAS forms and development of remedial action under section 8.3, rests with the supervisor acting as the first reporting officer under section 4.1.* (Emphasis added)

30. For the above reasons, the Tribunal is of the view that the impugned decision is *prima facie* flawed and therefore unlawful. The Respondent did not thoroughly follow its own rules and/or practices:

- a. By deciding not to renew the Applicant's appointment without allowing the rebuttal process to be completed.
- b. By its failure to ensure a timely implementation of the 2010-2011 e-PAS.

URGENCY ELEMENT

31. Since the contract of the applicant is due to come to an end on 2nd May 2011 this element is satisfied.

IRREPARABLE DAMAGE

32. As a rule where damages can adequately compensate an applicant if he or she is successful on the substantive case, an interim measure will not be granted.

However that rule cannot be applied in an absolute manner. Where an employer flouts his or her own rules to the detriment of a staff member he or she cannot be allowed to get away through the compensation channel. As was stated in *Tadonki* Order UNDT/2009/016

Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In the same case it was observed: An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

33. In the present matter there was a disregard of the rules relating to e-PAS process in respect of the 2010-2011 e-PAS cycle. The Applicant has stated in her submissions that the non-renewal of her employment will impact adversely on her professional integrity, her career prospects especially as she would be terminated without having been given a chance to rebut the non performance allegation which is a serious allegation that can ruin her career. For these reasons the Tribunal is satisfied that the Applicant has satisfied that test too.

CONCLUSION

34. The Tribunal notes that the Respondent is prepared to extend the contract of the Applicant in order to allow the rebuttal process on the 2009-2010 e-PAS to go through. The Respondent further recognizes that upon the eventual finalization of her 2011-2011 e-PAS, the Applicant will have fourteen days to file a request for rebuttal in respect to it and will, pursuant to Section 15.6 of ST/AI/2010/5, be entitled to an extension of her appointment for purposes of completing this additional rebuttal process.

35. Applicable administrative decisions are normally suspended pending management evaluation. In this particular case, to allow the suspension to depend on the management evaluation would cause injustice in as much as the rebuttal process

to which the Applicant has resorted is not yet to be completed. The Tribunal expects the management evaluation unit to bear this fact in mind.

36. Given the above legal conclusions on the requirements for suspension of action and the Respondent's stand as well as the powers vested in the Tribunal.

IT IS THEREFORE DECIDED THAT:

37. The administrative decision is suspended.

38. The suspension shall remain in force up to 14 working days following the date on which notification of the report(s) of the Rebuttal Panel(s) is/are made to the Applicant.

(Signed)

Judge Vinod Boolell

Dated this 29th day of April 2011

Entered in the Register on this 29th day of April 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi