



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

CHAROT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Maria Teresa Cirelli

Counsel for Respondent:

Federica Midiri, UNFPA

Introduction

1. By application filed on 24 August 2015, and amended on 25 August 2015, the Applicant contests a decision of 3 March 2015 by the United Nations Population Fund (“UNFPA”) not to renew her fixed-term appointment beyond 30 April 2015.

Facts

2. The Applicant joined the Organization on 15 March 2009, as Gender Based Violence (“GBV”) Policy Adviser (L-5) in Kinshasa, Democratic Republic of Congo. In November 2011, she was appointed as Program Coordinator (P-5) at the UNFPA Office in Goma. On 12 August 2013, she was appointed as GBV Area of Responsibility (“AoR”) Coordinator (P-5) at the UNFPA Liaison Office in Geneva.

3. On 8 May 2014, the Applicant’s work plan for 2014 as GBV AoR Coordinator was finalised.

4. On 27 June 2014, the Applicant’s Performance Appraisal and Development (“PAD”) report for 2013 was finalised by her former supervisor in the Goma Office, with the participation of her new supervisor in Geneva. The PAD identified a number of shortcomings in respect of the Applicant’s performance in both her roles as Program Coordinator at the UNFPA Office in Goma, and as GBV AoR Coordinator in Geneva, including weaknesses in the financial implementation of programs, failure to meet deadlines in drafting a number of documents, difficulties in ensuring good communication of information, lack of follow-up on staff management issues and the need to “make better planning and use of mobilized resources”. In his comments on the Applicant’s overall performance, the Applicant’s supervisor in Geneva identified areas for improvement, stating:

[S/M], although involved and passionate about her work, needs to dedicate more attention on increasing her overall efficiency and the quality of her outputs. Some of her work outputs have not been delivered. Those who (sic) were partly done were delivered with considerable delay. The S/M is hereby strongly encouraged to improve her writing and communication skills. The lack in clarity of messaging impedes on the overall efficiency in the coordination of the GBV AoR.

The Applicant received the following overall ratings:

- a. Work Plan Outputs: “partially achieve outputs”;
- b. Core Competencies: “fully proficient”;
- c. Functional Competencies: “fully proficient; and
- d. Development Outputs: “partially achieved”.

5. On 18 September 2014, the Applicant was reassigned to work as GBV Advisor, with new terms of reference and outputs to be produced by 31 January 2015.

6. On 30 September 2014, the Applicant’s 2014 PAD mid-year review was finalised. It assessed her work performance as GBV AoR Coordinator from 1 January 2014 to 18 September 2014, and reflected her reassignment as GBV Advisor. The mid-year review identified significant shortcomings in respect of almost all outputs and most core competencies. Amongst others, the Applicant’s supervisor referred to non-delivery or late delivery of various outputs, recurrent communication problems, and failure to ensure engagement of donors and partners. He also noted the Applicant’s failure to respect authority, to abide by collective decisions and to build consensus.

7. On 27 February 2015, the Applicant’s 2014 PAD year-end appraisal was finalised. In evaluating the Applicant’s outputs, her supervisor highlighted the sub-standard quality of three reports, and the Applicant’s failure to take into account his comments aimed at improving their quality. In evaluating the Applicant’s competencies, her supervisor highlighted difficulties in delivering high quality work, accepting feedback from her supervisor and abiding by the

agreed course of action, as well as a lack of adherence to organizational policies and procedures, a failure to take mandatory trainings, and substantial challenges in forming a team and in creating and fostering team spirit. He also reiterated the Applicant's difficulties in ensuring effective communication with key stakeholders. The Applicant received the following overall ratings:

- a. Work Plan Outputs: "partially achieve outputs";
- b. Core Competencies: "developing proficiency";
- c. Functional Competencies: "developing proficiency"; and
- d. Development Outputs: "partially achieved".

8. By letter of 4 March 2015 from the Director, Division of Human Resources, UNFPA, the Applicant was notified that her fixed-term appointment would not be renewed beyond 30 April 2015 for what was described as "documented performance reasons".

9. On 27 March 2015, the Applicant submitted a rebuttal against her 2014 PAD. Her appointment was extended pending the review by the Rebuttal Panel.

10. On 1 May 2015, the Applicant submitted a request for management evaluation of the decision not to renew her fixed-term appointment.

11. By letter of 22 May 2015, received by the Applicant on 26 May 2015, the Executive Director, UNFPA, responded to the Applicant's request for management evaluation. He upheld the contested decision and specified that it would "be implemented or rescinded on the basis of the outcome of the Rebuttal Panel's review".

12. On 25 June 2015, the Rebuttal Panel issued its report on the Applicant's statement of rebuttal of her 2014 PAD, retaining the ratings and comments expressed by the Applicant's supervisor.

13. By letter of 1 July 2015, the Director, Division of Human Resources, UNFPA, informed the Applicant that upon review of the Rebuttal Panel's report, the Organization decided that the decision not to renew her fixed-term appointment, originally notified by letter dated 3 March 2015, would be maintained and implemented. The Applicant was further informed that her appointment would not be extended beyond 3 July 2015.

14. The Applicant filed her application with the Dispute Tribunal on 24 August 2015, and amended it on 25 August 2015.

15. On 8 September 2015, the Applicant submitted to the Office of Audit and Investigations Services ("OAIS"), UNFPA, a complaint of harassment and abuse of authority against her former direct supervisor—namely the Humanitarian Coordinator Advisor, UNFPA Geneva Liaison Office—the Chief of the Humanitarian and Fragile Context Branch, UNFPA Headquarters, and the Chief of the UNFPA Geneva Liaison Office, for alleged wrongdoings committed between September 2013 and July 2015.

16. The Respondent filed his reply to the application on 25 September 2015.

17. On 27 January 2016, after conducting a preliminary assessment, OAIS decided to close the Applicant's complaint of harassment and abuse of authority.

18. On 23 December 2015 and 3 April 2016, the Applicant filed additional observations and documents, with leave from the Tribunal. The Respondent did the same on 26 January 2016, 21 March 2016, 22 March 2016 and 10 May 2016.

19. Both parties agreed that a hearing was not necessary to dispose of the case.

Parties' submissions

20. The Applicant's principal contentions are:

- a. The contested decision does not comply with the applicable legal framework as the requirements to provide the Applicant with an opportunity to improve by means of an improvement plan, set forth in secs. 10.1 and

10.2 of ST/AI/2010/5 on Performance Management and Development System of 30 April 2010, have not been fulfilled;

b. The Organization did not act with due care and in good faith in managing the Applicant's performance, in that she was unfairly blamed for delays in achieving outputs;

c. The contested decision is not justified by the 2014 PAD and not adequately substantiated, because:

i. The 2014 PAD does not mention the possibility of a non-renewal of contract, and the terminology used for the ratings does not suggest it either;

ii. It is in contradiction with a letter sent to the Applicant by the Executive Director of UNFPA on 17 December 2014 expressing his gratitude for the Applicant's work and stating that he "looks forward to continuing [their] work together";

iii. It is in contradiction with the Applicant's recognised professional abilities; and

iv. The 2013 and 2014 PADs were not completed in accordance with the applicable rules, notably in respect of the period involved, designation of supervisor, work plan and rating methodology;

d. The rebuttal process of the Applicant's 2014 PAD was flawed, thereby depriving the Applicant of the possibility to effectively challenge it;

e. The contested decision is motivated by personal prejudice, as evidenced by the fact that:

i. It was taken quickly after the finalisation of the 2014 PAD;

ii. The Applicant's supervisors previously had humiliated her in public;

- iii. The Applicant was assigned a disproportionate workload; and
 - iv. The 2014 PAD contains arbitrary statements and tends to minimise the Applicant's achievements;
- f. Consequently, the Applicant requests the Tribunal to:
- i. Rescind the decision not to renew her contract;
 - ii. Order her reinstatement within UNFPA;
 - iii. Award her compensation for the loss of salary and allowances from the time of her separation to her reinstatement;
 - iv. Award her moral damages; and
 - v. Award her EUR5,000 for legal fees and other costs.
21. The Respondent's principal contentions are:
- a. The application, insofar as it challenges the decision to reassign the Applicant as GBV Advisor, is not receivable because it has not been the subject of a request for management evaluation;
 - b. The decision to reassign the Applicant as GBV Advisor was motivated by the need to assign her to more suitable functions, as a remedial measure to address her performance shortcomings identified in the 2014 PAD mid-year review;
 - c. The Applicant's PAD reports for 2013 and 2014 were conducted within the time frame set forth in the PAD Guide Book, and demonstrate a performance that was below standard, as defined by sec. 5.13 of UNFPA Separation from Service Policy;
 - d. The rebuttal process was conducted in accordance with the applicable rules and provided a fair opportunity for the Applicant to challenge her 2014 PAD;

e. The Applicant's fixed-term appointment was due to expire, without further notice, on 14 March 2015, and carried no expectancy of renewal;

f. The contested decision is substantiated by the 2014 PAD and the report of the Rebuttal Panel, which demonstrate that the Applicant's performance was below standard;

g. The UNFPA Separation from Service Policy does not require that a staff member whose PAD indicates a departure from the standards of performance be given an opportunity to improve before a decision not to renew his or her fixed-term contract is taken, nor that a staff member be informed prior to such;

h. The Applicant has been informed on several occasions of shortcomings in her performance, not only in her PADs but also in several meetings with her supervisors throughout 2013 to 2015. She was also given the opportunity to improve her performance by being reassigned to new functions;

i. The Applicant did not bring any concrete evidence that she has been discriminated against; and

j. In the circumstances, the Respondent requests the Tribunal to reject the application.

Consideration

Receivability

22. The Applicant challenges the decision not to renew her contract beyond 30 April 2015.

23. In so doing, she also challenges her 2014 PAD and the rebuttal process, which are closely related to the contested decision. She asserts that the decision not to renew her contract is the result of a pattern of harassment and abuse of authority from her supervisors and the Chief of the UNFPA Geneva Liaison

Office. As such, she seeks to link the present application with her complaint of harassment and abuse of authority to the OAIS.

24. It is clear from the Applicant's submissions, in particular her additional submissions of 23 December 2015, that she does not challenge the decision to reassign her as GBV Advisor.

25. The Tribunal finds that the only decision that the Applicant submitted for management evaluation is the decision of 3 March 2015 not to renew her fixed-term appointment. Pursuant to art. 8 of the Dispute Tribunal's Statute, this is the only decision that the Tribunal is competent to examine.

Merits

26. Staff rule 4.13(c) provides that "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14(b)". Pursuant to staff rule 9.6(b), "[s]eparation as a result of ... expiration of appointment ... shall not be regarded as a termination within the meaning of the Staff Rules".

27. It is settled jurisprudence that "poor performance ... may be the basis for the non-renewal of [a] fixed-term appointment" (*Said* 2015-UNAT-500, para. 34, referring to *Morsy* 2013-UNAT-298, para. 18; *Ahmed* 2011-UNAT-153, para. 49). The Appeals Tribunal also held that "a staff member whose performance was rated as 'partially meeting performance expectations' had no legitimate expectancy of renewal of his contract" (*Said*, para. 41, referring to *Dzintars* 2011-UNAT-176, paras. 30-31).

28. In *Said*, the Appeals Tribunal stressed that the Dispute Tribunal shall give deference to the decision-maker's assessment of the staff member's performance. It is not the Tribunal's role to place itself in the role of the decision-maker, and determine whether it would have renewed the contract based on the performance appraisal (para. 40).

29. A non-renewal decision can be challenged on the grounds that the Administration did not act fairly, justly or transparently, or if the decision is motivated by bias, prejudice or improper motive against the staff member. The staff member has the burden of proving that such factors played a role in the administrative decision (*Said*, referring to *Ahmed*; *Obdeijn* 2012-UNAT-201; *Asaad* 2010-UNAT-021).

30. Further, the Appeals Tribunal confirmed that where the Administration provides a reason for the non-renewal of a fixed-term appointment, that reason must be supported by the facts (*Islam* 2011-UNAT-115).

31. The rules governing non-renewal of contracts and performance management at UNFPA are expressed in its Policies and Procedure Manual, Separation from Service of 1 January 2014 (“Separation Policy”) and the UNFPA PAD Guide Book of January 2011 (“PAD Guide Book”).

32. In particular, para. 5.8 of the Separation Policy provides that:

Although fixed term appointments expire automatically and without the need for formal or legal advice (Staff Rule 9.4), DHR should, as a matter of good human resources management practice rather than on the basis of a legal obligation to do so, inform the staff member in writing a minimum 30 calendar days prior to the expiration of the fixed term appointment that the appointment will not be renewed. The reason for the non-renewal would be given at that time.

33. Sec. 5.13 of the Separation Policy further provides that:

Where reasons of unsatisfactory performance account for the decision not to renew the fixed term appointment, the departures from the required standards of performance should be reflected in “Performance Appraisal and Development” (PAD), UNFPA’s performance management system.

34. Pursuant to sec. 5.14 of the Separation Policy, “in the event that a staff member has submitted a statement of rebuttal in respect of the year-end appraisal relied upon by the organization for the administrative decision not to renew the fixed term appointment, the rebuttal should be reviewed by the UNFPA Rebuttal Panel prior to the implementation of separation from service”.

35. As to performance management, the PAD Guide Book provides that when a staff member receives ratings of “Partially Achieved Outputs” or “Developing Proficiency”, the supervisor “should suggest ways for improvement in these areas and monitor progress”.

36. In view of the foregoing, the Tribunal will examine whether:

- a. The Applicant was deprived of the possibility to effectively challenge her 2014 PAD, and whether this PAD was affected by procedural irregularities;
- b. The decision not to renew the Applicant’s fixed-term appointment was taken in compliance with the applicable legal framework; and
- c. The contested decision was motivated by bias, prejudice or improper motive against the Applicant.

The Applicant’s 2014 PAD

37. The Tribunal finds that the Applicant’s performance for the year 2014 was rated by her former supervisor as “partially achieved” in respect of her work plan and development outputs, and as “developing proficiency” in respect of core and functional competencies. The ratings provided to the Applicant are substantiated by detailed comments provided by her supervisor, which identified several shortcomings in the delivery of outputs and in her level of competence.

38. The Applicant challenged this performance appraisal before the Rebuttal Panel, in accordance with the UNFPA Policy on Rebuttal and Related Remedies Regarding Performance Appraisal and Development (PAD) of July 2013 (“Rebuttal Policy”). The Rebuttal Panel reviewed the documentation submitted by the Applicant, interviewed her, her supervisors, a multi-rater source for the Applicant’s work plan outputs and others whom the Applicant asked to be interviewed. The Panel also reviewed the documentation submitted by these witnesses. The Rebuttal Panel concluded that:

[T]he indicators in the SM's 2014 PAD were only partially met, thus confirming the ratings of the Supervisor. Although the SM has shown good team and management skills in the past, the Panel considered that the SM did not deliver on the requirements of this post at the quality expected of a Technical Adviser and Coordinator at the P-5 level.

Furthermore, there was strong consensus among those interviewed with knowledge of the SM's work and technical expertise that the SM does not possess the competencies required for the post and that her performance in 2014 was generally inadequate.

39. The Rebuttal Panel confirmed the ratings and comments provided by the Applicant's supervisor.

40. The Applicant argued that the rebuttal process was flawed as, amongst others, her submissions were not taken into consideration and the report contained arbitrary statements and inaccurate information, notably in mentioning that the 2014 PAD was the first that the Applicant's supervisor conducted.

41. The Tribunal finds that these allegations are not substantiated. The Rebuttal Panel carried out a detailed review of the documentation submitted by the Applicant, and took into account comments by her and by witnesses. The Rebuttal Panel's report complies with the requirement of sec. 4.14 of the Rebuttal Policy, which provides that "[t]he draft report shall be brief; contain a decision on whether the original combined rating(s) should or should not be maintained; in the latter case, contain a decision on a different combined ratings; and set forth the reasons for the decision".

42. The Tribunal finds that the method of rating used by the Applicant's supervisor for her functional competencies, although not strictly compliant with the terms of the PAD Guide Book, is not such as to vitiate the 2014 PAD. The PAD Manual provides that each competency shall be rated individually. Although the Applicant's supervisor gave her only an overall rating of "developing proficiency" for functional competencies, it is clear from his comments that this rating applied to five of the six competencies, and that the sixth one was rated "proficient". In addition, he made specific comments for his appraisal of each of these five competencies, as required by the PAD Manual. Although it would have

been desirable to have entered individual ratings for each of the six functional competencies, the Applicant's supervisor provided the necessary information to reflect his appraisal of these competencies. The Tribunal finds that there was no material irregularity in the procedure followed in that the supervisor's way of proceeding had no significant impact on the Applicant's appraisal.

43. The Applicant has not established that her 2014 PAD was vitiated by procedural irregularities, and that she was denied the opportunity to challenge it. Pursuant to sec. 4.19 of the Rebuttal Policy, the ratings and comments contained in the 2014 PAD are final. The Tribunal is therefore bound to examine the legality of the contested decision in the light of this performance appraisal.

The decision not to renew the Applicant's fixed-term appointment

44. Based on the Applicant's 2014 PAD, which was finalised on 27 February 2015, the Organization decided, on 3 March 2015, not to renew her fixed-term appointment beyond 30 April 2015. The Applicant was informed within the deadline set forth in sec. 5.8 of the Separation Policy of her non-renewal and of the reason for such, namely "documented performance reasons". The Applicant's departure from the required standards of performance was fully and properly documented in her 2014 PAD, as required by sec. 5.13 of the Separation Policy.

45. In this respect, the Tribunal notes that sec. 5.13 of the Separation Policy refers to "unsatisfactory performance", and sets a different standard for non-renewal of fixed-term appointments from the standard applicable to termination of appointments, as set forth in sec. 7.3 of the Separation Policy. Although sec. 5.13 and 7.3.5 of the Separation Policy both use the expression "unsatisfactory performance", it is clear from sec. 7.3.5 of the Separation Policy that the specific factors and criteria for determining "unsatisfactory performance" apply to "termination" of appointments. It is unfortunate that sec. 5.13 uses the same terminology as sec. 7.3.5, but it is clear from sec. 5.13 that the standard for non-renewal is a "departure from the required standards of performance". The difference in the applicable standards is consistent with the jurisprudence of the Appeals Tribunal, which held that it is not necessary for the performance of a staff

member to be rated as “unsatisfactory” in order to support a decision not to renew an appointment for “poor performance” (*Said*, para. 41, referring to *Morsy*, para. 20).

46. In considering whether the Applicant’s performance presented a departure from the required standards of performance, the Tribunal notes that the Applicant’s ratings for outputs and competencies correspond to the second lowest ratings out of four in the UNFPA rating scale. According to the PAD Guide Book, a rating of “partially achieved outputs” is given to a staff member who “[a]chieved the defined activities/performance indicators for the majority of outputs during the performance period” but “[d]id not achieve the defined activities/performance indicators for the remaining outputs”. In turn, a rating of “developing proficiency” is given to a staff member whose “[i]ndividual competency demonstration is developing toward the expected level for the post as defined in the competency profile, but does not meet expectations”. Contrary to the Applicant’s arguments, these ratings demonstrate a departure from the required standards of performance, as per sec. 5.13 of the Separation Policy, and are sufficient to conclude that the Applicant did not have any legitimate expectancy of renewal (*Said*).

47. The Applicant argued that the Organization did not provide her with a sufficient opportunity to improve her performance before deciding not to renew her contract, in that they did not put in place a performance improvement plan as per ST/AI/2010/5.

48. The Tribunal finds that ST/AI/2010/5 does not apply to this case. Pursuant to para. 2.3 of ST/SGB/2004/9 on Procedures for the promulgation of administrative issuances of 18 December 2009, “[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” (cf. also *Mashhour* 2014-UNAT-483). By submissions filed on 10 May 2016 upon the Tribunal’s request, the Respondent confirmed that UNFPA, which is a separately administered fund, has not accepted the

applicability of ST/AI/2010/5, and that this administrative instruction does not apply to it.

49. The Tribunal notes that the applicable rules, namely the Separation Policy and the PAD Guide Book, do not contain any provision for an improvement plan in case of unsatisfactory performance. They simply provide that deficient performance shall be reflected in the PAD, together with “ways for improvement”. This requirement must be differentiated from an obligation to extend a staff member’s appointment to provide him or her an opportunity to improve his or her performance.

50. The Appeals Tribunal recently held that absent any specific provision in the applicable rules, there is no legal obligation to afford a staff member an opportunity to improve over the course of another appointment or to otherwise take remedial measures before deciding not to renew a contract due to poor performance (*Said*). Consequently, the Tribunal finds that the Organization had no legal obligation to take any remedial measure aimed at improving the Applicant’s performance before deciding not to renew her fixed-term appointment, although this is certainly a desirable managerial practice.

51. In any event, the Tribunal notes that the Applicant was advised from at least 27 June 2014, namely eight months before the contested decision was taken, that her performance was below standard and that improvements were required. Her 2013 PAD, which was finalised on 27 June 2014, identified significant shortcomings in various areas of her work, both in her position in Goma and in Geneva. She was reassigned to new functions on 18 September 2014, to allow her to improve her performance and to meet the required standards. Her new terms of reference were thoroughly discussed and the deliverables agreed upon. It also appears that weekly meetings between the Applicant and her supervisors—namely the Chief of the Humanitarian and Fragile Context Branch based in New York, and, after 1 January 2014, the Humanitarian Coordination Adviser based in Geneva—were organized from 2013, in order to provide the Applicant with the necessary support to carry out her new role. The Head of the UNFPA Geneva Office also participated in those meetings to ensure additional monitoring and

coordination. It seems that those meetings were discontinued at some point in 2014 due to the Applicant's failure to participate. The correspondence produced by the Respondent between the Applicant and her supervisors also reflects the latter's dissatisfaction with her work.

52. The Tribunal finds that the decision not to renew the Applicant's fixed-term appointment was taken in accordance with the applicable legal framework.

Allegations of bias

53. The Applicant asserted that the decision not to renew her fixed-term appointment, as well as her 2014 PAD report, were motivated by bias against her and were the consequence of a pattern of harassment and abuse of authority. OASIS reviewed the Applicant's complaint for harassment and abuse of authority and found that the incidents that she described related to "the criticism of [the Applicant]'s work performance and disagreement between a supervisor and supervisee over the allocation of resources and tasks", and that there was no indication that the Applicant's supervisors "exceeded their authority and/or made unreasonable decisions regarding her work performance".

54. The Applicant's complaint of harassment and abuse of authority is not directly in issue in these proceedings. The question before the Tribunal is whether there is any credible evidence that the contested decision was motivated by bias, prejudice or improper motive against the Applicant.

55. Having examined the case file, the Tribunal finds that on several occasions the Applicant's supervisors expressed their dissatisfaction with her work output and overall performance. These comments were legitimate and justified in terms of the supervisors' assessment, and are fully within the ambit of a supervisor's role.

Conclusion

56. The Tribunal finds that the Applicant had no legitimate expectation that her fixed-term appointment would be renewed beyond the date of its expiry on 14 March 2015. In accordance with the applicable rules at UNFPA, proper

procedures were followed to evaluate her performance for the year 2014, and to give her notice of the non-renewal of her appointment. The allegation that the contested decision was motivated by ulterior considerations is not supported by the evidence.

JUDGMENT

The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 13th day of May 2016

Entered in the Register on this 13th day of May 2016

(Signed)

René M. Vargas M., Registrar, Geneva