



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

ZONG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Language Service Assistant, with the Department for the General Assembly and Conference Management (“DGACM”), contests the decision not to renew her temporary appointment, alleging that her negative performance appraisal was incorrect and that the non-renewal was tainted by ulterior motives. In response, the Respondent submits that the application is without merit.

2. For the reasons stated below, the Tribunal finds that the evaluation of the Applicant’s performance was lawfully conducted and, therefore, rejects the application.

Facts and procedural history

3. The Applicant’s temporary appointment was not extended any further when expiring on 19 September 2018, 364 days after the initial appointment.

4. Pursuant to Order No. 181 (NY/2018) dated 19 September 2018 on suspension of action, the Applicant’s appointment was extended until 30 September 2018 pending management evaluation. At the conclusion of the management evaluation process, the parties agreed that two performance appraisals would be placed in the Applicant’s Official Status File: the first performance appraisal, covering the period of 30 September 2017 to 19 March 2018, and the second performance appraisal, covering period of 20 March to 19 September 2018. The Applicant appended a written explanatory statement under sec. 6.2 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments) in objection to the performance evaluations.

5. On 28 September 2018, the Applicant filed the present application. The case was initially assigned to Judge Alessandra Greceanu. Following the end of Judge

Greceanu's term with the Dispute Tribunal, the case was assigned to the undersigned Judge on 20 January 2020.

Consideration

The parties' submissions and scope of the case

6. As a preliminary matter, the Tribunal notes that on 21 December 2019, the Applicant added an additional ground of appeal to her case by stating that she had filed a report of harassment against her Second Reporting Officer ("SRO") in December 2018, under former ST/SGB/2008/5 (Prohibition of harassment, including sexual harassment, and abuse of authority). In the complaint, the Applicant claims that the decision not to extend her temporary appointment was the result of the SRO's harassment and abuse of authority.

7. The Appeals Tribunal in *Luvai* 2014-UNAT-417, paras. 62-65, stated that the Dispute Tribunal lacks jurisdiction to conduct a review of harassment allegations when the applicant failed to file a complaint under ST/SGB/2008/5. In the present case, the Applicant only submitted her ST/SGB/2008/5 complaint after the decision not to extend her contract was taken. Without prejudice to the outcome of the Applicant's complaint, the Tribunal finds that this ground of appeal is not receivable in this case.

8. Otherwise, in sum, the Applicant argues that her performance appraisal, which led to the non-renewal of her temporary appointment, was unlawful on the following grounds:

- a. The SRO manipulated her first performance appraisal by supplanting the role of the FRO, who had praised her work;
- b. The SRO pressured the Applicant not to rebut her performance appraisal;

- c. The Applicant contends that the SRO did not provide any examples of performance shortcomings;
 - d. Because of these negative performance appraisals, she is unable to find any other jobs with the Organization.
9. The Respondent in essence, responds as follows:
- a. During the period of the first performance appraisal, both the FRO and the SRO provided guidance to the Applicant regarding her work. The SRO did not supplant the role of the FRO. The SRO sought the extension of the Applicant's appointment despite the perceived shortcomings.
 - b. In the period of the second performance appraisal, the Applicant was provided appropriate notice of her shortcomings and received guidance from her supervisors to remedy these shortcomings.
 - c. The evaluation of Applicant's performance was conducted squarely within the requirements of ST/AI/2010/4/Rev.1.
 - d. The SRO did not pressure the Applicant not to rebut the performance appraisal.
10. The basic issue for the Tribunal to assess is therefore whether the performance appraisals were manifestly unfair or irrational and determine whether there was a rational objective connection between the information available and the finding of unsatisfactory performance.

Legal framework

11. A temporary appointment does not carry any expectancy of renewal, irrespective of length of service in accordance with staff regulation 4.5(b) and staff rule 4.12(c).

12. The Appeals Tribunal has stated in *Ncube* 2017-UNAT-721, paras. 17-18, that where performance is the reason provided for the decision not to extend the applicant's appointment, the Administration is required to provide a performance-related justification for its decision. The Appeals Tribunal clarified that informal feedback to the staff member is not sufficient to justify a non-renewal decision for poor performance and the Administration should follow the applicable framework for performance appraisal. The purposes and goals of the performance appraisal system include the protection of the Organization's efficiency and the staff member's accountability.

13. In *Sarwar* 2017-UNAT-757, para. 14, the Appeals Tribunal reiterated its long-standing jurisprudence stating that in reviewing the Administration's appraisal of a staff member's performance, the Dispute Tribunal may not review such appraisal *de novo*, substituting its judgment for that of the Administration.

14. As the Applicant held a temporary appointment, the appraisal of her performance was governed by sec. 6.1 of ST/AI/2010/4/Rev. 1, which provides that, "At the end of the temporary appointment, regardless of duration, the programme manager shall issue a performance evaluation on a standard performance evaluation form for staff members holding temporary appointments". Section 6.1 further states that, "The form should state what was expected of the staff member and whether the staff member and the supervisor discussed those expectations. Signed hard copies of the standard performance evaluation form shall be included in the official status file of the staff member concerned".

15. If a staff member on a temporary appointment disagrees with the performance rating given at the end of his/her temporary appointment, in accordance with sec. 6.2 of ST/AI/2010/4/Rev.1, s/he may “within seven calendar days of signing the completed performance appraisal form, submit a written explanatory statement to the respective Executive Office at Headquarters, or to the Chief of Administration elsewhere” and “[t]he performance evaluation form and the explanatory statement shall become part of the official status file of the staff member”.

Were the Applicant’s performance appraisals lawful?

16. During the management evaluation process, the Administration acknowledged a procedural error in the recording of the evaluation of the second half of the Applicant’s appointment, from April to September 2018 and offered the Applicant two options to redress this error. In an email to the Applicant, the Management Evaluation Unit appeared to admit two procedural irregularities when it offered the Applicant different options to record the appraisal of her performance:

Query whether you have a preference to keep your performance evaluation for the period 20 September 2017 to 19 March 2018 completed by your first [first reporting officer (“FRO”, name redacted)] on the P.333 form (the performance evaluation form for staff members holding temporary appointments), dated and signed 26 March 2018 and to have a second P.333 issued for the second half of your appointment by your current [FRO, name redacted]. If you choose this option, our office will ensure that you are also allowed to write an explanatory statement in response to this first evaluation to be included in your Official Status File; provided you do so within seven days of the receipt of your second and final evaluation. While not procedurally correct, it seems reasonable in light of the fact that you had two different FROs during the year and the FROs are best placed to evaluate you for the period of their respective supervision.

Alternatively, per [ST/AI/2010/4/Rev.1], your current FRO [...] can issue one evaluation for the entire period.

Please note that your other two evaluations, ie, the one issued on the incorrect form covering the period up until 31 March 2018 by [the first FRO] as well as the P.333 for the three-month period April to June

2018 by [the current FRO] will not be part of your official records. I leave it up to you whether you would like to keep the first P.333 evaluation.

17. The Applicant responded, “I choose to have two evaluations from two separate FROs”. She further submitted an explanatory statement in response to the performance appraisals.

18. In reference to the performance appraisal of staff members under fixed-term contracts, the Appeals Tribunal in *Ncube* 2017-UNAT-721 determined that procedural irregularities only render a performance appraisal unlawful in certain circumstances:

18. ... If, on the other hand, the [electronic performance appraisal system report] suffers from procedural irregularities, an evaluation can only be upheld if it was not arbitrary and if the Administration proves that it is nonetheless objective, fair and well-based ...

19. ... It would not be in accord with [staff regulation 1.3(a) and staff rule 1.3(a)] if the Secretary-General was forced to renew the appointment of an unqualified staff member merely because there are procedural errors in the evaluation process, provided that the procedural errors are not so serious and substantial as to render the evaluation process unlawful or unreasonable or as to violate the due process rights of the staff member in question.

19. Following these principles, faced with the Administration’s admission to procedural irregularities in the appraisal of the Applicant’s performance, the Tribunal will look at the underlying evidence to determine whether said appraisal was nonetheless fair and well-based.

First performance appraisal

20. The first performance appraisal covered the first six months of the Applicant’s appointment, from 20 September 2017 to 19 March 2018. In the performance evaluation document signed on 26 March 2018, the Applicant received an overall rating “partially meets performance expectations”.

21. The FRO provided some positive comments and identified certain shortcomings in the Applicant's performance:

[The Applicant] has been a cooperative staff member, willing to learn and take up jobs when told to. She can do the basic jobs in the front office when told to. [The Applicant] is somewhat passive. She needs to be a more proactive and faster learner in order to be able to handle a myriad of front desk functions.

22. The SRO concurred and provided further information on the Applicant's performance shortcomings, "[The Applicant] is encouraged to be more active and proactive in dealing with all [Front Desk] functions so as to provide high-quality administrative support which is crucial for the smooth and efficient function of the Service. She is encouraged to take initiatives in learning so as to become a fully-fledged [Front Desk] colleague. We are ready to provide all necessary support".

23. The Applicant argues that during this first period, the FRO never gave her any negative feedback, but rather praised her performance. She submits that the negative rating was in fact provided by the SRO who supplanted the role of the FRO. She refers to an email exchange between the SRO and the Human Resources Partner ("HR Partner") on 5 March 2018. After the SRO requested the extension of the Applicant's contract for three months, the HR Partner asked the SRO to provide the Applicant's performance evaluation. The SRO responded that the FRO was on leave and inquired if he could do it himself. The HR Partner responded:

Dear [SRO] – OK. You could ask [the Applicant] to start the process (outside of Inspira [the online United Nations jobsite] in the form I provided). The FRO, upon discuss with [the Applicant] and conduct a midterm assessment. Please keep me posted. In the meantime, based on the email we will extend for three months + through end of June 2018.

24. The Respondent provided an email dated 19 September 2018 from the FRO during the second reporting period to another colleague from DGACM asking him to confirm whether he had told the Applicant that the Applicant's previous FRO had

given her a rating of “partially meets performance expectations” at the SRO’s behest. The DGACM colleague responded “No. [The Applicant] is wrong”.

25. The Tribunal finds that the 5 March 2018 emails do not support the Applicant’s contention that the SRO supplanted the FRO’s role. In fact, they only prove that the SRO inquired if he could do the performance evaluation in the absence of the FRO. The HR Partner responded that he would proceed with the contract extension while the appraisal was initiated by the Applicant. He instructed that the FRO must conduct a mid-term assessment upon discussion with the Applicant.

26. Moreover, the evaluation form for this period was signed by both the FRO and the SRO, as well as the Applicant.

27. With respect to the feedback provided to the Applicant during the first reporting period, the Respondent provides an email from the FRO to the SRO dated 21 September 2018. The FRO explains that he advised the Applicant to get training to improve certain areas of her performance. He states that he assigned her other tasks as the Applicant proved unable to perform those originally assigned to her. He refers to private conversations in which he advised her on her communication difficulties. However, there is no evidence that this feedback was formalized in writing prior to the conclusion of the first performance appraisal.

28. This notwithstanding, despite the partially negative appraisal, by email dated 5 March 2018, the SRO requested the extension of Applicant’s contract for three months stating, “The reason is that [the Applicant’s] performance so far is not fully satisfactory in terms of ability to perform the full functions efficiently and effectively and lack of initiative. As the FD [assumedly, front desk] functions are very important to for the smooth operations of the Service, and in all fairness to the staff member, I would like to recommend her for another [three] months on [temporary job opening]. During the three months, we will provide all necessary training and support to help her grow to meet the standard”.

Second performance appraisal

29. In the second performance appraisal, covering the period from 1 April to 19 September 2018, signed by the FRO and the SRO on 21 September 2018, the Applicant was graded as “unsatisfactory” in the core value of professionalism and the core competencies of communication and teamwork. She was graded as “requires development” in the core value of integrity and the core competency of planning and organizing and “fully competent” in the core competencies of technological awareness and commitment to continuous learning, with a final overall rating of “partially meets performance expectations”.

30. In the FRO’s comments, he acknowledged a slight improvement in the first part of this reporting period, “She showed some willingness to be retrained to perform the FD skills, and could perform some functions immediately after retraining”. However, he stated that “after a while”, the Applicant fell back to have problems in the areas of communication and teamwork. He noted that she was absent from work for long periods of time, often without notice; was not able to demonstrate basic communication skills orally and in writing; used disrespectful language with colleagues; did not timely complete assignments; showed poor work ethics and refused to perform assignments; asked others to perform her tasks; and failed to understand basic functions of the job and made numerous mistakes.

31. The SRO fully endorsed the FRO’s evaluation.

32. To support her argument that she was not afforded sufficient notice of her shortcomings, but was rather praised on her performance, the Applicant provides an email from the SRO dated 27 March 2018 in which he thanks her for the efficient processing of a voluminous document.

33. In her explanatory statement of 28 September 2019, included in her Official Personnel File following the agreement with the Management Evaluation Unit, the Applicant further states that she was willing to undertake new assignments and

replace staff on leave, particularly in April 2018. She also submits that she was unaware that she was allowed to write a self-evaluation and skipped that part of the process. The final grade was unfair and arbitrary in her opinion. She refers to the praise received by a new programming officer and by another colleague who she replaced while she was on leave. According to the Applicant, this colleague appraised her work as “90 out of 100”. The Applicant contends that she was told that greeting her supervisors with “hello” was disrespectful.

34. The Respondent provided copies of correspondence from the FRO and SRO during this reporting period.

35. On 4 April 2018, the SRO emailed the Applicant in reference to two conversations: one before the expiration of her previous contract and another on the day of the email. He described six areas where he deemed the Applicant’s performance required improvement and advised her to seek the FRO’s support and guidance.

36. In an email to the SRO dated 8 June 2018, the FRO reported to the SRO the content of seven meetings he had with the Applicant from 1 April to 27 June 2018 where he identified aspects of her work requiring improvement.

37. On 19 September 2018, the SRO requested feedback from the Applicant’s colleagues on her performance during the reporting period while she covered for them during their leave in May 2018. The two colleagues reported a number of failures from the Applicant during that period.

38. On 16 August 2018, a colleague emailed the Applicant identifying an error she had committed in one of her tasks. The SRO was copied in this email.

39. In an email in July 2018, the FRO reported to the SRO an error committed by the Applicant.

40. By email dated 7 August 2018, the SRO alerted the Applicant that she had missed a deadline for a task he had entrusted her with.

41. This evidence shows that the Applicant was indeed put on notice of her performance shortcomings orally during the period of the first performance appraisal and in writing as of 26 March 2018. The Applicant continued to receive feedback throughout the period of the second performance appraisal, from April to September 2018 as shown in the email correspondence.

42. The Applicant also contends that the SRO pressured her not to rebut the performance appraisal. The Respondent rejects this claim. The Tribunal notes that ST/AI/2010/4/Rev.1 does not provide for a rebuttal process of the performance appraisals of staff members on temporary appointments. Section 6.1 of this Administrative Instruction provides that a performance evaluation shall be issued at the end of the appointment, and sec. 6.2 affords the staff member the opportunity to submit a written explanatory statement. Both documents must be included in the staff member's Official Status File. In this case, the Applicant elected to submit a written explanatory statement which, as agreed with the Management Evaluation Unit, was included in her Official Status File.

43. In conclusion, the evidence shows that while some procedural irregularities occurred in the recording of the Applicant's performance, the overall evaluation of her performance was fair and well-based. She was put on notice of the perceived shortcomings in her performance from early on in her appointment and was provided continuous feedback by her supervisors by way of meetings and email correspondence. To allow the Applicant the chance to improve her performance, her initial contract was extended. However, while the monitoring and feedback continued after the initial extension of her contract, the supervisors identified subsequent shortcomings in the Applicant's performance. While the Applicant may disagree with how her performance was graded, the Tribunal finds no evidence of ulterior motive or ill-intent.

44. The Tribunal therefore finds that the Applicant has failed to establish that the procedural irregularities in the recording of the Applicant's performance appraisal rendered it unlawful. The decision not to extend her temporary appointment beyond 364 days because of poor performance was therefore justified.

Conclusion

45. In light of the above, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 11th day of February 2020

Entered in the Register on this 11th day of February 2020

(Signed)

Nerea Suero Fontecha, Registrar