



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

ANDELIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 19 December 2017, the Applicant requests suspension of action, pending management evaluation, of the decision not to renew her fixed-term appointment (“FTA”) beyond 31 December 2017 pursuant to sections 10.3 and 15.6 of ST/AI/2015/5 (Performance Management and Development System).
2. The application was served to the Respondent who filed his reply on 20 December 2017.
3. On 22 December 2017, the Applicant, without seeking prior leave from the Tribunal, submitted comments on the Respondent’s reply.

Facts

4. The Applicant currently serves as a Coordination Officer (P-4), Jalalabad Field Officer, United Nations Assistance Mission in Afghanistan (“UNAMA”), Department of Peacekeeping Operations (“DPKO”), under an FTA that expires on 31 December 2017.
5. On 15 June 2016, the Applicant electronically acknowledged that her performance review for the 2015-2016 cycle had been conducted, with a rating of “partially meets performance expectations”. The Applicant submitted a rebuttal against this performance rating.
6. The record before the Tribunal shows that as per instruction of the Acting Assistant-Secretary General (“Acting ASG”), Office of Human Resources Management (“OHRM”), the outcome of the rebuttal process was annulled, and the Applicant then agreed upon the constitution of an ad-hoc Rebuttal Panel (“ad-hoc panel”).
7. On 31 March 2017, the Applicant’s First Reporting Officer (“FRO”) during her 2015-2016 and 2016-2017 performance evaluation cycles retired from the service of the Organization.

8. On 3 May 2017, the Applicant submitted her rebuttal statement to the ad-hoc panel examining the rebuttal of her 2015-2016 performance cycle rating.

9. On 10 June 2017, the Applicant electronically acknowledged that her performance review for the 2016-2017 cycle had been conducted, with a rating of “does not meet performance expectations”. On 21 June 2017, the Applicant submitted a rebuttal concerning this rating.

10. On 9 August 2017, the ad-hoc panel submitted its report to the Acting ASG, OHRM, concerning the Applicant’s performance rating for the 2015-2016 cycle. The panel recommended that the Applicant’s rating be maintained as “partially meets performance expectations”.

11. On 5 December 2017, the rebuttal panel constituted to consider the Applicant’s rebuttal of her 2016-2017 performance cycle rating submitted its report to the Chief of Mission Support (“CMS”), UNAMA. The panel recommended, by “majority of consensus”, that the Applicant’s performance rating be changed from “does not meet performance expectations” to “partially meets performance expectations”.

12. By memorandum dated 13 December 2017, the CMS, UNAMA, informed the Applicant of the rebuttal process outcome and more importantly, that “[b]ased on the [rebuttal process outcome, her] fixed term appointment ... [would] not be extended further to sections 10.3 and 15.6 of ST/AI/2015/5 (“Performance Management and Development System”)”.

13. On 19 December 2017, the Applicant requested management evaluation of the decision not to renew her FTA beyond 31 December 2017.

Parties' contentions

14. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The non-renewal decision is unlawful because there are "substantive lapses in the rebuttal process (e.g., the panel failed to interview [her])", and one of the rebuttal panel members noted that her 2016-2017 performance evaluation process was not in accordance with ST/AI/2010/5;
- b. The application of section 10.3 of ST/AI/2010/5 "appears arbitrary as it does not establish [her] failure to rectify performance shortcomings and contradicts the recommendation of the [Rebuttal Panel] which changed [her] performance rating for a higher one". Furthermore, the section "offers a range of administrative actions and does not establish a direct causal link between a 'Partially meets performance expectations' rating and non-renewal of an appointment";
- c. The non-renewal decision "fails to demonstrate the link between ... the recommendation of the Rebuttal Panel and ... the decision of non-renewal of [her] appointment, and appears to be ungrounded in the provisions of ST/AI/2015/5 cited in the said decision and hence without legal merit";

Urgency

- d. If the contested decision is implemented, she will be separated from service on 31 December 2017, namely within 11 days from the date of filing of her request for suspension of action;

Irreparable damage

- e. The non-renewal of her FTA has a direct impact on her conditions of service and will cause irreparable harm which includes loss of employment and of livelihood.

15. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The contested decision is not *prima facie* unlawful. The Applicant did not fully meet performance expectations for two consecutive performance cycles: she received an overall rating of partially meets performance expectations for the 2015-2016 performance period, and of does not meet performance expectations for the 2016-2017 performance period. Rebuttal panels constituted to review the overall ratings given to the Applicant for the two consecutive performance periods did not change the ratings to successfully meets performance expectation. Given that the Applicant had not fully met performance expectations, as confirmed by the rebuttal panels, the decision to not renew her appointment pursuant to Staff Regulation 9.3 and section 10.3 of ST/AI/2010/5 is lawful;

Urgency

b. The application is urgent because the Applicant's appointment expires on 31 December 2017;

Irreparable damage

c. The Applicant has not established irreparable harm and, as per *Nwuke* UNDT/2011/107, *Stephens* UNDT/2011/167 and *Osmani* UNDT/2011/190, any harm she might suffer can be adequately compensated through a monetary award.

Consideration

16. Pursuant to art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure, the Tribunal may suspend the implementation of an administrative decision during the pendency of a management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff

member. These three conditions are cumulative and must, thus all be met for an application for suspension of action to be granted.

Prima facie unlawfulness

17. The Tribunal recalls that the threshold required in assessing this condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Bchir* Order No. 77 (NBI/2013); *Kompass* Order No. 99 (GVA/2015)).

18. With respect to the non-renewal of an FTA, the Tribunal recalls the established jurisprudence of the Appeals Tribunal according to which an FTA does not bear any expectancy of renewal (*Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341). A non-renewal decision can be challenged on the grounds that it is arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (*Said* 2015-UNAT-500; *Assale* 2015-UNAT-534). The staff member alleging that the non-renewal decision is based on improper motives carries the burden of proof with respect to these allegations (*Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503).

19. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal further stressed that “a decision not to renew an FTA can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members”.

20. When considering termination of a staff member’s contract on grounds of poor performance, the Appeals Tribunal, in *Sarwar* 2017-UNAT-757, held that:

72. Generally, termination of an appointment on the grounds of poor or unsatisfactory work performance must be justified by the evidence. It is incumbent on the Secretary-General to provide sufficient proof of incompetence, usually on the basis of a procedurally fair assessment or appraisal establishing the staff member’s shortcomings and the reasons for them. There must be a valid and fair reason for termination based on poor performance. By “valid” one means that the reason for termination must rest on a reasonable basis and sufficient proof, as a matter of objective fact, that the staff member’s performance falls short. Fairness in relation to the substantive reason goes to the weight or sufficiency of the reason - the issue being whether the deficiency was sufficiently

serious to render the continuation of the employment relationship untenable.

73. Whenever the Secretary-General is called upon to decide if a valid and fair reason exists to terminate an appointment for poor performance, he should consider whether the staff member in fact failed to meet the performance standard and if so whether: i) the staff member was aware, or could reasonably be expected to have been aware, of the required standard; ii) the staff member was given a fair opportunity to meet the required standard; and iii) termination of appointment is an appropriate action for not meeting the standard in the circumstances. The processes and standards contained in ST/AI/2010/5 are geared to the specific attainment of these general objectives.

21. It is, therefore, not enough to argue, as the Respondent has done, that the Applicant did not meet performance expectations in two consecutive performance cycles in support of the contested decision. The performance evaluation/rebuttal processes must be examined to determine whether the non-renewal decision was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation.

22. First, the Tribunal notes the Applicant's claim, unchallenged by the Respondent, that the rebuttal panel constituted to examine her 2016-2017 performance evaluation did not interview her. In this connection, the Tribunal observes that section 15.3 of ST/AI/2010/5 provides in its relevant part that "[u]nless geographical location makes it impractical, the [rebuttal] panel **shall** hear the staff member" (emphasis added). The rebuttal panel's report of 5 December 2017 does not mention interviewing the Applicant, and refers to an interview with the Applicant's Second Reporting Officer ("SRO") on 23 August 2017.

23. Second, the evidence on file shows that the Applicant's FRO—who retired on 31 March 2017, namely the last day of the 2016-2017 performance evaluation cycle—did not make herself available for an interview either with the rebuttal panel or with the ad-hoc panel. The rebuttal panel, therefore, had to exclusively rely on information from the Applicant's SRO. The latter *inter alia* shared with the rebuttal panel that he had noted an improvement of the Applicant's performance, which he documented in his comments in the Applicant's 2016-2017 ePAS because he did

not have the authority to change the rating given by the Applicant's FRO and, moreover, he could not discuss the rating with the FRO because she had left the mission on retirement.

24. Third, the rebuttal panel's report of 5 December 2017, flagged several shortcomings in the Applicant's 2016-2017 performance evaluation process, namely: non-compliance with performance evaluation deadlines, lack of documentary evidence that the Applicant had failed to meet the agreed work plan goals and about counselling or mentoring by the Applicant's FRO, absence of an agreed and signed Performance Improvement Plan ("PIP"), that interpersonal issues between the Applicant and her FRO had influence the final rating, and that "[m]anagement should have taken adequate steps in counselling and mentoring" the Applicant.

25. Concerning a PIP and the Applicant's 2016-2017 performance, the SRO wrote the following comments in the Applicant's ePAS:

Staff member has made some progress on her work with UNTRUE. As part of Jalalabad team, she made some joint assessment missions and shared regular reports with the RCO. The staff member briefed me on establishing an Anti-Corruption network, which is a good initiative. Moreover, she brought to the attention of the Unit some economic governance issues. The PIP proposed during the cycle to improve managerial capacity couldn't be implemented as the staff member was away on sick leaves.

26. The above elements brought the rebuttal panel to conclude that the Applicant's 2016-2017 performance cycle rating should be changed (upgraded). There was, however, no unanimity on the rating to be recommended: the Chairperson and the member designated by the head of the department/office/mission were of the view that the new rating should be partially meets performance expectations. The member designated by the staff representatives of the department/office/mission was of the view that the new rating should be successfully meets performance expectations noting in the rebuttal panel's report "that in the absence of any other evidence to support the rating of the FRO, [he] would recommend that the [Applicant] be afforded the rating of 'Meeting

performance expectations' for 2016-2017 as the evaluation process was not in accordance with the provisions outlined in ST/AI/2010/5".

27. In view of the foregoing, the Tribunal finds that *prima facie*, there appear to be several deficiencies in both the contested decision and the processes leading to it, thus leading the Tribunal to conclude that the contested decision is *prima facie* unlawful.

Urgency

28. Both parties have acknowledged that the application is urgent. The Tribunal, therefore, finds that this condition is met. The Applicant has less than a week left before the expiry of her appointment.

Irreparable Damage

29. It is generally accepted that mere economic loss is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage. In each case, the Tribunal has to look at the particular factual circumstances.

30. The Tribunal is satisfied that the non-renewal of the Applicant's FTA would cause more than mere economic harm to her, namely loss of career prospects, self-esteem and an unquantifiable potential harm to her reputation, particularly when the contested decision is alleged to be grounded on performance shortcomings that seemed to not have been properly and timely addressed. Such cannot simply be compensated by the award of damages (cf. *Kasmani* UNDT/2009/017; *Diop* UNDT/2012/029).

31. Since the three cumulative conditions of art. 2.2 of the Statute are met, the request for suspension of action will be granted.

Conclusion

32. In view of the foregoing, it is ORDERED that the decision not to renew the Applicant's fixed-term appointment beyond 31 December 2017 be suspended pending the outcome of the management evaluation.

(Signed)

Judge Rowan Downing

Dated this 27th day of December 2017

Entered in the Register on this 27th day of December 2017

(Signed)

René M. Vargas M., Registrar, Geneva