



Before: Judge Francis Belle

Registry: New York

Registrar: Pallavi Sekhri, Officer-in-Charge

GUENFOUDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Yehuda Goor, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Arabic Verbatim Reporter, with the Department for General Assembly and Conference Management (“DGACM”), had his continuing appointment terminated due to unsatisfactory performance by decision of the Under Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”).

Facts

2. On 30 July 2021, the Applicant was informed of the decision to terminate his continuing contract effective immediately.

3. On 27 August 2021, the Applicant requested management evaluation of the aforementioned decision.

4. On 8 October 2021, the Applicant filed an application before this Tribunal.

5. On 8 November 2021, the Respondent filed his reply.

6. On 1 July 2022, the instant case was assigned to the undersigned judge.

7. By Order No. 65 (NY/2022) of 19 July 2022, the Tribunal invited the parties to a case management discussion (“CMD”), which was held on 26 July 2022 with the participation of the Applicant and Counsel for the Respondent.

8. By Order No. 69 (NY/2022) of 28 July 2022, the Tribunal decided to adjudicate the case based on the papers and instructed the parties to file closing submissions by 8 August 2022.

9. On 5 and 8 August 2022, the Applicant and the Respondent respectively filed their closing submission as per Order No. 69 (NY/2022).

Parties' submissions

10. The Applicant's principal contentions are:

a. The termination of the Applicant's appointment due to unsatisfactory service is based on two flawed and biased performance evaluations for the 2019-2020 and 2020-2021 performance cycles. Before, the Applicant had eight consecutive good evaluations, no performance shortcomings and was never recommended for a performance improvement plan ("PIP");

b. The alleged performance shortcomings were only ever identified after the new Chief of the Arabic Verbatim Reporting Section took office and became the Applicant's first reporting officer ("FRO"). The Applicant had an ongoing conflict with his FRO, against who he filed a complaint of harassment and abuse of authority. Thus, the FRO was in no position to do an objective, unbiased and fair evaluation of the Applicant's performance;

c. The Applicant's termination was a retaliatory measure following multiple complaints of abuse of authority and workplace harassment made by the Applicant against his FRO, and against the unhealthy and unhygienic working conditions in the UNITAR building;

d. The Applicant rebutted the 2019-2020 performance appraisal, which, however, was upheld by a biased and partial rebuttal panel formed by members of the same Administration that colluded to terminate the Applicant's appointment. Without faith in the process, the Applicant did not rebut the 2020-2021 performance evaluation because he was sick during most part of the evaluation cycle and for fear of the same outcome;

e. The Applicant refused to partake in the performance evaluation process and to engage in the suggested PIPs because they were biased, false, demeaning, and not aiming to help the Applicant, but rather created as preparatory measures for the termination of the Applicant's appointment;

f. The Administration rushed to terminate the Applicant's appointment while he was on sick leave, thus violating staff rule 6.2 by not allowing him the right to use all of his sick leave entitlements; and

g. The retaliation is also clear from the Administration unlawfully confiscating a large part of the Applicant's separation benefits.

11. The Respondent's principal contentions are:

a. The Applicant's continuing appointment was lawfully terminated based on unsatisfactory service in compliance with staff rule 9.6(c)(ii) and staff regulation 9.3(a)(ii);

b. The Applicant tries to have adjudicated a variety of unrelated issues that are not properly before the Dispute Tribunal as a matter of law. Specifically, the allegations of prohibited conduct against the Applicant's supervisor and the allegations regarding the remittance of certain amounts of his salary to the United Nations Federal Credit Union ("UNFCU") due to unpaid debts. Those issues are not presently before the Dispute Tribunal, were not subject to management evaluation, and are outside the scope of the application:

i. Regarding the Applicant's allegations of prohibited conduct against his supervisors, conduct is not an administrative decision and challenges to conduct brought to the Tribunal in the first instance are not receivable. The Applicant has not exhausted internal remedies in accordance with ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) and the Dispute Tribunal is not authorized to pass judgment on conduct before an administrative decision with respect to the same has been made. Accordingly, the Dispute Tribunal should not make any inferences from these conduct-related allegations as to the legality of the decision to terminate the Applicant's appointment;

ii. In addition, a prior harassment complaint brought by the Applicant against his FRO was already investigated by an investigation panel, which concluded that the allegations were unsubstantiated. The Applicant did not contest the outcome of that investigation as required under ST/SGB/2019/8. The outcome of the investigation is therefore not before the Dispute Tribunal, was not subject to management evaluation, and is not part of this case; and

iii. Similarly, the Applicant's request for a remedy in relation to the remittance of certain portions of his salary and other payments to the UNFCU is not part of this case. It constitutes a distinct administrative decision that was not subject to management evaluation. That decision is outside the scope of the present case because it involves the banking relationship between the Applicant and UNFCU, and the latter's recourse in the case of unpaid debts;

c. The procedures for identifying and addressing performance shortcomings and unsatisfactory performance are set out in ST/AI/2010/5 (Performance management and development system). Sec. 10.4 provides that a single overall performance rating of "does not meet performance expectations" is sufficient grounds for termination of appointment, assuming a PIP was initiated not less than three months before the end of the performance cycle. Such termination is permitted irrespective of the staff members' prior performance ratings and termination for unsatisfactory service is also lawful if a staff member's performance shortcomings were not rectified following implementation of remedial measures;

d. The Applicant's performance ratings in the 2019-2020 and 2020-2021 performance cycles were objective, fair, and well-grounded, and the Applicant's due process rights were fully respected within the evaluation process. The Applicant was constantly made aware of his performance shortcomings, as his supervisors made repeated attempts to address them with the Applicant and to help him improve his performance. However, the

Applicant refused to cooperate, declined all remedial measures offered and did not meet the targets set in the proposed PIPs;

e. In fact, the Applicant has expressly refused to engage with his supervisors on performance issues, in acts that not only reflect a lack of cooperation, lack of collegiality, and poor performance, but also potential insubordination, all of which cannot be tolerated in the Organization;

f. Furthermore, the Applicant has not established that any procedural irregularities tainted his performance evaluation process, which has been carefully documented, was transparent and objective. The fact that the Applicant disagreed with his supervisor's professional judgement of his work is not a basis for relief. The fact that the Applicant did not engage or consent with the PIPs is irrelevant since lack of cooperation by a staff member does not create a procedural irregularity. The Organization met its obligation by providing the Applicant the opportunity to participate in the development of the PIPs and their implementation, and the Applicant's refusal cannot benefit him from his own obstruction of that process;

g. The Applicant rebutted his 2019-2020 rating of "partially meets expectations", but the rating was upheld by a duly-constituted rebuttal panel that found that the Applicant was made aware of his performance shortcomings and that his supervisors took remedial actions to address those deficiencies. The Applicant did not rebut his 2020-2021 performance rating of "does not meet performance expectations". Therefore, both of these evaluations are binding on the Applicant and on the administration;

h. In addition, it is also well-settled that the Dispute Tribunal cannot replace its judgement for that of the Secretary-General in connection with performance appraisal, and that its jurisdiction is limited to review whether the decision was lawful, and whether the Applicant's rights respected;

i. The Applicant's claims of irregularity regarding his sick leave entitlements are without merit. The Applicant was encouraged prior to the termination of his appointment to take advantage of sick leave. However, the Applicant expressly declined to take sick leave and he cannot complain about sick leave entitlements that he refused to take advantage of;

j. Moreover, the fact that the Applicant did not exhaust his sick leave entitlement prior to separation does not grant him the right to continue working in the Organization after a termination decision has been lawfully made. Under staff rule 9.11(a)(v), a termination is effective on the date specified in the letter and entitlement to sick leave ceases on the same date;

k. The Applicant's claims of an intentional delay resulting from alleged retaliation in the payment of his benefits have no merit and are unsupported. It is a technical matter over which the Applicant's supervisor, who was allegedly retaliating against him, has no control or influence; and

l. Finally, the Applicant is not entitled to any compensation as (i) the decision was lawful and, (ii) he did not produce any evidence to show that he suffered any harm resulting from his termination apart from his own assertions, which is not sufficient under sec. 10.5(b) of the Tribunal's Statute.

Consideration

Defining the scope of the instant judicial review

12. The Applicant identifies the contested decision as the decision to terminate his continuing appointment, which is also confirmed in his request for management evaluation. However, when arguing that this termination decision was unlawful, the Applicant contends that it was based on a flawed performance appraisal process and makes various submissions in this regard.

13. The Tribunal notes that albeit interrelated, the decision to terminate the Applicant's appointment is an entirely different and independent decision from any decision taken in the context of the performance appraisal process. It is governed by different legal provisions and administrative issuances and also defined by

different sets of facts. Accordingly, as the Applicant has not challenged any decisions concerning the performance appraisal in the present case, the Tribunal cannot undertake a judicial review of any such decisions in this context (*Nadeau* UNDT-2020-013, para. 34).

14. Similarly, the issues with the alleged delay in payment of the separation benefits, and the remittance of part of the amount to the UNFCU, were not subject to management evaluation and, therefore, cannot be addressed by the Tribunal in the context of the instant application. Likewise, the outcome of the investigation of prohibited conduct against the Applicant's FRO was not subject to management evaluation. Accordingly, the Tribunal will not undertake a judicial review of the outcome of the investigation into the Applicant's FRO.

15. Hence, the scope of judicial review in this case is limited to reviewing whether the Applicant's appointment was lawfully terminated based on unsatisfactory service and in full compliance with staff rule 9.6(c)(ii) and staff regulation 9.3(a)(ii).

Whether the termination of the Applicant's appointment was lawful

16. The Applicant was notified on 6 May 2021 that based on his 2020-2021 overall rating of "does not meet performance expectations" and the 2019-2020 "partially meets performance expectations", the DGACM would be seeking the termination of his continuing appointment in accordance with staff rule 9.6(c)(ii) and staff regulation 9.3(a)(ii). These rules provide the following:

9.6(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

...

(ii) **Unsatisfactory service**; (emphasis added)

9.3(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

...

(ii) **If the services of the staff member prove unsatisfactory;** (emphasis added)

17. In making the decision to terminate the Applicant' appointment, the administration would have had to ensure that the necessary elements of legality are in place before embarking upon termination as a course of action, and it is the role of the Tribunal to determine the lawfulness of said decision.

18. In this regard, UNAT's jurisprudence provides guidance, as follows:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and also consider whether the decision is absurd or perverse. (*Sarwidi* 2010-UNAT-084)

19. Accordingly, performance standards generally fall within the prerogative of the Secretary-General and, unless the standards are manifestly unfair or irrational, the Tribunal's role is not to consider the correctness of the decision made by the Secretary-General, and neither to substitute it for its own decision (*Sarwar* 2017-UNAT-1034, para. 74). The role of the Tribunal is limited to determining whether the proper procedures have been applied (*Said* 2015-UNAT-500, para. 40).

20. Having examined the evidence on record, the Tribunal considered the relevant facts, including the Applicant's performance evaluations, the exchange of emails between the Applicant and his FRO regarding the Applicant's performance, the suggested PIPs, and the rebuttal process. Particularly, the fact that the Applicant rebutted the 2019-2020 "partially meets performance expectations" overall rating, which was however upheld by an independent rebuttal panel, and the fact that the Applicant opted to not rebut the 2020-2021 "does not meet performance expectations" overall rating.

21. However, despite of the Applicant's disagreement with his performance evaluations, both overall ratings are binding on the Applicant, the Administration, and this Tribunal, which cannot undertake a "*de novo*" review of the Applicant's ratings or of the performance process in the present context.

22. In addition, documentary evidence shows that the Applicant was given several opportunities to address the performance shortcomings raised by his FRO and SRO and to engage in the suggested PIPs to improve his work performance. However, the Applicant refused to participate in the performance-related discussions proposed by his FRO, to accept the PIPs and offerings of support, to discuss other remedial measures to address his performance shortcomings, and to participate in the mid-point review meeting. As a result, the Applicant's performance did not improve.

23. The Applicant alleges that his FRO's assessment of his performance is biased, retaliatory and wrongly motivated, as well as demeaning and offensive for disregarding his several years of experience as a translator and verbatim reporter. However, there is no evidence on record that confirms the alleged inaptitude of the FRO to evaluate the Applicant, nor of the alleged wrongful motivations. The fact that the Applicant had made a harassment complaint against the FRO after the first PIP was suggested, which was later found unsubstantiated, is not proof of the alleged retaliation.

24. In this regard, the Tribunal notes that the Applicant made similar allegations in his rebuttal of the 2019-2020 performance overall rating. However, the independent rebuttal panel decided to uphold the rating of "partially meets performance expectations" on the basis that there was evidence supporting the FRO and SRO's findings that the Applicant was performing below the required level, that the Applicant was made aware of these performance shortcomings, and that his supervisors took appropriate remedial actions to address those shortcomings. The Applicant did not challenge said decision, which, as stated above, is now binding.

25. Likewise, the Applicant's allegations of inaptitude, bias, and lack of independence of the rebuttal panel are unsubstantiated. The rebuttal panel does not owe allegiance to the Administration, as it is its role to conduct a thorough and independent review of the evaluation process, which was based on interviews and documentary evidence.

26. Therefore, the two consecutive underperformance ratings alongside the Applicant's refusal to engage with his supervisors in improving his performance through the available remedial measures, left the Administration with the lawful option of terminating the applicant's appointment.

27. While other options may have been available to the Secretary-General, it cannot be argued that termination was not a rational response to the two subsequent unsatisfactory performances. The Applicant's refusal to rebut one of these performance evaluations, to adhere to the proposed PIPs, and to engage with his supervisors to address his performance shortcomings certainly did not favour as well. In fact, it can be argued that such attitude showed a lack of commitment that only added value to the course of action chosen by the Administration.

28. Therefore, the Applicant's unsatisfactory service is well-substantiated and the procedure adopted by the Secretary-General, as a result, was in no way flawed based on the information before the Tribunal.

29. Accordingly, it is considered that the contested decision is entirely lawful and appropriate, having followed the proper legal procedures, as well as proportionate, since, when faced with the performance evaluations, the Applicant did nothing to redeem his position or to improve his performance. Thus, the Secretary-General's decision was also neither absurd nor perverse.

Whether the Applicant was entitled to exhaust his sick leave entitlements before the termination of his appointment

30. The Applicant argues that his contract should not have been terminated given his medical condition and not before he had exhausted all of his sick leave entitlements.

31. Having examined the evidence on record, the Tribunal notes that the Applicant was encouraged to take sick leave prior to the termination of his appointment, which he refused. While the effort to continue working is commendable, it cannot serve as an excuse for poor performance and neither as fuel against an administration who only encouraged him to take advantage of sick leave.

32. In addition, email exchanges on record show that the Applicant only applied for sick leave on 12 May 2021, thus after being informed on 6 May 2021 that DGACM was seeking to terminate his appointment. The Applicant cannot now argue that on becoming ill and seeking sick leave, the process that had been set in train as a result of his performance in the previous two performance cycles should have brought the termination to a halt.

33. This is not a case where the Administration made an allegation against the Applicant while he was on sick leave and, consequently, he was unable to mount a defence or make himself available for an interview that may have affected the outcome of the matter. The Applicant was given resources and the opportunity to improve his performance. On his performance being found unsatisfactory, the process was put in train for his termination. There was therefore no good reason for the Administration not to proceed with the action of termination.

34. Furthermore, the Applicant had no right to continue working in the Organization after a termination decision had been lawfully made simply because he had not yet exhausted his sick leave quota. Under staff rule 9.11(a)(v), a termination is effective on the date specified in the letter of termination and entitlement to sick leave ceases on the same date. There is no requirement under the applicable rules to extend a terminated continuing appointment for the purpose of sick leave.

35. The Tribunal therefore finds that the process adopted and ending in termination was lawful, and that there was no good reason to delay it to accommodate the remaining of the Applicant's sick leave entitlement.

Conclusion

36. In view of the foregoing, the Tribunal DECIDES to reject the application.

(Signed)

Judge Francis Belle

Dated this 24th day of August 2022

Entered in the Register on this 24th day of August 2022

(Signed)

Pallavi Sekhri, Officer-in-Charge, New York