



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

PASCAL

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 staff member of the Department of Management Strategy, Policy and Compliance (“DMSPC”), filed an application with the Tribunal contesting the decision to terminate his permanent appointment due to unsatisfactory service.
2. The Respondent in his reply submits that the contested decision is legal, reasonable, and procedurally fair.
3. For the reasons stated below, the Tribunal finds that the contested decision is lawful and rejects the application.

Facts

4. The Applicant, a successful candidate of the National Competitive Recruitment Examination, joined the Organization on 30 August 2000 as an Associate Finance Officer at the P-2 level. He was granted a permanent appointment on 1 August 2002.
5. From July 2004 to January 2005, the Applicant served in the Payroll Unit at the Office of Programmed Planning, Budget and Accounts (“OPPBA”), Department of Management (“DM”). On 1 January 2005, the Applicant was appointed to the position of Accountant in the former Accounts Division at OPPBA. The Applicant continued to serve in that Division through 31 December 2018 with several lateral moves.
6. On 1 January 2019, the Applicant was reassigned to the position of Management and Programme Analyst at the P-3 level in the Organizational Performance Measurement Section (“OPMS”) of the Monitoring and Evaluation Service in the Business Transformation and Accountability Division (“BTAD”), DMSPC.

7. In the 2017-2018 and 2018-2019 performance cycles, the Applicant received an overall rating of “partially meets performance expectations”. The Applicant rebutted the 2018-2019 performance evaluation, but the Rebuttal Panel maintained the rating.

8. In the 2019-2020 performance cycle, the Applicant received an overall rating of “partially meets performance expectations”. The Applicant did not rebut this rating.

9. The Applicant was placed on a Performance Improvement Plan (“PIP”) from 22 October 2020 to 15 March 2021. The PIP included seven specific areas for improvement which were divided into 23 target actions. At the conclusion of the 2020-2021 cycle, it was determined that the Applicant only met six of the 23 targets identified in the PIP. Consequently, the PIP was unsuccessful.

10. In the 2020-2021 performance cycle, the Applicant received an overall rating of “does not meet performance expectations”. The Applicant did not rebut this rating.

11. On 29 July 2021, the Director, BTAD/DMSPC submitted to the Central Review Bodies (“CRBs”) a proposal for the termination of the Applicant’s permanent appointment for unsatisfactory service.

12. On 24 August 2021, the members of the Central Review Committee (“CRC”) were appointed by the Secretariat of the CRBs. Following a review of the proposal for termination including, *inter alia*, background information and the Applicant’s comments on the proposal, the CRC unanimously concluded that “there was sufficient ground for the termination of the permanent appointment for unsatisfactory service” and agreed with the recommendation for termination of the Applicant’s permanent appointment.

13. By memorandum of 7 October 2021, the Chairman of CRC transmitted the CRC’s report setting out its considerations and conclusions including supporting documents to the Assistant Secretary-General for Human Resources for her consideration.

14. By letter dated 8 October 2021, the Under-Secretary-General, DMSPC (“USG/DMSPC”) informed the Applicant of the decision to terminate his permanent appointment with immediate effect due to unsatisfactory service. The letter indicates, *inter alia*, that the Applicant would receive termination indemnity for the maximum amount permitted pursuant to Annex III (c) of the Staff Rules and compensation in lieu of notice pursuant to staff rules 13.1(a) and 9.7(d).

15. On 5 November 2021, the Applicant requested management evaluation of the contested decision.

16. On 8 November 2021, the Applicant filed an application for suspension of action, which was rejected by Order No. 107 (NY/2021) of 11 November 2021.

17. On 20 January 2022, the Applicant was informed of the outcome of his request for management evaluation. The contested decision was upheld.

18. On 23 February 2022, the Applicant filed the present application.

19. On 25 March 2022, the Respondent filed his reply.

20. On 20 February 2023, the Applicant filed a rejoinder.

Consideration

Applicable law

21. Staff regulation 9.3(a)(ii) and staff rules 9.6(c)(ii) and 13.1(b)(i) provide that the Administration may terminate a permanent appointment for unsatisfactory service. Under sec. 4.10 of ST/SGB/2011/7 on CRBs, requests for termination of permanent appointment under these provisions are reviewed by a CRC following the procedure established in ST/AI/222¹, before the Secretary-General makes a decision on whether to terminate a permanent appointment.

22. The Appeals Tribunal has recalled that in examining the validity of the Administration’s exercise of discretion, the Dispute Tribunal’s scope of review is

¹ ST/AI/222 entitled Procedure to be followed in cases of termination of permanent appointment for unsatisfactory services is dated 10 December 1974.

limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see *Abusondous* 2018-UNAT-812, para. 12). In this regard, the Dispute Tribunal can “consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General” (see *Sanwidi* 2010-UNAT-084, para. 40).

23. Having reviewed the parties’ submissions, the Tribunal notes that, on the one hand, the Applicant raises allegations in respect of the procedures to assess his performance and to terminate his permanent appointment. On the other hand, the Respondent adduces evidence of performance shortcomings in the Applicant’s employment for four performance cycles including a rating of “does not meet expectations” for the 2020-2021 performance cycle. He also provided relevant information concerning the procedure for the termination of the Applicant’s appointment.

24. In view of the foregoing, in determining the lawfulness of the contested decision, the Tribunal will examine the following issues:

- a. Whether the Applicant’s performance was evaluated in a fair and objective manner; and
- b. Whether the Administration followed a proper procedure in making the contested decision.

Whether the Applicant’s performance was evaluated in a fair and objective manner

25. The Tribunal recognizes that its role is not to review *de novo* the Administration’s evaluation of the Applicant’s performance but rather to determine whether the rules and procedures governing performance evaluation were complied with (see *Ncube* UNDT-2016-069, para. 127). In this respect, the Tribunal recalls that sec. 2.1 of ST/AI/2010/5 on the Performance Management and Development

System requires that staff members' performance be managed or evaluated in a "fair and equitable manner". This means that performance evaluation should be objective and bias-free.

26. Section 10 of ST/AI/2010/5 sets forth the legal framework for addressing performance shortcomings and unsatisfactory performance providing that (emphasis added):

10.1 During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include **counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan**, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

10.2 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as "partially meets performance expectations", **a written performance improvement plan shall be prepared by the first reporting officer**. This shall be done in consultation with the staff member and the second reporting officer. **The performance improvement plan may cover up to a six-month period.**

10.3 **If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1**, a number of administrative actions may ensue, including the withholding of a within-grade salary increment pursuant to section 16.4, the non-renewal of an appointment or **the termination of an appointment for unsatisfactory service in accordance with staff regulation 9.3.**

10.4 Where at the end of the performance cycle performance is appraised overall as "does not meet performance expectations", the appointment may be terminated as long as the remedial actions indicated in section 10.1 above **included a performance improvement plan, which was initiated not less than three months before the end of the performance cycle.**

27. In the present case, the Applicant claims that his performance appraisals for the period from 2013 to 2018 were conducted “under dark clouds” with respect to his past performance. He asserts that said period was very challenging in an uncomfortable and unproductive working environment, which ended with the COVID-19 era in 2021. The Applicant also argues that over the last two performance cycles, he completed all assignments received within the specified timeframe but that he continued to receive unsatisfactory performance evaluations regardless of his efforts. The Applicant further states that his supervisor was focused on his “alleged weaknesses for ulterior motives that [he] cannot explain”.

28. The Tribunal notes that the contested decision is based on the Applicant’s records for the 2019-2020 and 2020-2021 performance cycles. The Applicant received a rating of “partially meets performance expectations” for the 2019-2020 cycle and a rating of “does not meet performance expectations” for the 2020-2021 cycle.

29. The Administration also referred in the contested decision to the Applicant’s records for the 2017-2018 and 2018-2019 performance cycles in which he received ratings of “partially meets performance expectations”, as evidence of his performance shortcomings. The Tribunal will thus review the evidence on performance management.

30. The Tribunal notes that during the 2019-2020 performance cycle, the Applicant was advised on multiple occasions to improve his work ethic and productivity. He was also put on notice of the need to request approval prior to taking leave or unilaterally prolonging his leave. The evidence shows that his First Reporting Officer (“FRO”) met with the Applicant to discuss unauthorized absences and performance shortcomings. However, the Applicant’s performance did not improve.

31. At the end of the 2019-2020 performance cycle, the Applicant was assessed as meeting only two of his four goals, and he was rated “unsatisfactory” in the core value of Professionalism and “requires development” in the core competency of Teamwork. The Applicant obtained an overall rating of “partially meets expectations”.

32. During the 2020-2021 cycle, the Applicant’s performance continued to deteriorate. The evidence shows that his work required multiple corrections and he continued to be absent from work without prior notice or approval. The Tribunal notes that several meetings were set up by the FRO to provide feedback and guidance to the Applicant following the submission of assignments that were below standard.

33. At the midpoint review of the 2020-2021 performance cycle, the Applicant was placed on a PIP which included seven areas for improvement divided into 23 specific target actions. The PIP lasted five months covering the period from 22 October 2020 to 15 March 2021. During the PIP period, his FRO held regular meetings with the Applicant to review the progress against the PIP. At the conclusion of the PIP period, it was determined that the Applicant only met six of the 23 target actions identified in the PIP, which was therefore deemed unsuccessful.

34. At the end of the 2020-2021 performance cycle, the Applicant was assessed as only achieving one of his four goals, partially achieving another one, and not achieving the two other goals. He was rated “unsatisfactory” in the core value of Professionalism as well as in the core competencies of Communication and Teamwork. He was rated “requires development” in the core competency of Client Orientation. The Applicant obtained an overall rating of “does not meet expectations”.

35. While the Applicant disagreed with the assessment of his performance, the evidence shows that the Applicant only rebutted his 2018-2019 performance evaluation which ended up being maintained by the Rebuttal Panel and that he did

not rebut his performance evaluations for the 2017-2018, 2019-2020 and 2020-2021 cycles.

36. It is clear that the Applicant's FRO and Second Reporting Officer ("SRO"), as well as his Additional Supervisors, provided him with performance guidance and feedback. The evidence shows that the Administration assisted the Applicant to improve his performance by calling his attention to performance shortcomings, undertaking performance discussions, providing advice, and coaching on performance issues in line with secs. 10.1 and 10.2 of ST/AI/2010/5 and by implementing a PIP as required by secs. 10.2 and 10.4 of the same AI.

37. Under such circumstances and based on the evidence on the record discussed above, the Tribunal is satisfied that the Applicant's performance was evaluated in a fair and objective manner in accordance with sec. 10 of ST/AI/2010/5 and that the Applicant's due process rights were respected.

Whether the Administration followed a proper procedure in making the contested decision.

38. The procedure to be followed in cases of termination of the permanent appointment of a staff member for unsatisfactory services is set forth in ST/AI/222, as amended by ST/SGB/2011/7, particularly sec. 4.10. In fact, following the abolition of the Appointment and Promotions Board, the relevant Central Review Bodies carry out the review of proposals for the termination of permanent appointments for unsatisfactory service under staff regulation 9.3 (a)(ii) and staff rule 13.1(b)(i), and advise the Secretary-General as to whether the conditions for such termination are met.

39. The ST/AI/222 provides in its relevant part that (emphasis added):

2. In order to ensure that the review of a proposal to terminate a permanent appointment on the grounds of unsatisfactory service is conducted in a way that will satisfy **the requirements of due process, the proposal shall be referred to a joint review body for advice before the Secretary-General takes a decision on it.**

...

4. The proposal for termination, together with supporting evidence, **shall be submitted in writing to the joint review body** prior to its consideration of the case. A copy of this material shall, at the same time, be provided to the staff member concerned.

5. The joint review body shall base its deliberations on the proposal placed before it and shall advise the Secretary-General **whether or not, in its opinion, there is sufficient ground for the termination of the permanent appointment** for unsatisfactory services under staff regulation 9.1(a).

6. The joint review body may request any member of the Secretariat to provide information, either orally or in writing, relevant to its consideration of the case.

7. The staff member concerned shall be afforded a reasonable opportunity **to comment on the proposal for termination** or on any matter relating to the case and to request that information which he considers to be relevant to the case be obtained from specified staff members. The joint review body shall hear the staff member in person, whenever it considers this feasible.

...

9. The joint review body **shall adopt a report that includes a statement of its considerations, as well as its conclusions and recommendations.**

10. The report of the joint review body shall be transmitted to the Secretary-General through the Appointment and Promotion Board.

11. In cases where the **decision of the Secretary-General is to terminate the permanent appointment, the staff member shall be given in the notice of termination a statement of the reasons** for the Secretary-General's decision and the considerations, conclusions and recommendations of the joint review body.

40. The Tribunal notes that the Director, BTAD/DMSPC submitted to the CRBs a proposal for the termination of the Applicant's appointment for unsatisfactory service in line with para. 2 of ST/AI/222. The proposal was based on the Applicant's overall rating for the 2019-2020 and 2020-2021 performance cycle and referred, *inter alia*, to the remedial actions put in place including the implementation of a PIP, as required by sec. 10.1 of ST/AI/2010/5. The Tribunal is thus satisfied that

the requirements under secs. 10.3 and 10.4 of ST/AI/2010/5 for proposing the termination of the Applicant's appointment were met.

41. The evidence shows that the CRC was provided with the documentation submitted by the Director, BTAD/DMSPC including the Applicant's performance documents, his performance improvement plan, and e-mail correspondence. The CRC afforded the Applicant a reasonable opportunity to comment on the proposal for termination in line with paras. 4 and 7 of ST/AI/222.

42. The Tribunal notes that the CRC interviewed the Applicant as well as his FRO and his two Additional Supervisors for the 2019-2020 and 2020-2021 performance cycles. It also interviewed the Applicant's FRO for the performance cycles covering the periods from 2013-2014 to 2018-2019.

43. Following the interviews, the CRC met to deliberate on the proposal. In its deliberation, the CRC noted "a lack of productivity in the Applicant's performance" and considered that due process had been followed in accordance with ST/AI/2010/5 with regards to "identifying and addressing performance shortcomings and unsatisfactory service".

44. The CRC unanimously concluded that there was sufficient ground for the termination of the Applicant's permanent appointment for unsatisfactory service and recommended the termination of his appointment to the Secretary-General.

45. The USG/DMSPC, in the exercise of her delegated authority, accepted the CRC's recommendation and issued the Applicant a termination notice which provides, *inter alia*, that the Applicant would receive termination indemnity for the maximum amount permitted pursuant to Annex III (c) of the Staff Rules and compensation in lieu of notice pursuant to staff rules 13.1(a) and 9.7(d).

46. In relation to the procedure to terminate his appointment, the Applicant contends that "the term and mandate of the Committee constituted to review the ... termination of his permanent employment have expired and as a result, any recommendation from the CRB was null and void". In this respect, the Tribunal notes that the members of the CRC were appointed for the period from

1 January 2021 to 31 December 2022. Therefore, since the Applicant's proposal for termination was reviewed by the CRC during September and October 2021, the Applicant's claim is unsubstantiated.

47. With respect to the Applicant's allegations that he served the Organization for 21 years and that he was only two years away from satisfying the requirements for full retirement when he was terminated, the Tribunal considers that his claims are unrelated to the performance issues and that as such, they are not relevant for the review of the legality of the contested decision.

48. In light of the above, the Tribunal finds that the Administration properly followed the relevant procedures to address performance shortcomings and for the termination of the Applicant's permanent appointment for unsatisfactory service. Consequently, the Tribunal determines that the contested decision is lawful.

Conclusion

49. In view of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joëlle Adda

Dated this 21st day of March 2023

Entered in the Register on this 21st day of March 2023

(Signed)

Isaac Endeley, Registrar, New York