



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/040

Judgment No.: UNDT/2011/134

Date: 28 July 2011

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

BERGER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Duke Danquah, OSLA

Amal Oummih, OSLA

Counsel for Respondent:

Bettina Gerber, UNOG

Introduction

1. On 25 July 2011, the Applicant filed with the United Nations Dispute Tribunal an application requesting it to suspend, during the pendency of the management evaluation, the implementation of the decision not to extend his appointment beyond its expiration date on 31 July 2011.

Facts

2. The Applicant joined the United Nations Office at Geneva (“UNOG”) on 3 June 2009 as a Security Officer, at level G-2, in the Security and Safety Section. After a three-month break in service, the Applicant returned to his position on 13 December 2010 under a temporary appointment which was subsequently extended.

3. On 9 June 2011, the Applicant met with his supervisors Lieutenant L. and Lieutenant D. During this meeting, he was given and invited to sign his performance appraisals for the months of April and May 2011. In both appraisals, his performance was rated “[n]ot satisfactory”. The Applicant objected to these ratings and refused to sign the appraisals.

4. Also on 9 June 2011, the Applicant submitted a written complaint to the Director of the Division of Administration, alleging that he had been subjected to harassment and abuse of authority by two of his supervisors Sergeant J. and Sergeant L.

5. By an email of 12 July 2011, the Applicant was notified that, “[i]n view of his latest performance appraisals”, it had been decided not to extend his appointment beyond its expiration date on 31 July 2011.

6. On 20 July 2011, the Applicant requested management evaluation of the decision not to extend his appointment and, on 25 July, he filed his application for suspension of action with the Tribunal. The Respondent submitted his reply on 27 July 2011.

Parties' contentions

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

Prima facie unlawfulness

a. It was decided not to extend the Applicant's appointment based on his latest performance appraisals. However, the procedure followed to appraise the Applicant's performance in April and May 2011 was flawed. On 9 June 2011, he was asked to sign appraisals which indicated that his performance had been unsatisfactory in spite of the fact that another supervisor, Sergeant C., had previously rated his performance as "satisfactory". Additionally, although performance appraisal reports of temporary UNOG security staff are first completed by sergeants, this was not applied in his case. Lastly, the appraisals are generally not in compliance with section 6 of administrative instruction ST/AI/2010/4 (Administration of temporary appointments), which deals with performance evaluation of temporary staff;

b. The negative performance appraisals were influenced by extraneous factors. Based on the chronology of events that took place after the Applicant had filed a written complaint against his supervisors, a reasonable inference can be drawn that the decision not to extend his appointment was retaliatory in nature;

Urgency

c. The Applicant's appointment expires on 31 July 2011;

Irreparable damage

d. The Applicant and his family rely on his income, which supplements his modest pension income;

e. No monetary amount could adequately compensate the damage to the Applicant's professional reputation and emotional harm, given that he

is three years away from the mandatory retirement age and has no realistic career prospects.

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

Prima facie unlawfulness

a. The decision not to extend the Applicant's appointment beyond its expiration date is lawful. His performance for the months of April and May 2011 was appraised in accordance with the provisions of administrative instruction ST/AI/2010/4. The Applicant was well aware of his terms of reference. A few incidents occurred during the months of April and May 2011 and, in spite of several reminders of his professional obligations, he did not improve his performance;

b. Since temporary security officers often change functions and locations, they work under the supervision of different sergeants at the G-5 level who, in turn, report to lieutenants at the G-6 level. Thus, lieutenants evaluate the performance of security officers in coordination with the sergeants who directly supervised the officers concerned. In line with this procedure, the Applicant's direct supervisors, Sergeants A., J. and O., rated the Applicant's performance for the month of April 2011, then Lieutenants L. and D. prepared his final rating. Likewise, Sergeants A., J., L. and D. S. rated the Applicant's performance for the month of May 2011 before Lieutenants L. and D. issued the final evaluation document. Two of the sergeants who evaluated the Applicant's performance for May 2011 rated it "insufficient" and one of the sergeants who gave him the rating of "satisfactory" had supervised the Applicant for three days only;

Urgency

c. The requirement of particular urgency is not satisfied. The Applicant was well aware of the fact that temporary appointments do not carry any expectancy of renewal and he was informed on 12 July 2011 that his would not be extended beyond its expiration date;

Irreparable damage

d. There is no cogent evidence that the Applicant will suffer irreparable harm. The Applicant has been serving the United Nations only since 2009 and always under short-term appointments. He is not a career staff but a retiree who has been working for short periods of time;

e. There is not indication that the implementation of the contested decision would negatively affect his health;

f. The Applicant is already in receipt of a pension from a former employment.

Consideration

9. In accordance with article 2.2 of its Statute, the Tribunal may suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision where the decision appears to be *prima facie* unlawful, the matter is of particular urgency and the Applicant would suffer irreparable damage if the decision in question is not suspended.

Prima facie unlawfulness

10. As the Tribunal held in *Corcoran* UNDT/2009/071, the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see also *Corna* Order No. 90 (GVA/2010)). The unlawfulness may result from the fact that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith (see, e.g., *Jaen* Order No. 29 (NY/2011), *Hashimi* Order No. 93 (NY/2011), *Villamorán* UNDT/2011/126).

11. At this juncture, it should be recalled that, pursuant to staff regulation 4.5(b) and staff rule 4.12(c), temporary appointments do not carry any expectancy of renewal or conversion. This notwithstanding, whenever the Administration

decides not to extend an appointment on the grounds of poor performance, the Tribunal has to verify if the Administration complied with the relevant procedures (see *Eldam* UNDT/2010/133, *Jennings* UNDT/2010/213).

12. In addition, the Tribunal recalls the principle that the Administration is bound by its own rules (*Lorand* Order No. 93 (GVA/2010)).

13. Section 6 of administrative instruction ST/AI/2010/4 (Administration of temporary appointments) is the applicable law for the purpose of appraising the performance of staff holding temporary appointments. This section states:

6.1 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. 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.

6.2 A staff member who disagrees with the performance rating given at the end of his/her temporary appointment may, within seven 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. The performance appraisal form and the explanatory statement shall become part of the official status file of the staff member.

14. The above provisions foresee only a few procedural requirements which are not at stake in the present case. However, the Respondent concedes in his reply that, “[a]s the direct supervisors of G-2 security agents often change, the lieutenants evaluate the performance of the security agents in coordination with the sergeant(s) who directly supervised the staff member concerned”. He further contends that this “procedure” was applied to the Applicant’s performance appraisals for April and May 2011.

15. The Tribunal observes that the “Performance Evaluation Review” documents which had been prepared, in the Respondent’s words, “after consultation of all the sergeants who had ... directly supervised the Applicant in

his successive missions” and which were given to the Applicant on 9 June 2011 are both signed by Lieutenant L. and Lieutenant D. and dated 9 June 2011.

16. On the other hand, it is clear from the documents submitted by the Respondent that all but two evaluation forms completed by sergeants postdate the evaluations prepared by the lieutenants. Only the form completed by Sergeant C., who rated the Applicant’s performance as “fully satisfactory”, is dated 30 May 2011. Another form, completed by Sergeant L., bears the date of “22/05/2011”, but this date seems to be erroneous in view of the period covered by the evaluation, that is, from 23 to 27 May 2011. The other forms completed by sergeants (Sergeants A., J., O. and D. S.) are dated either 21 or 28 June 2011.

17. Having reviewed these documents, the Tribunal has doubts as to whether the Applicant’s direct supervisors were indeed consulted *before* the lieutenants finalized and gave to the Applicant the performance evaluation forms on 9 June 2011. Absent an explanation from the Respondent on this particular point, the Tribunal considers that these doubts have a direct impact on the lawfulness of the contested decision. If indeed the Administration did not follow its accepted and reasonable practice, the decision not to extend the Applicant’s appointment due to his poor performance might be tainted by procedural flaws, which cast serious doubts on its lawfulness.

18. In view of the foregoing, other allegations concerning the unlawfulness of the contested decision need not be addressed by the Tribunal. Therefore, it will not consider whether the Applicant’s performance appraisals were unjustified, nor whether the contested decision was based on improper motives.

Urgency

19. The prerequisite of urgency is satisfied since the Applicant’s contract will expire on 31 July 2011, in just three days from the delivery of this Judgment. In addition, the Tribunal notes that the Applicant was notified of the decision on 12 July 2011. He filed his request for management evaluation a week later on 20 July and submitted his application to the Tribunal on 25 July 2011, almost two weeks after having received notification of the contested decision. Thus, even though he could have shown greater diligence in submitting his application for suspension of

action (see *Lorand* Order No. 93 (GVA/2010), *Jaen* Order No. 29 (NY/2011)), the latter was still timely filed since the Respondent was not prevented from filing a reply in due time (see *Samuel Thambiah* Order No. 90 (GVA/2011)).

Irreparable damage

20. Although the Tribunal has held that mere financial loss is not enough to satisfy the requirement of irreparable damage (see, e.g., *Fradin de Bellabre* UNDT/2009/004, *Kweka* UNDT/2011/122, *Villamoran* UNDT/2011/126) it also considered that harm to professional reputation and legitimate career prospects could constitute such damage (see, e.g., *Corcoran* UNDT/2009/071, *Villamoran* UNDT/2011/126). Further, in a number of cases, it took into consideration, for the purpose of determining whether the implementation of the contested decision would cause irreparable damage to the applicants, the fact that they would soon be reaching the statutory age of retirement (see *Corna* Order No. 90 (GVA/2010), *Mills-Aryee* UNDT/2011/051).

21. Given his age, the Applicant's chances of being reemployed are slim. The implementation of the contested decision, which is based on poor performance, will therefore result in irreparable damage to his career prospects as well as to his professional reputation.

Conclusion

22. In view of the foregoing, the Tribunal ORDERS the suspension, during the pendency of the management evaluation, of the decision not to extend the Applicant's appointment beyond its expiration date on 31 July 2011.

(Signed)

Judge Thomas Laker

Dated this 28th day of July 2011

Entered in the Register on this 28th day of July 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva