



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

PERROT-MAÎTRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION
FOR FURTHER SUSPENSION OF
ACTION**

Counsel for Applicant:

Seth Levine, OSLA

Counsel for Respondent:

Miouly Pongnon, UNON on behalf of UNEP

Introduction

1. On 20 April 2011, the Applicant filed an application with the United Nations Dispute Tribunal in Nairobi (“the Tribunal”) seeking the suspension of the decision not to renew her contract with the United Nations Environment Programme (“UNEP”) beyond 2nd May 2011 on the ground of “unsatisfactory performance”.

2. Having considered that the Applicant should be given an opportunity to complete the rebuttal process of her e-PASes for the period 2009-2010 and 2010-2011, the Tribunal issued Judgment UNDT/2011/076 dated 29 April 2011 wherein it decided that the impugned decision would be suspended during 14 working days following the date on which notification of the report(s) of the Rebuttal Panel(s) is/are made to the Applicant.

3. Subsequently, the Applicant filed her requests for the rebuttal of her e-PASes and her contract was renewed on a month to month basis. On 20 June 2011 and 21 July 2011 respectively, the Rebuttal Panels issued their decisions in respect of the e-PASes for 2009-2010 and 2010-2011.

4. On 22 July 2011, the Applicant filed an application with the Tribunal seeking further suspension of the decision of the same decision. The application was acknowledged and served on the Respondent on 26 July 2011.

Facts

5. The Applicant joined the Organization on 3rd May 2009 on a one year Intermediate Term Appointment at the L-5 level, step 5, as Senior Task Manager/Sub Programme Coordinator, Division of Environmental Policy Implementation (“DEPI”) in UNEP.

6. The Applicant relocated to Nairobi to take up her assignment and worked under the supervision of the Deputy Director and Head of the Freshwater and

Terrestrial Branch (First Reporting Officer) and the Director of DEPI (Second Reporting Officer).

7. On 25 November 2009, the Applicant met with her First Reporting Officer to discuss her mid-term review in respect of her 2009-2010 e-PAS.

8. On 18 March 2010, the Applicant's Second Reporting Officer recommended that UNEP extend the Applicant's appointment for one additional year, through 2nd May 2011.

9. In March 2010, the Applicant's contract was extended for one year, until 2nd May 2011.

10. In June 2010, at a Branch meeting, the Applicant's First Reporting Officer requested all staff to complete their work plan for the 2010-2011 performance cycle which had begun on 1 April 2010.

11. On 18 June 2010, the Applicant met with her First Reporting Officer to review her performance for the period May 2009 to March 2010. The Applicant received an overall rating of "Partially meets performance expectations".

12. On 6 August 2010, the Applicant met with her First Reporting Officer to discuss her e-PAS and the need to complete her 2010-2011 work plan as well as continuing poor performance issues.

13. On 24 August 2010, the Applicant indicated to her supervisor that she had been unable to access her e-PAS for the previous four weeks owing to a failure of her password. In his reply that same day, her supervisor asked the Applicant to call the Information Technology Help Desk for assistance.

14. The e-PAS was signed by the First Reporting Officer on 8 October 2010 followed by the Second Reporting Officer on 19 November 2010.

15. Subsequently, the Applicant wrote an email on 14 December 2010 to her supervisors expressing her concerns and surprise at the overall rating and comments contained in the e-PAS. She asked her First Reporting Officer the reasons why the result of this assessment had not been shared with her in March 2010 at the time her contract was renewed. She also provided additional information and requested an opportunity to discuss the review of the performance assessment for the said period. She further expressed her willingness to work with her First Reporting Officer on a Performance Improvement Plan in order to avoid facing the same concerns in the next evaluation.

16. On 21 January 2011, the Applicant wrote an email to her First Reporting Officer seeking guidance on how to proceed with the outcome of her e-PAS and the preparation of a Performance Improvement Plan. The Applicant signed off her e-PAS on the same day.

17. On 3 February 2011, the Applicant's First Reporting Officer advised her that her contract would not be renewed beyond its date of expiry for 'unsatisfactory performance'.

18. On 15 February 2011, the Applicant met her First and Second Reporting Officers to discuss the appraisal of her performance for the 2009-2010 e-PAS cycle. During the meeting the First Reporting Officer indicated that the overall rating of her e-PAS would not be changed.

19. On the next day, i.e. 16 February 2011, the Applicant wrote to her First Reporting Officer indicating that her request for the development of a Performance Improvement Plan which had not been acknowledged. On 17 February 2011, her supervisor replied that he had never refused to discuss the issues of her performance and had met with her on three occasions to formally discuss the e-PAS. On 20 February 2011, the Applicant filed an incomplete rebuttal statement challenging her appraisal for the period 2009-2011.

20. On 11 March 2011, the First Reporting Officer confirmed to the Human Resources Management Services of UNON (“HRMS/UNON”)¹ that the Applicant’s contract would not be renewed for ‘unsatisfactory performance’.

21. On the same day, the Applicant uploaded her final work plan for the performance cycle ending 31 March 2011.

22. On 21 March 2011, the Applicant sent a request for management evaluation of the decision not to renew her current appointment with UNEP beyond 2nd May 2011.

23. On 8 April 2011, the Applicant met with her First Reporting Officer for the mid-term evaluation for the period 2010-2011. Her supervisor stated to the Applicant that her performance continued to warrant only a ‘Partially meets performance expectations’ rating. The Applicant’s e-PAS for the period 2010-2011 was initiated and the First Reporting Officer put down his views in the e-PAS system for the 2010-2011 performance cycle.

24. Subsequently, the Applicant decided on 19 April 2011 to send another request for management evaluation of the same decision.

25. By an email circulated within DEPI in the month of April 2011, staff members were informed that a male colleague in the Global Programme of Action Unit in the Marine and Coastal Ecosystems Branch would take up the Applicant’s functions as of 3 May 2011. This notification was confirmed on 12 April 2011 by the Division Director in a meeting of Heads of Units and Branches.

Original Application for Suspension of Action

26. On 20 April 2011, the Applicant filed an application with the Tribunal seeking the suspension of the same decision. The application was served on the Respondent on the same day.

¹ UNON provides administrative support services to UNEP.

27. No hearing was held as the Tribunal had considered that the documentation was thorough and comprehensive. By Judgment UNDT/2011/076, dated 29th day of April 2011, it granted the suspension and decided that it would remain in force up to 14 working days following the date on which notification of the report(s) of the Rebuttal Panel(s) is/are made to the Applicant.

28. The Applicant challenged her performance appraisal for the period 2009-2010 and 2010-2011 and her contract was renewed on a month to month basis, since 2nd May 2011.

Review by the Rebuttal Panels

29. On 20 June 2011, the Rebuttal Panel advised the Applicant that the rating of her e-PAS for the period 2009-2010 had been changed from “Partially meets performance expectations” to “Fully meets performance expectations”. But in relation to the second e-PAS, the Applicant was informed on 21 July 2011 that the rating “Partially meets performance expectations” would remain unchanged i.e.

New Application for Further Suspension of Action

30. On 22 July 2011, the Applicant wrote to the MEU to seek a review of the decision not to renew her contract, in the light of the first e-PAS rebuttal outcome.

31. On the same day, i.e. 22 July 2011, the Applicant filed an application for further suspension of action.

Applicant's Submissions

32. The Applicant's contentions are as follows:

- a. The Applicant submits that her application meets the three requirements provided for in article 2.2 of the Tribunal's Statute and article 13 of the Tribunal's Rules of Procedure.

- b. First, the Applicant argues that both e-PAS cycles were “unfair, unrepresented and vitiated by procedural impropriety and bias”. Whilst the Applicant accepts that that the rating of the 2010-2011 e-PAS was fair, she asserts that the 2009-2010 appraisal was tainted by procedural irregularities, in violation of Sections 10.1 and 10.2 of ST/AI/2010/5.
- c. Moreover, it is the Applicant’s view that this application is of particular urgency as she expects the Administration to not renew her appointment very soon because the rebuttal process has now been completed. Should the decision be implemented, she would be separated without the possibility to explore the channels of informal resolution in the light of the first e-PAS’ positive outcome.
- d. Finally, the Applicant states the decision can cause her irreparable harm in terms of her reputation and career prospects that cannot be remedied by a monetary award alone. Further, she argues that if she is separated on the basis of “poor performance” she will lose the prospects of applying to job openings as an internal candidate within the UN system.
- e. For the above reasons, the Applicant moves the Tribunal to grant the application.

HEARING

33. For the purpose of the present application, the written submissions of the Parties are thorough and comprehensive and a hearing is not warranted.

WAS THE DECISION UNLAWFUL?

34. When the decision was taken not to renew the Applicant on 11 March 2011 the decision was based on the ground of unsatisfactory performance as a result of her e-PAS rating “Partially meets performance expectations” for the period 2009-2010.

35. The Rebuttal Panel has found that the rating of the Applicant’s e-PAS for 2009-2010 did not properly reflect the Applicant’s performance. For this reason it changed the rating from “Partially meets performance expectations” to “Fully meets performance expectations”.

36. The Applicant also filed a request with the Rebuttal Panel in respect of her e-PAS for the period 2010-2011 which was rated “Partially meets performance expectations”. However, this time, the rating remained unchanged and the Applicant states in her pleadings that she accepts this review as being fair.

37. Considering that the Respondent’s allegation that the Applicant’s contract was not renewed for unsatisfactory performance during the period 2009-2010, the Tribunal notes that the rating “Partially meets performance expectations” has been considered by the Rebuttal Panel as unfair and changed to “Fully meets performance expectations”. In the light of this finding the Tribunal takes the view that the decision not to renew the Applicant’s contract on the ground of unsatisfactory performance for the year 2009-2010 cannot stand anymore.

38. For the above reasons, the Tribunal considers that the decision is *prima facie* unlawful.

URGENCY ELEMENT

39. Since the contract of the applicant is due to come to an end on 2nd August 2011 this element is satisfied.

IRREPARABLE DAMAGE

40. As stated in Judgment UNDT/2011/076, the Applicant has stated in her submissions that the non-renewal of her employment will impact adversely on her professional integrity, her career prospects especially as she would be terminated without having been given a chance to seek the opportunity to resolve the pending dispute through an agreed agreement.

41. For these reasons the Tribunal is satisfied that the Applicant has satisfied that test too.

DECISION

42. For the above reasons, the Tribunal considers that the decision should remain suspended.

(Signed)

Judge Vinod Boolell

Dated this 29th day of July 2011

Entered in the Register on this 29th day of July 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi