



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/032

Judgment No.: UNDT/2020/087

Date: 15 June 2020

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

ELBAGHIR OSMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Gall ALD/OHR, UN Secretariat

Introduction

1. On 20 May 2019, the Applicant, a Senior Reviser at the Department of General Assembly and Conference Management (“DGACM”), filed an application contesting the decision to terminate his permanent appointment on the ground of unsatisfactory service.
2. On 19 June 2019, the Respondent duly filed his reply, responding that the application was without merit.
3. For the reasons stated below, the Tribunal finds that the Administration properly followed the applicable procedure to terminate the Applicant’s permanent appointment and dismisses the application.

Facts

4. Over six electronic performance appraisal system (“ePAS”) cycles (from 2011-2012 to 2016-2017), the Applicant’s performance was deemed inadequate at various points, and DGACM implemented a total of three performance improvement plans (“PIPs”).
5. In the 2011-2012 and 2012-2013 ePAS , the Applicant’s productivity fell under the minimum standard five pages of translation, and he received the first overall rating of “does not meet performance expectations” in the 2012-2013 ePAS report, leading up to the first PIP in the 2013-2014 cycle. The PIP lead to an improvement in the Applicant’s performance, and he received a “successfully meets performance expectations” rating in the ePAS for this cycle.

6. In the 2014-2015 cycle, the Applicant's productivity dropped again. With the assistance of his supervisors, the Applicant's performance improved and reached the standard level, receiving a "successfully meets performance expectations" rating for this cycle's ePAS.

7. In the 2015-2016 cycle, the Applicant's productivity dropped again and a second PIP was implemented. By the end of the cycle, the Applicant's productivity improved to the required standard and he received an overall rating of "successfully meets performance expectations".

8. In the 2016-2017 cycle, the Applicant's productivity dropped again, and a third PIP was implemented. Despite the PIP and coaching from his supervisor, the Applicant's performance did not improve to the minimum standard. His ePAS for this cycle was rated "does not meet performance expectations". The Applicant sought rebuttal of the ePAS. In November 2017, the rebuttal panel confirmed the awarded rating.

9. On 13 April 2018, DGACM submitted a request for termination of the Applicant's permanent appointment for unsatisfactory service to the Central Review Body ("CRB") under sec. 4.10 of ST/SGB/2011/7 (Central review bodies) and ST/AI/222 (Procedure to be followed in cases of termination of permanent appointment for unsatisfactory services). On 10 August 2018, the CRB concluded that there were sufficient grounds for the termination of the Applicant's permanent appointment. The CRB recommended that the Secretary-General consider DGACM's request for termination. The CRB further recommended that the Secretary-General consider the possibility of granting the Applicant early retirement.

10. On 23 October 2018, the Under-Secretary-General for Management, in the exercise of her delegated authority, accepted the request for termination. On 1 November 2018, the Applicant was provided three months' notice of the termination of his appointment.

Consideration

Applicable law

11. Staff regulation 9.3(a)(iii) 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, requests for termination of permanent appointment under these provisions are reviewed by a central review body following the procedure established in ST/AI/222.

12. 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 limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see, for instance, *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).

Was the decision to terminate the Applicant's appointment lawful?

13. The Applicant claims that the contested decision was tainted by procedural errors. He states that he was not afforded the opportunity to provide comments at the end of the 2017-2018 ePAS in violation of sec. 15.1 of ST/AI/2010/5, because the rebuttal process was underway when he received the termination notice. The Respondent responds that the outcome of the Applicant's ePAS is irrelevant because the termination was based on his poor performance over a period of six cycles, culminating in an overall rating of "does not meet performance expectations" in the 2016-2017 ePAS. The Respondent adds that secs. 10 and 15 of ST/AI/2010/5 do not require the completion of the rebuttal process for the 2017-2018 cycle.

14. The Appeals Tribunal held that it was "unreasonable to require the Administration to restart the termination process if a new performance appraisal is completed before a final termination decision is taken. Otherwise, it would potentially place the Administration in an endless cycle whereby it could never be in a position to terminate the appointment of a staff member" (*Weerasooriya* 2015-UNAT-571, para. 31). Therefore, the Tribunal agrees with the Respondent that the outcome of the Applicant's 2017-2018 performance appraisal was irrelevant for his termination decision that was based on the performance cycles of 2011-2012 to 2016-2017.

15. The Applicant further argues that the CRB failed to consider his health and family problems which, he claims, were the cause of his poor performance. He states that the CRB failed to consult with the Medical Services Division or DGACM to obtain information about his medical condition and, in doing so, he was deprived of his right to be heard.

16. The Respondent rejects these claims. He states that the Applicant's requests for sick leave were considered according to the applicable framework. He states that the Applicant's record shows that he was absent frequently, but for short periods of time. The Respondent submits that the Applicant did not request any specific accommodation in connection with his health problems. To the contrary, when in 2016 his manager suggested him to telecommute, the Applicant declined. The Respondent states that DGACM was not aware of the Applicant's family issues until November 2016. To assist the Applicant to meet his productivity shortfall, he was assigned translations of texts that contained "a lot of text that had previously been translated".

17. With respect to the Applicant's claim that the CRB did not adequately review his health and family concerns, the Respondent recalls that the Applicant was given the opportunity to substantiate his claims and submit supporting evidence, which he failed to do. The Respondent argues that the Applicant failed to demonstrate that the CRB erred in considering his claims. In support of his assertion, the Respondent submitted the Applicant's leave record from 2015 to 2018 which indeed shows numerous short medical leaves, both certified and uncertified. The Respondent further provided email correspondence showing that the Applicant was offered the possibility to telecommute in 2018 and 2011.

18. The evidence shows that on 25 April 2018, the CRB notified the Applicant of DGACM's request for termination of his permanent appointment. The CRB forwarded all the documentation submitted by DGACM in support of its request and provided the Applicant 30 days to make observations in writing. The Applicant submitted his response on 25 May 2018. The CRB requested additional information from DGACM which was submitted on 31 May 2018 and to which the Applicant was allowed to respond. In view of these submissions, the CRB interviewed four staff members of

DGACM, including quality control officers and the Applicants supervisors during the period under review. The CRB interviewed the Applicant in person on 14 June 2018.

19. On 10 August 2018, the CRB rendered its findings. Having reviewed the documentation submitted by both parties, the CRB found that DGACM had adequately established the Applicant's unsatisfactory performance during the period under review. The CRB also noted that the Applicant claimed that DGACM had not properly considered his health and family issues, which negatively affected his performance and further claimed that the request for termination was in retaliation for his having complained about one of his supervisors in the 2012-2013 ePAS cycle. The CRB was not satisfied, however, that the Applicant had provided evidence to support his claims.

20. In light of this evidence, the Tribunal is satisfied that despite having had the opportunity to do so, the Applicant failed to provide evidence that DGACM disregarded his health concerns or that such concerns had an impact on his productivity. Similarly, the Applicant failed to provide any evidence in support of his allegations of retaliation or any other ulterior motive, for that matter.

21. The Applicant further challenges the institution and management of the PIPs. He claims that in the 2012-2013 ePAS cycle, where he received the overall rating of "does not meet performance expectations", he was not promptly made aware of his shortcomings and, therefore, was not afforded a chance to improve his performance.

22. The Tribunal notes that the Applicant did not seek rebuttal of his 2012-2013 ePAS and he is therefore barred from challenging this administrative decision at this point.

23. The Applicant states further that he was assigned additional managerial duties during the 2013-2014 ePAS cycle, which were not mentioned in the resulting PIP for that cycle and which resulted in a “successfully meets expectation” rating. The Applicant further claims that the PIPs that of the 2015-2016 and 2016-2017 cycles, were unwarranted because the previous PIPs resulted in a “successfully meets expectations” rating.

24. The Respondent responds that a PIP was instituted during the 2013-2014 ePAS cycle following the Applicant’s overall rating of “does not meet performance expectations” in the previous cycle.

25. With respect to the 2015-2016 and 2016-2017 ePAS ratings, the Respondent recalls that sec. 10.2 of ST/AI/2010/5 does not limit the ability to implement a PIP to situations where a staff member received an unsatisfactory rating in the previous cycle. The Respondent states that a PIP can be implemented once a performance shortcoming has been identified under sec. 10.1 of ST/AI/2010/5. He explains that a PIP must be implemented under sec. 10.2 of ST/AI/2010/5 in two cases: first, where the remedial actions under sec. 10.1 do not contribute to the improvement of the performance and, second, where a staff member receives an overall rating of “partially meets performance expectations”. In the Applicant’s case, for the 2015-2016 and 2016-2017 ePAS cycles, the first reporting officer (“FRO”) properly decided that a PIP would be the most appropriate remedial measure to improve the Applicant’s shortcomings.

26. The Tribunal recalls that sec. 10.2 of ST/AI/2010/5 provides that a PIP may be initiated where the other remedial actions instituted in application of 10.1 of ST/AI/2010/5, including counselling and training, do not result in the improvement of

the performance. Therefore, the rating in the previous cycle is irrelevant to the decision to institute a PIP.

27. The Applicant further challenges the PIP instituted during the 2017-2018. However, the Tribunal has already established that the 2017-2018 cycle is irrelevant in the decision to terminate the Applicant's permanent appointment.

28. In sum, while the Respondent's documentation shows that he followed the applicable process to terminate the Applicant's permanent appointment, the Applicant's claims of procedural violations are not supported by the evidence. Therefore, the Tribunal is satisfied that the decision to terminate the Applicant's permanent appointment is lawful.

Conclusion

29. In light of the foregoing, the application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 15th day of June 2020

(Signed)

Entered in the Register on this 15th day of June 2020

Nerea Suero Fontecha, Registrar