



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

SUAREZ LISTE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, HRLU, UNOG

Introduction

1. The Applicant contests the decision dated 6 March 2023 not to convert his two-year fixed term appointment (“FTA”) to a continuing appointment (“CA”) after the end of his probationary period as language staff, extending it instead.
2. For the reasons set forth below, the Tribunal rejects the application.

Facts and Procedural background

3. On 15 March 2021, the Applicant was appointed as Translator with the Department of General Assembly and Conference Management (“DGACM”) in New York, after having successfully passed the competitive examination for recruitment against a language position.
4. On 1 September 2021, the Applicant transferred to Geneva to serve in the same functions with the Division of Conference Management, United Nations Office at Geneva.
5. On 28 September 2021, the Applicant’s former first reporting officer (“FRO”) in New York completed the first half of his performance evaluation for the 2021-2022 performance cycle, specifically for the period between 1 April 2021 and 31 August 2021. The Applicant was then assessed as “successfully meets expectations”.
6. On 30 December 2021, the Applicant received a memo confirming that ST/AI/2020/3 (Competitive examinations for recruitment against or placement in language positions at the P-2 or P-3 level) applied to his appointment, and that he would receive a CA upon completion of two years on an FTA, subject to satisfactory service.
7. On 7 April 2022, the Applicant’s FRO in Geneva completed the other half of his performance evaluation for the 2021-2022 performance cycle, assessing him as “successfully meets expectations”.

8. On 21 October 2022, the Applicant had the first performance conversation with his FRO for the performance cycle of 2022-2023, in accordance with ST/AI/2021/4 (Performance Management and Development System).
9. On 27 January 2023, the Applicant had a second performance conversation with his FRO for the performance cycle of 2022-2023.
10. On 6 March 2023, the Applicant and his FRO held another performance discussion in which they allegedly discussed negative feedback that the Applicant received during the month of February 2023. Later that day, the Applicant was informed that his probationary appointment would be extended for one year, as per sec. 6.4 of ST/AI/2020/3, because his performance during the 2022-2023 cycle was found not to be satisfactory. This is the “contested decision”.
11. On 15 March 2023, the Applicant requested management evaluation of the contested decision.
12. On 12 April 2023, the Management Evaluation Unit (“MEU”) considered that the Applicant’s request was not receivable.
13. On 11 July 2023, the Applicant filed the present application.
14. On 11 August 2023, the Respondent filed his reply, *inter alia*, challenging the receivability of the application.
15. By Order No. 132 (GVA/2023) of 4 October 2023, the Tribunal instructed:
 - a. The Applicant to file a rejoinder by 2 November 2023; and
 - b. The parties to revert to it by 10 November 2023 concerning possible amicable settlement of the dispute.
16. By motion dated 31 October 2023, the Applicant requested an extension of the deadline to file his rejoinder.

17. By Order No. 145 (GVA/2023) of 1 November 2023, the Tribunal granted the Applicant's motion.

18. On 16 November 2023, the Applicant filed his rejoinder.

19. On 1 December 2023, the parties filed a joint motion informing the Tribunal that they were not in a position to explore alternative dispute resolution.

20. On 26 December 2023, the Respondent filed a motion for leave to adduce additional evidence.

21. By Order No. 33 (GVA/2024) of 15 April 2024, the Tribunal granted the Respondent's motion for leave to adduce additional evidence, and instructed the Applicant to file an amended rejoinder, if he so wished, which he did on 3 May 2024.

22. By Order No. 59 (GVA/2024) of 24 May 2024, the Tribunal instructed the parties to file their respective closing submissions, which they did on 7 June 2024.

Consideration

Whether the application is receivable

23. The case at hand relates to a decision not to convert an FTA to a CA after a two-year probationary period, extending it instead.

24. The Respondent claims, *inter alia*, that the application is not a reviewable administrative decision under the jurisdiction of this Tribunal because the extension of a probationary appointment for one year is only a step within a larger process that, provided that a staff member's performance is rated as satisfactory, will lead to a decision to convert an FTA into a CA. The decision regarding the Applicant's situation has only been put on hold due to the existing performance shortcomings during the 2022-2023 performance cycle.

25. The Applicant's position, however, is that, as a language staff member recruited following a competitive examination, he had a contractual right to a CA at the end of a two-year probationary period if he met the criterion of satisfactory service. The denial of a CA at the end of the probationary period represents a final decision impacting the Applicant's contractual rights, regardless of whether he might be granted a CA in the future. The decision not to grant him a CA at the end of two years was final regarding that contractual right.

26. Having examined the case record, the Tribunal agrees with the Applicant.

27. Firstly, the contested decision has a direct legal consequence and constitutes a final administrative decision impacting the Applicant's appointment status with the Organization. Indeed, the decision to not grant a CA and instead extend the FTA's probationary appointment for one year is unambiguously a denial of granting a CA to the Applicant at that point in time.

28. In other words, the fact that the Applicant might still be eligible for a CA in the future is irrelevant to the determination that the decision not to grant him one after the end of his probationary period is a final reviewable administrative decision.

29. Secondly, a memorandum received by the Applicant confirming that he would receive a CA upon completion of two years on an FTA, subject to satisfactory service, demonstrates explicitly that he had a contractual right contingent on only one condition. A decision impacting the Applicant's contractual rights was thus a final decision, which was considered receivable most pertinently in *Benser* UNDT/2016/016 and *Benser* 2016-UNAT-696.

30. Thirdly, the Respondent's argument that the extension of a probationary appointment for one year is only a step within a larger process, and that there is no final administrative decision in respect of granting a CA to the Applicant are baseless and irrelevant to the Applicant's contentions. In fact, the Applicant is not contesting the renewal of his FTA, but rather the denial of his right to have the FTA converted into a CA as he met the condition of satisfactory service.

31. Accordingly, the Tribunal deems the application receivable.

Legal framework

32. Turning to the legal framework, staff rule 4.14(b) provides that “[s]taff members recruited in the Professional category upon successful completion of a competitive examination pursuant to staff rule 4.16 shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service”.

33. The Applicant’s contract is governed by ST/AI/2020/3, which provides the following in its relevant parts:

6.2 Upon recruitment, external candidates shall be offered a fixed-term appointment for a duration of two years, which will be regarded as a probationary period.

6.3 In accordance with paragraph 23 of section II of General Assembly resolution 63/250 and staff rule 4.14 (b), staff members recruited upon the successful completion of a competitive examination, pursuant to staff rule 4.16, shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service.

6.4 If a staff member’s performance is not satisfactory, a decision shall be made either to extend the probationary period on a fixed-term appointment for one year or to separate the staff member from service. The performance of staff members whose probationary period is extended for one year shall be reviewed towards the end of that period. If their performance is certified as being satisfactory, they shall be offered a continuing appointment. If not, they shall be separated from service.

34. Performance conversations and the rating system is governed by ST/AI/2021/4 (Performance Management and Development System), which reads in its relevant part (emphasis in original):

Section 7

Performance conversations and milestone discussions

7.1 During the year, the first reporting officer and the staff member should have ongoing performance conversations, whether verbally or in writing, which should be used to acknowledge good performance and address any shortcomings.

7.2 The first reporting officer should conduct milestone discussions at regular intervals agreed upon with the staff member. Such discussions should include progress made and an explanation of any updates to the workplan goals, key results and achievements. The first reporting officer should also note progress made in demonstrating the competencies and in implementing the personal and professional development plan. The staff member may note the progress made towards the goals set in the workplan, the competencies and the personal and professional development plan. Documentation of the milestone discussions is the responsibility of the first reporting officer.

...

Section 9

Rating system

...

Overall performance rating

...

9.7 A rating of “partially meets performance expectations” should be considered if the staff member did not meet the defined success criteria and/or performance expectations for some of the goals, key results and achievements but demonstrates potential for and a commitment to developing and applying the required skills.

...

9.9 A rating of “partially meets performance expectations” or “does not meet performance expectations” indicates the existence of performance shortcomings.

35. Considering the above, after a careful review of the case and the evidence on record, the Tribunal identifies the following legal issues for determination:

- a. Whether the decision not to convert the Applicant’s FTA to a CA was lawful, reasonable and procedurally correct; and
- b. Whether the Applicant is entitled to any remedies.

Whether the decision not to convert the Applicant's FTA to a CA was lawful, reasonable, and procedurally correct

36. The Applicant disputes the assertion that he had performance shortcomings and relies on the fact that he was given a “successfully meets expectations” rating in the two performance evaluations he received for the 2021-2022 performance cycle. In this regard, he contends that he had a contractual right to a CA, and that the decision not to convert his FTA was unlawful and based on inexistent performance shortcomings.

37. The Respondent submits, however, that the Applicant was made aware throughout the year of several performance shortcomings with respect to the quality of his work. He was informed of this through feedback from revisers, and by his FRO during the “landmark” performance discussions that occurred on 21 October 2022 and 27 January 2023.

38. It is well-established case law that in cases of unsatisfactory performance, the Administration must provide sufficient proof of said poor performance based on a procedurally fair assessment or appraisal establishing the staff member's shortcomings and the reasons for them (*Sarwar* 2017-UNAT-757, para 71-72).

The Applicant's performance

39. It is undisputed by the parties that the Applicant received a rating of “successfully meets expectations” during the 2021-2022 performance cycle.

40. What is disputed is whether the Applicant has met the condition of satisfactory service during his probationary period to warrant a contractual right to have his FTA converted into a CA. In this context, the Applicant claims that his FRO and second reporting officer (“SRO”) did not identify any performance shortcomings during the performance cycle, not even at the “landmark” performance discussions of 21 October 2022 and 27 January 2023. Allegedly, the first time he heard about any dissatisfaction with his performance was when he was informed that he would not receive a CA and, instead, would have his FTA extended for another year.

41. Confronted with the evidence showing negative feedback from the revisers, the Applicant explained that he never interpreted those as performance shortcomings. Instead, he claims that it is the role of revisers in the translation section to provide new staff with improvement feedback throughout their probationary period, and the role of the FRO and SRO to identify and bring to the attention of the staff member any actual performance issue.

42. Furthermore, the Applicant argues that the 2022-2023 performance cycle had not ended by the time of the contested decision, thus no unsatisfactory performance had been established by then. As it follows, his 2022-2023 performance rating of “partially meets performance expectations” and the following rebuttal report are not relevant to the determination under dispute.

43. The Respondent submits, however, that performance is assessed continually through regular conversations and milestone discussions, as per ST/AI/2021/4. There was no need for a final performance evaluation with respect to the 2022-2023 performance cycle for the Applicant’s unsatisfactory performance to be established.

44. Instead, the Applicant’s unsatisfactory performance was established throughout the performance cycle of 2022-2023, during which he received a large number of explicit negative feedback on several aspects of his work, and performance shortcomings were identified either by his FRO or the revisers working with him. The Respondent further contends that during the two “landmark” conversations between the Applicant and his FRO in October 2022 and January 2023, the negative feedback and performance shortcomings were brought to the Applicant’s attention.

45. Having reviewed the parties’ submissions and the evidence on record, the Tribunal does not see any unlawfulness or unreasonableness in the contested decision.

46. First, with respect to the 2022-2023 performance evaluation rating and its corresponding rebuttal report, the Tribunal agrees with the Applicant that these documents are irrelevant to the determination of the facts under dispute. Regardless of the assessment given to the Applicant at the end of the performance cycle, the point in contention is whether the Applicant had met the “satisfactory service” condition by the time the contested decision was made. Any document that was finished afterwards is irrelevant for the purpose of the current exercise of judicial review.

47. To understand if the Applicant’s performance was satisfactory or not at the time of the contested decision, the Tribunal turns to the evidence available at that point in time, i.e., the feedback from revisers and from the Applicant’s FRO during the landmark performance discussions held in accordance with sec. 7.1 of ST/AI/2021/4.

48. In this context, the Tribunal first highlights that it is not fully convinced that the Respondent has met its obligation under sec. 7.1 of ST/AI/2021/4 by which “the first reporting officer and the staff member should have ongoing performance conversations”. The evidence on record does not clearly show these ongoing performance conversations between the Applicant and his FRO/SRO. It rather shows feedback from the revisers to the Applicant.

49. However, the Tribunal notices that email exchanges between said revisers and the Applicant reveals extensive negative feedback concerning the Applicant’s work, which was deemed uneven, lacking attention to details, and of poor quality. Different revisers stated that the Applicant did not use the templates appropriately, if at all, despite being repeatedly asked to do so, and the extensive review/edits in the documents on record show substantial technical issues and difficulty in following directions.

50. Also, it is noteworthy that the aforementioned feedback provided by the revisers was not limited to editorial changes in the documents, but was conveyed to the Applicant in multiple emails ranging from June 2022 to February 2023.

51. In one email dated 13 June 2022, the Applicant was asked *inter alia* to be more careful with the options from the translation interface specifically developed for the translation of United Nations documents (“eLUNa”), to pay attention to the origin of the proposed translation, and to better use the software in order to avoid different translations for the term. He was further informed that it was unclear why he did not check the titles and names of institutions in some cases (informal translation).

52. In another instance, the Applicant was encouraged to look for more idiomatic solutions that allow the reader to better understand the text in Spanish (informal translation).

53. Based on such extensive (negative) feedback on the quality of his work dating back to June 2022, it is completely implausible that the Applicant’s performance issues only happened during the last few weeks of this probationary period or that he did not know about any said issues.

54. Indeed, the Tribunal finds it hard to believe that the Applicant was not aware of any issues with his performance until the date of the contested decision, as he claims. In an email dated 22 February 2023, the Applicant even replied to one of the revisers as follows:

Thank you for your comments, I will take note of it for future translations. I do not know if there was something you liked about the translation. If so, it would help if you could also mention it, as it would reinforce the translator’s motivation. (informal translation)

55. With respect to the “landmark” performance discussions between the Applicant and his FRO, the Tribunal acknowledges the Applicant’s argument that the follow-up emails to these conversations do not explicitly show performance issues. Indeed, the FRO gave the Applicant feedback using encouraging words and acknowledged that the Applicant had achieved “some of the goals in [his] work plan for the reporting period”, “that [he was] progressing well towards achieving the rest of them”, and “[the FRO] encourage[d] [the Applicant] to keep up the good work”.

56. However, the Tribunal also acknowledges the Respondent's allegation that the FRO indicated some performance issues in the email about the conversation of 27 January 2023 when he stated: "we discussed your progress and areas for your attention". It is implied that if there were areas the Applicant needed to pay attention to, some issues had been raised.

57. Indeed, the inexplicit emails are not probative of the Applicant's allegation that performance shortcomings had not been identified or conveyed to him during the conversations. Instead, based on the feedback that the FRO was receiving from revisers, as shown in the illustrative excerpts above, the Respondent's allegation that the FRO talked to the Applicant about the performance issues during the aforementioned conversation is more credible than the Applicant's version that nothing of the sort ever came up.

58. In reviewing performance-related decisions, it is relevant to look at whether "the staff member was aware, or could reasonably be expected to have been aware, of the required standard" (*Sarwar*, para. 73). In this respect, the Tribunal is of the view that the Applicant's FRO, with the assistance of revisers, identified and communicated to the Applicant some performance shortcomings.

59. Although the FRO and SRO are not free from criticism in terms of documenting the content of the performance conversations with the Applicant, the evidence on record is enough to support their position that the Applicant was not performing to the expected standards during the performance cycle of 2022-2023, and that he was deficient in the competencies of professionalism, communication, and planning.

60. For the purpose of triggering the conversion of an FTA to a CA, the only requirement concerning the staff member's performance is that it is deemed "satisfactory". In view of the foregoing, the Tribunal finds that it was not unreasonable for the decision-maker to conclude that the Applicant's service was unsatisfactory at the time of the contested decision.

The lawfulness of the decision

61. Sec. 6.3 of ST/AI/2020/3 provides that a staff member “shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service”.

62. As aforementioned, the Applicant’s service was not deemed satisfactory by the end of his initial FTA. It follows that there was no legal basis to grant a CA to the Applicant at the time of the contested decision.

63. Granting a CA “after two years on a fixed-term appointment, subject to satisfactory service” requires that a staff member maintains a satisfactory performance throughout the two-year probationary period. The Applicant’s arguments that he successfully met performance expectations in two formal evaluations (due to an internal transfer of duty station) and for more than half of the probationary period do not change the fact that he had performance shortcomings during the probationary period and that his immediate supervisors decided that he had not performed satisfactorily enough to trigger a contract conversion.

64. Considering the Applicant’s positive performance for more than half of the probationary period and his unsatisfactory service towards the end of the probationary period, the Respondent electing leniently to extend the Applicant’s probationary period rather than to separate the Applicant from service was in full compliance with sec. 6.4 of ST/AI/2020/3.

65. Therefore, the decision not to convert the Applicant’s FTA into a CA was both reasonable and lawful.

The delegated authority

66. The Applicant argues that while authority to make decisions regarding the granting or otherwise of CA lies with the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”), as per Annex IV of ST/SGB/2019/2 (Delegation of human resources authorities), the contested decision was made by the Officer in Charge (“OiC”) of the Spanish Section, who was the competent manager at the time.

67. The Tribunal notices that Annex IV of ST/SGB/2019/2 indeed delegates the authority to grant a CA to the USG/DMSPC.

68. However, that does not mean that the contested decision is *ultra vires*.

69. Pursuant to sec. 6.4 of ST/AI/2020/3, if a staff member's performance is not satisfactory, a decision shall be made to either extend the probationary period on an FTA for one year or to separate the staff member from service. In this context, performance is assessed in accordance with ST/AI/2021/4.

70. According to ST/AI/2021/4, performance is assessed by the FRO and SRO of the staff member. They are the ones with the responsibility to recommend a staff member for a CA based on satisfactory performance under sec. 6.3 of ST/AI/2020/3. Only after this recommendation, the granting or otherwise of a CA will be subject to the authority of the USG/DMSPC.

71. Notwithstanding, another important part of the contested decision concerns the renewal of the Applicant's FTA for another year.

72. In this respect, the decision was also legally and procedurally correct. Annex IV of ST/SGB/2019/2 determines the authority to extend temporary or fixed-term of appointments, which lies with the Heads of Entity.

73. Accordingly, the decision under challenge was not under the delegated authority of the USG/DMSPC and was procedurally correct.

Whether the Applicant is entitled to any remedies

74. Since the contested decision is deemed lawful, the Applicant is not entitled to any remedies.

Conclusion

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

(Signed)

Judge Sun Xiangzhuang

Dated this 28th day of June 2024

Entered in the Register on this 28th day of June 2024

(Signed)

René M. Vargas M., Registrar, Geneva