



Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

LITVINIUK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jan Schrankel, UNHCR

Marietta Hristovski, UNHCR

Introduction

1. The Applicant, a former Information Management Associate working with the Office of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision to terminate her fixed-term appointment in accordance with staff regulation 9.3(a)(v).
2. The Respondent filed a reply on 13 June 2024, in which he argues that the contested decision was lawful, and the application is without merit.

Factual background

3. On 16 December 2022, UNHCR advertised the position of Information Management Associate, G-6 level (“the position”).
4. On 2 January 2023, the Applicant applied for the position and, thereafter, participated in the recruitment process.
5. On 27 April 2023, UNHCR informed the Applicant that she was selected for the position.
6. On 25 May 2023, UNHCR wrote to the Applicant requesting her to provide additional information on her previous work experience, including exact dates of all previous employments, as well as whether the work was full or part-time.
7. The Applicant provided the requested information on 28 May 2023. Among others, she indicated that between July 2019 and 18 November 2022, she worked on various projects for Solway Investment Group (“SIG”) in Switzerland and its subsidiaries in various locations around the world, including Guatemala. She also confirmed her capacities, which included Corporate Communication Manager, Environment, Social and Governance Head and Consultant, and Sustainable Development Director.
8. The Applicant reported on duty on 1 June 2023 and signed the offer of appointment on the same day.

9. The Applicant states, however, that whereas she reported on duty on 1 June 2023, she only received her letter of appointment on 8 June 2024. She thus contends that she was not remunerated for the period 1-7 June 2023, yet she was on duty.

10. The Respondent explains that the delay in issuance of the Applicant's letter of appointment was due to the need to first create her employee identification and conduct the medical clearance processes. The processes were completed on 8 June 2023 and the Applicant was thereafter issued with a letter of appointment.

11. On 22 August 2023, UNHCR received information that pursuant to Executive Order 13818, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") had designated the Applicant for acts of corruption in the Guatemalan mining sector. The designation concerning the Applicant was in relation to her role as an employee of SIG. A press release issued by OFAC implicating the Applicant in said designation was issued on 18 November 2022. On that same day, SIG suspended the Applicant and issued a press release about pending investigations to be conducted.

12. On 1 September 2023, UNCHR requested the Applicant to provide comments on the above designation. UNHCR also informed the Applicant that it was considering terminating her appointment for facts anterior in accordance with staff regulation 9.3(a)(v), as these facts were relevant to her suitability and integrity and would have precluded her appointment had they been known at the time of appointment.

13. On 11 September 2023, the Applicant responded that she had never been subject of an investigation in relation to her work for Solway in Guatemala. The Applicant further refuted the accusations of OFAC and informed UNCHR that she had filed a request for disclosure under the U.S. Freedom of Information Act to have access to the evidence that OFAC held.

14. On 27 September 2023, UNHCR terminated the Applicant's appointment ("the contested decision"). In the termination letter, the Director, Division of Human Resources, UNHCR stated:

the seriousness of the facts anterior and your non-disclosure of them to UNHCR prior to your appointment warrant the termination of your fixed-term appointment in accordance with staff regulation 9.3 (a)(v).

15. The Applicant requested management evaluation of the contested decision on 27 November 2023. In her request she challenged not only the termination but also the non-payment of certain benefits and entitlements. That aspect of the claim was based on the alleged error in her date of appointment and on her contention that if the termination was not disciplinary, she was entitled to various heads of compensation including payment in lieu of notice and pending medical claims.

16. On 9 February 2024, the Applicant received a response to her request, upholding the contested decision. Nevertheless, the response indicated that the Applicant was entitled to receive the compensation sought under the various heads save that the claims as to medical expenses had to be supported by documentation.

Consideration

Applicant's submissions

17. The Applicant contends that the termination of her appointment violated her human rights. Without citing a specific provision, the Applicant avers that UNHCR acted contrary to the general provisions of the International Bill of Human Rights, various International Labour Conventions and the International Convention on the Elimination of all Forms of Racial Discrimination.

18. She maintains that UNHCR does not have any evidence (e.g., decision of a court convicting her of corrupt acts, documents that would prove that there is a case filed or investigated against her regarding the corrupt acts or any other evidence). She claims that UNHCR only based its decision on the unilateral coercive measures of OFAC, which violate her due process rights, including the presumption of innocence, fair trial, freedom to work and to freely choose employment.

19. As remedies, the Applicant requests:

- a. Reinstatement to her position;
- b. Compensation for the period of 1-7 June 2023, when she was on duty, but not paid;
- c. Compensation for accrued annual leave;
- d. Compensation for medical expenses for the period 1 June 2023 to 29 September 2023;
- e. Compensation in lieu of notice, as the notice period of 30 days was not observed;
- f. Payment of interest for late payment of the sums due to her in accordance with points b-e above;
- g. Return of social contributions/deductions deducted from her salaries received for June to September 2023; and
- h. Financial indemnification for losing other job opportunities and consequently lost profit and lost professional development.

The Respondent's submissions

20. The Respondent's position is that the decision to terminate the Applicant's appointment was lawful. He argues that this case does not concern a disciplinary action, but termination under staff regulation 9.3 regarding facts anterior to an appointment.

21. The Respondent also submits that in terminating the Applicant's appointment, the Organization followed the correct steps and observed the Applicant's due process rights. The Respondent elaborates that before terminating the Applicant's appointment, the Organization sent her a letter dated 1 September 2023, affording her the opportunity to respond and supply information on the facts anterior, in accordance with staff rule 1.5(e). The Respondent states

that the Organization adequately appraised the Applicant of the allegations against her in the letter dated 1 September 2023. The Organization also directly requested information from the Applicant, thereby affording her a reasonable opportunity to make representations. The Organization put the Applicant on notice that the termination of her appointment was contemplated, and thereby warned her of the consequences of failing to provide the information requested.

22. Regarding the Applicant's contention that UNHCR does not have any evidence (e.g., decision of a court convicting her of corrupt acts or documents showing that there is a case being investigated against her), the Respondent submits that the Applicant failed to take advantage of the opportunity that the Organization presented to her to provide any relevant exculpatory evidence. For example, the Applicant did not dispute that she had been designated by OFAC and simultaneously suspended from her functions by SIG on allegations of corruption.

23. The Respondent further submits that contrary to the Applicant's averment, the question is neither whether the allegations against the Applicant of improper conduct considered by OFAC are well-founded, nor whether her placement on the Specially Designated Nationals and Blocked Persons list ("SDN list") of OFAC was warranted under U.S. law. The relevant question is whether the circumstances of the designation in question, described in the termination letter, existed during the hiring process and prior to the Applicant's appointment. The Respondent appropriately acted on the fact that the Applicant was on the SDN list of OFAC due to allegations of "acts of corruption in the Guatemalan mining sector", and that she had not informed the Organization about this at the time of her appointment.

24. The Respondent underscores that the Applicant does not dispute that she was on the SDN list of OFAC. Nor does she dispute that she failed to advise the Organization of such at the time of her appointment. The Respondent highlights the serious basis for the designation as explained in the OFAC press release as follows:

The leader of Solway's mining operations in Guatemala, Russian national Dmitry Kudryakov (Kudryakov), along with Belarusian national Iryna Litviniuk (Litviniuk), allegedly led multiple bribery schemes over several years involving politicians, judges, and government officials. In addition, Litviniuk conducted corrupt acts in furtherance of Russian influence peddling schemes by unlawfully giving cash payments to public officials in exchange for support for Russian mining interests.

25. Accordingly, the Respondent advances that the seriousness of the facts anterior of the said designation and the Applicant's non-disclosure of it to the Organization prior to her appointment warrants the termination of her appointment in accordance with staff regulation 9.3(a)(v).

26. Finally, the Respondent contends that the serious financial and reputational risks for the Organization in unknowingly recruiting a staff member who had been sanctioned for corruption, illustrate that the facts anterior were sufficiently serious to have precluded the Applicant's appointment had they been known at the time of her recruitment. The Respondent, therefore, submits that the facts anterior were directly relevant to an assessment of the Applicant's suitability and, had they been known, would have precluded her from the appointment.

Applicable law

27. Staff regulation 9.3 provides that:

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

...

(v) If facts anterior to the appointment of the staff member and relevant to his or her **suitability** come to light that, if they had been known at the time of his or her appointment, should, under the **standards** established in the **Charter**, have precluded his or her appointment. [Emphasis added]

28. Article 101.3 of the United Nations Charter, Chapter XV provides as follows (emphasis added):

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of **efficiency, competence, and integrity**. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

29. Staff Rule 1.5(e) provides that:

Staff members may at any time be required by the Secretary-General to supply information concerning facts anterior to their appointment and relevant to their suitability or concerning facts relevant to their integrity, conduct and service as staff members.

30. The Tribunal, in determining whether the Respondent acted within the provisions of the applicable law in terminating the Applicant's employment, does not seek to put forward a different decision based on its own views. Rather, the determination involves judicial review of the decision-making process that the Respondent applied in deciding on termination (*Sanwidi* 2010-UNAT-084, para. 40).

31. The United Nations Dispute Tribunal has, in prior judgments, addressed the type of factors that may be relevant for consideration when reviewing terminations on grounds of facts anterior. One such Judgment, cited by both parties, is *Kamushiga* UNDT-2017-021 where the Tribunal observed:

30. It is common ground that the Tribunal is not required, or expected, to carry out its own investigation and/or to make a finding on the guilt or innocence of the Applicant, but to examine whether the Administration applied the above-cited provisions on "facts anterior" procedurally correctly, arriving at a decision that was not affected by improper considerations and was, in all the circumstances, a permissible option for a reasonable decision-maker to have reached.

32. In *Kamushiga* the Tribunal identified three questions for consideration, arising on the specific facts of that case, as follows:

- a. Was the Applicant afforded due process?

b. Was there sufficient evidence to support a factual finding that the Applicant had engaged in the alleged fraudulent claim for medical treatment?

c. Were these facts directly relevant to an assessment of the suitability of the Applicant under the standards established in the Charter, and was it reasonable to conclude that, had these facts been known at the time of his appointment, they should have precluded him from obtaining such appointment?

33. Each case must turn on its own facts. The Applicant's case rests heavily on her submission that the OFAC designation was not based on any investigations. Moreover, she has not been convicted in any Court of law and therefore, she argues, there is no factual finding of corruption against her that could be considered a fact anterior meriting termination.

34. There is patent weakness in the Applicant's said analysis. The regulatory framework on termination for facts anterior does not limit it to cases where there has been a proven prior factual finding of misconduct or a conviction of crime. What is required is that there must be a fact anterior that detracts from the suitability of the prospective recruit due to concerns of efficiency, competence, and integrity. The fact must be of so serious a nature that it would have precluded the staff member's appointment if it had been disclosed to the Organization during the recruitment process.

35. It is clear from the recruitment process in which the Applicant was engaged that even the existence of a prior or pending investigation against a prospective staff recruit is a serious matter. The existence of an investigation may be information to be considered by the Organization in making recruitment decisions. This is clear from the inclusion in the application form of a question, to be answered truthfully by prospective staff members, as to whether they have been subject to investigations.

36. Considering the foregoing, the issues identified by the Tribunal as relevant in the circumstances of this case to deciding whether the Respondent acted appropriately in coming to the challenged decision are as follows:

a. Was there sufficient evidence of facts anterior in the Respondent's discovery of the OFAC designation, the Applicant's suspension from SIG, and a pending investigation, to justify a decision to terminate the Applicant's employment?

b. Were these facts anterior directly relevant to an assessment of the suitability of the Applicant under the standards established in the Charter, and was it reasonable to conclude that, had these facts been known at the time of her appointment, they should have precluded her from obtaining such appointment?

c. Was the Applicant afforded due process?

37. These issues will be examined in turn.

Sufficiency of Evidence

38. There can be no fault taken with the view that had information been disclosed about a staff member being the subject of a serious international designation in corrupt activities, as well as suspension and pending investigations for same, such a staff member would be precluded from appointment. In this case, the Respondent discovered documented information on the fact of the Applicant's OFAC designation, her suspension from SIG, and the pending investigation.

39. That information was sufficient for the Respondent to consider terminating the Applicant's employment. This is so, particularly in circumstances where no disclosure of these matters was included in the Applicant's application for employment.

40. In the submissions of both parties, there appears to be an acceptance that what the Respondent needed to make the decision was "sufficient evidence to support a factual finding that the Applicant had engaged in the alleged conduct". As

aforementioned, the case of *Kamushiga* cited by the parties does not appear to apply such a blanket approach to the circumstances of every case.

41. However, even if there were a requirement under staff regulation 9.3(a)(v) that the Respondent must have evidence to support a factual finding that a staff member has engaged in the alleged conduct, the Tribunal's conclusion in this case is that there was sufficient evidence in that respect before the decision-maker. The evidence was in the fact of the OFAC designation, the SIG suspension, and ongoing investigations all underpinned by the relevant entities concerns about corruption.

Direct relevance of the anterior facts to an assessment of the Applicant's suitability

42. In submissions, the Respondent underscores the Organization's zero-tolerance approach to corruption. In that context, it is plain to see how an international designation on the SD list based on corruption would be relevant to an assessment of a prospective staff member's suitability for employment.

43. The fact of such a designation flies in the face of the United Nations maintaining at least the appearance of recruiting employees with standards of integrity expected of United Nations staff members as set out in the Charter.

Due Process

44. It is not in dispute that the Organization sent a letter dated 1 September 2023 to the Applicant with information on the allegations against her and afforded her the opportunity to respond. She was thereby put on notice that the termination of her appointment, based on specified facts anterior, was contemplated. The letter afforded the Applicant an opportunity to supply information on the facts anterior to her appointment that were previously undisclosed. It was an offer extended in accordance with staff rule 1.5(e) affording the Applicant due process before terminating her appointment.

45. The Applicant failed to provide any relevant information in support of her retention as a staff member in the face of the proven fact that she was designated by OFAC, suspended by SIG and one of the subjects of ongoing corruption investigations. On the contrary, her response was limited to providing explanations

for not disclosing this information during the recruitment process. She said she did not know about any investigations by SIG. Such lack of knowledge cannot per se support an argument for continued employment of the Applicant. The Applicant provided unexplained information about her employment with SIG ending in November 2022 without disclosing that that was when she was suspended.

46. While, as submitted by the Respondent, the failure to disclose was not the basis for the Applicant's termination, the fact that her response was so limited gave credence to the strength of the information about the facts anterior. Additionally, the explanation that the Applicant is challenging the designation of OFAC is irrelevant to the fact that the designation was in place. It is the designation, underpinned by corruption involvement concerns, that is viewed as impacting negatively on the Applicant's suitability in terms of integrity.

47. The Tribunal's finding is that, as submitted by the Respondent, "although the Applicant claims that her designation by OFAC was arbitrary and that UNHCR should provide evidence of the alleged corruption, she has failed to provide any evidence that she was formally contesting the OFAC designation or the underlying determination relating to corruption".

48. In all the circumstances, the Respondent had sufficient evidence of facts anterior, including the OFAC designation, the SIG suspension, and ongoing investigations, to have decided against the suitability of the Applicant as a staff member. The decision to terminate the Applicant's employment was therefore justified because had the information been known beforehand, she would have been precluded from appointment.

Compensation Claims

49. The Respondent has from inception indicated that the Applicant is entitled to payment in lieu of notice as well as any other relevant termination benefits and that these payments would be made. There was likewise no denial of her entitlement to make claims for medical benefits provided such claims are supported by relevant documents.

50. The Claim for additional compensation for lost employment opportunities to be paid upon a termination for anterior facts is not supported by any relevant authority. The Tribunal observes in any event, that the Applicant has not presented any evidence of harm, which the Appeals Tribunal has explained is a *sine qua non* for such an award (See *Langue* 2018-UNAT-858, para. 14; *Hasan* 2015-UNAT-541, para. 30; *Rehman* 2018-UNAT-882, para.18). Her suggestion that she lost opportunities is unsupported by any details or documented evidence.

51. The Applicant must accept responsibility for failing to disclose information about her OFAC designation and SIG suspension to the Respondent prior to her appointment. Had she done so, she would not have been appointed at UNHCR and would have been available to access other opportunities. Accordingly, compensation for lost employment opportunities will not be awarded.

Conclusion

52. In view of the foregoing, the Tribunal DECIDES to deny the application in its entirety.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 7th day of November 2024

Entered in the Register on this 7th day of November 2024

(Signed)

René M. Vargas M., Registrar, Geneva