



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

FAGASINSKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, HRLU, UNOG

Introduction

1. The Applicant, a former staff member at the Office of the United Nations High Commissioner for Human Rights (“OHCHR”), contests the decision not to renew his Temporary Appointment (“TA”) for unsatisfactory performance.
2. For the reasons set forth below, the Tribunal decides to reject the application.

Facts and procedural history

3. On 7 August 2022, the Applicant was appointed to the position of Human Rights Officer (“HRO”), Office of the Examination of the Human Rights Situation in Belarus (“OEB”), OHCHR. He held a TA at the P-4 level until 31 March 2023.
4. By email dated 15 December 2022, the Applicant’s First Reporting Officer (“FRO”) wrote to his OEB colleagues requesting “to prepare individual workplans, containing goals, related actions and success criteria, based around the job descriptions in the vacancy announcement, to which [they] applied, using the template provided”. The Applicant’s FRO explained in the same email that these “draft workplans would be discussed with supervisors in January, before they are approved” and that they would need to be evaluated at the end of March.
5. On 16 February 2023, the Applicant was informed that his contract had been extended for a further month.
6. On 22 February 2023, the Applicant submitted his workplan. The following day, his FRO replied to the Applicant that “the workplan including actions and success criteria needs to be more concrete”, and that his plan was “shorter and less detailed than those of the other P4s”. The Applicant’s FRO proposed to the Applicant language—taken from the respective job description—that the Applicant could include in his workplan “under related actions in goal 1/ goal 2”.
7. During a meeting held on 31 March 2023, the Applicant’s FRO informed the Applicant that his TA would not be extended beyond 30 April 2023 due to performance reasons and provided an explanation.

8. By email dated 3 April 2023, the Applicant's FRO wrote to the Applicant confirming that his TA would not be extended beyond April 2023.
9. On 5 April 2023, the Applicant wrote to his FRO and Second Reporting Officer raising "concerns about the entire performance evaluation process [...] done to serve the decision on the non-renewal of [his] appointment".
10. On 11 April 2023, the Applicant's FRO shared with the Applicant the performance evaluation form with his comments. The Applicant's overall performance was rated as "partially meets performance expectations".
11. The Applicant commented on his performance evaluation on 14 April 2023 and requested his FRO to remove remarks related to the recruitment process.
12. By email dated 28 April 2023, the Applicant informed his FRO that he would not sign his performance evaluation form because, *inter alia*, "it contains false and unjust statements". Upon the expiration of his FTA, the Applicant separated from service.
13. On 1 May 2023, the Applicant received a message from Human Resources, OHCHR, related to separation arrangements.
14. On 29 May 2023, the Applicant requested management evaluation of the decision not to renew his FTA.
15. On 7 July 2023, the Management Evaluation Unit notified the Applicant that the Under-Secretary-General for Management, Strategy, Policy and Compliance ("USG/DMSPC") upheld the contested decision.
16. On 4 October 2023, the Applicant filed the application referred to in para. 1 above.
17. On 6 November 2023, the Respondent filed a reply, in which he seeks the dismissal of the application on the basis that the contested decision was reasonable and fair.

18. By Order No. 170 (GVA/2023), dated 26 December 2023, the Tribunal directed the Applicant to file a rejoinder, and ordered the parties to explore resolving the dispute amicably and to revert to it in this respect by 1 February 2024.

19. On 25 January 2024, the Applicant filed a rejoinder.

20. On 1 February 2024, the parties informed the Tribunal that they were not in a position to explore alternative dispute resolution.

21. On 26 September 2024, the parties filed their closing submissions in response to Order No. 111 (GVA/2024).

Consideration

22. The primary legal issue before the Tribunal is whether the decision not to renew the Applicant's TA beyond 30 April 2023 for unsatisfactory performance was lawful.

Scope of judicial review

23. Staff rule 4.12 (Temporary appointment), provides the following in its relevant part:

(c) A temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment.

24. Section 6 (Performance evaluation) of ST/AI/2010/4/Rev. 1 (Administration of temporary appointments) reads:

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 calendar 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 evaluation form and the explanatory statement shall become part of the official status file of the staff member.

25. It is well-settled case law of the United Nations Appeals Tribunal (“UNAT” or “Appeals Tribunal”) that there is no legitimate expectation to renew a TA unless the Administration has made an express promise in writing that gives the staff member an expectancy that the appointment will be extended (see, e.g., *He* 2018-UNAT-825, para. 41; *Igbinedion* 2014-UNAT-411, para. 26).

26. Nevertheless, the UNAT has consistently held that where performance is the reason for the decision not to extend an appointment, the Administration is required to provide a performance-related justification (see *Ncube* 2017-UNAT-721, para. 170), and this reason must be lawful and supported by the facts (see *Islam* 2011-UNAT-115, paras. 29; *Nouinou* 2019-UNAT-902, para. 50).

27. Moreover, a non-renewal decision can be challenged on the grounds that the Administration has not acted fairly, justly, or transparently with the staff member or was motivated by bias, prejudice or improper motive. It is incumbent on the staff member to prove that such factors played a role in the non-renewal decision (see *Porras* 2020-UNAT-1068, para. 24; *Nouinou* para. 47; *Said* 2015-UNAT-500, para. 34).

28. In light of the foregoing, and having reviewed the parties’ submissions to date, the Tribunal defines the issues to be examined in the present case as follows:

- a. Whether the Applicant was promised a renewal;
- b. Whether the reason provided for the non-renewal decision was lawful and supported by the facts, and whether the performance evaluation procedure was proper;
- c. Whether the non-renewal decision was tainted by improper motive; and

d. Whether the Applicant is entitled to any remedies.

Whether the Applicant was promised a renewal

29. The Applicant did not contest that his TA lapsed at the end of the period stipulated in his contract. Although he concedes in his application that a TA creates no expectancy of renewal, he argues that, in his case, several verbal communications created an expectancy of renewal.

30. The Applicant claims that he had a reasonable and legitimate expectation of renewal of his service based on Resolution A/HRC/RES/52/29 extending the mandate of OEB. Furthermore, he alleges that such expectancy was also created by statements of his FRO who “in December 2022, and later until March 2023, during several team meetings ... explicitly stated and announced that if the mandate of the OEB was extended ... the appointments of the entire team would be renewed for the duration of the next mandate”. While the appointments of 4 persons out of 15, including the Applicant, were not renewed, other 11 persons had their appointments extended for an extra year. However, the Applicant failed to provide a written promise of his contract renewal.

31. The Respondent submits that the Applicant had no legitimate expectation of renewal given that he did not provide any promise in writing from the Administration as per the jurisprudence from UNAT.

32. The Tribunal recalls that a legitimate expectation of renewal must not be based on a mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case (see *Munir* 2015-UNAT-522, para. 24). Moreover, a promise to renew a fixed-term appointment must at least “be in writing” and contain “the essential elements of a proper and concrete offer of renewal, such as the duration of the extension” (see *Kalil* 2015-UNAT-580, para. 67).

33. In the present case, general verbal statements, which the Applicant asserts were made by his FRO during team meetings, cannot constitute an express promise despite the extension of the mandate of OEB. More importantly, such verbal

statements lacked the essential elements of a proper and concrete offer of renewal, such as the duration of the extension and the name of the appointee.

34. As for the Applicant's allegation that he was not renewed while others did, the Tribunal is mindful that renewing a TA is not an entitlement of a staff member (see *Beaudry* 2010-UNAT-085, para. 20; *Abdalla* 2011-UNAT-138, para. 22; *Ahmet* 2011-UNAT-153, para. 42; *Appellee* 2013-UNAT-341, para. 16), but rather a discretionary measure of the Administration, unless it can be established that such a measure was unfair (see *Awoyemi* UNDT/2017/008 referring to *Assad* 2010-UNAT-021; *Sanwidi* 2010-UNAT-084, para. 40; *Abbasi* 2011-UNAT-110, para. 24).

35. The Tribunal finds that no official commitment was made to the Applicant in writing to substantiate an expectation of renewal of his TA. The Applicant failed to demonstrate this claim, which the Tribunal dismisses.

Whether the reason provided for the non-renewal decision was lawful and supported by the facts, and whether the performance evaluation procedure was proper

36. When reviewing an administrative decision based on performance evaluation, it is well-established jurisprudence that the Dispute Tribunal must give deference to the Administration's appraisal of the performance of staff members. The Tribunal cannot review *de novo* a staff member's appraisal or place itself in the role of the decision-maker and determine whether it would have renewed the contract based on the performance appraisal (see *Sarwar* 2017-UNAT-757, para. 74).

37. Performance standards generally fall within the prerogative of the Secretary-General and, unless the standards are unfair, the Tribunal should not substitute its judgment for that of the Secretary-General. The primary task is to decide whether the preferred and imposed performance standard was not met and to assess whether an adequate evaluation was followed to determine if the staff member failed to meet the required standard. The Tribunal must decide whether there is a rational objective connection between the information available and the finding of unsatisfactory work performance.

38. In the case at hand, the reason provided for the non-renewal of the Applicant's TA is his overall rating of "partially meets performance expectations" in his performance evaluation at the end of his TA.

39. The Applicant submits that his performance evaluation was not fairly evaluated. He argues that neither a performance expectation meeting nor follow-up meetings were held or feedback given to substantiate the alleged underperformance. Furthermore, he asserts that there was no remedial action to improve his performance.

40. The Applicant further claims that his FRO initiated his workplan in December 2022 and only developed it in March 2023, beyond the timeframe set forth in UN procedures. The Applicant alleges that "[t]his delay deprived [him] of a structured framework to guide his performance and did not allow for ongoing assessment and improvement". He also argues that his FRO addressed comments related to his recruitment process in violation of general principles governed by ST/AI/2010/5 (Performance Management and Development System). The performance evaluation should have been based only on the workplan. The Applicant concludes that OHCHR management failed to adhere to the principles of fairness, transparency, and accountability.

41. The Respondent contends that the contested decision was lawful and made in full accordance with the applicable rules and procedures, including those related to performance management. A performance discussion was held with the Applicant in August 2022 and he never sought additional clarification. The Applicant's FRO rated the Applicant objectively against the United Nations core values and competencies. The Applicant's performance shortcomings were elaborated upon. The Applicant availed himself of the right to provide his comments on the evaluation and received the reply of his FRO.

42. The Respondent submits that in the absence of satisfactory performance, it was lawful for the Administration not to renew the Applicant's TA.

43. This leads the Tribunal to examine whether the applicant's rating of "partially meets performance expectations" was factually supported.

44. In his performance evaluation narrative comments, the Applicant's FRO gave a detailed assessment of the Applicant's performance, which reflected the performance rating. He indicated, *inter alia*, that:

The Staff Member did not provide guidance to the investigation team members on how they should integrate gender during the investigation phase, and his review of the SGBV section and the report in general, including sections drafted by him, lacked nuanced gender perspectives.

With regard to goal 2, the Staff Members (sic) first analytical and reporting task undertaken, in August 2022 was to draft the High Commissioners (sic) oral update on Belarus to the Council, scheduled for September 2022. Once received and reviewed, the Coordinator had to redraft the oral update, as the text proposed by the Staff Member did not meet the required standard.

The Staff Member was accordingly ill suited to coordinate the drafting of the OEB's reports, and act as its main drafter, as per the job description for his position.

45. The comments of the Applicant's FRO were also corroborated in email exchanges between the Applicant and his FRO, e.g., dated 7 December 2022 as follows:

Maciej,

Discussion has been finished today. Please note the following[:]

1. This is a human rights investigation not an international criminal law investigation. Our mandate is to comprehensively document human rights violations. The starting point therefore is not the ICC Statute.
2. International criminal law references belong under the Conclusions under international law and the accountability section, not in the substantive sections, all others were taken out. Those sections cover our assessment of the available evidence from the perspective of applicable international criminal law, as we said we would do, see para 86 of the last report.

46. As to the Applicant's allegations regarding his workplan and its discussion, the Tribunal disagrees with the Applicant's statement that no performance expectations meetings were held and finds that there were no irregularities. As the

Applicant conceded in an email dated 14 April 2023 about his performance evaluation, there was “one meeting in the beginning of August during which [his] TOR was read out to [him] and [he] was asked if [he] had questions”. The Tribunal notes that, normally and pursuant to sec. 6.2 of ST/AI/2010/5, “[a]t the beginning of the performance cycle, supervisors shall meet with the staff under their direct supervision to ensure that the objectives of the work unit are understood and individual workplans are prepared”. Based on the record before it, the Tribunal is satisfied that the Applicant’s FRO complied with said section.

47. The evidence on record also shows that by email of 15 December 2022, the Applicant’s FRO informed the OEB team, including the Applicant, that “colleagues are requested to prepare individual workplans, containing goals, related actions and success criteria”, and “[t]he workplans should be as concrete as possible” and “should also take into account the OHCHR standardized goals”.

48. The email chain between the Applicant and his FRO further reveals that the Applicant submitted his workplan on 22 February 2023, and an updated one on 10 March 2023, after being reminded to do so. The Applicant’s FRO indicated that the Applicant “was the last person in the team to submit his workplan to [him], months following the initial request, and following numerous reminders from [him], and [he] provided more assistance to him, than to the other P-4s in completing the workplan, which omitted some key areas outlined in the job description”.

49. With respect to the Applicant’s allegations regarding the fairness of his performance evaluation, the Tribunal finds that in addition to the notification from the Applicant’s FRO requesting the Applicant to develop his workplan, the Applicant was informed of performance shortcomings and received appropriate feedback starting from November 2022.

50. The evidence on record indicates that feedback was timely provided to the Applicant. For instance, on 27 November 2022, he was requested to refer to recommendations in the last report that were “more concise and better drafted”. His

FRO offered feedback in relation to the torture analysis drafted by the Applicant, providing comments about and proposed edits to the draft in tracked changes.

51. Contrary to the Applicant's claims about the absence of feedback and not being given a chance to improve his overall performance, his FRO pointed out that "plenty of feedback [was] provided around performance in emails, and meetings. [and that unlike] other staff members, the [Applicant] hardly ever approached [his FRO] for further guidance".

52. The Tribunal finds that the Applicant's allegations on his unsubstantiated underperformance and the absence of performance expectation meetings are meritless. In fact, as indicated above, he was provided with feedback guiding his performance improvement as soon as his performance shortcomings were identified. Moreover, pursuant to sec. 6 of ST/AI/2010/4/Rev. 1, performance expectation meetings were held with the Applicant's FRO at the beginning and the end of the Applicant's appointment.

53. With respect to the Applicant's allegation regarding fairness, transparency and accountability in his performance evaluation process, the evidence on record indicates that his FRO issued a performance evaluation at the end of his appointment addressing the Applicant's performance shortcomings. Subsequently, the Applicant submitted a written explanatory statement stating his disagreement, which was placed in his Official Status File.

54. The Tribunal finds that performance management procedures governed by ST/AI/2010/5 and established UNAT jurisprudence on the matter set in *Ncube* were followed.

55. Accordingly, the Tribunal finds that the reason provided for the non-renewal of the Applicant's TA was lawful and supported by the facts. It also finds that the Applicant's performance evaluation procedure was proper and conducted in accordance with the applicable norms, and that the rating of "partially meets performance expectations" was supported by reliable facts.

Whether the non-renewal decision was tainted by improper motive

56. The Applicant submits that the non-renewal decision was motivated by abuse of authority by his FRO.

57. The Respondent argues that the Applicant failed to substantiate that the contested decision was tainted by ulterior motives. Moreover, the Applicant never complained of prohibited conduct under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

58. In this respect, it is well-established jurisprudence that the exercise of the Respondent's broad discretionary authority must not be tainted by forms of abuse of power, bad faith, prejudice, arbitrariness or other extraneous factors, the presence of which contribute to a flawed administrative decision. It is incumbent on the staff member to prove that such factors played a role in the non-renewal decision (see *Nouinou* para. 47; *He* para. 43).

59. The Tribunal finds that the Applicant did not adduce any evidence to prove the improper motivation on the part of his FRO or that improper motives influenced the contested decision.

Whether the Applicant is entitled to any remedies

60. In light of the Tribunal's finding that the decision not to renew the Applicant's TA was lawful, there is no basis for the remedies pleaded for in the application. Accordingly, the Tribunal rejects the Applicant's requests for remedies.

Conclusion

61. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Sun Xiangzhuang

Dated this 12th day of November 2024

Case No. UNDT/GVA/2023/051

Judgment No. UNDT/2024/095

Entered in the Register on this 12th day of November 2024

(Signed)

René M. Vargas M., Registrar, Geneva