UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/181
Order No.: 272 (GVA/2015)
Date: 31 December 2015
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KOTANJYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Stéphanie Cochard, HRLU

Introduction

1. By application filed on 23 December 2015, the Applicant, a Regional Adviser (P-5) at the Sustainable Energy Division ("SED") of the United Nations Economic Commission for Europe ("UNECE"), requested suspension of action, pending management evaluation, of the decision not to renew his fixed-term appointment beyond 31 December 2015.

2. On the same date, the application was served on the Respondent, who filed his reply on 28 December 2015.

Facts

3. The Applicant joined the United Nations on 3 May 2014, at the above-mentioned level and position, under a one-year fixed-term appointment.

4. On 10 December 2014, the Applicant's supervisor and First Reporting Officer ("FRO")—namely the Director, SED, UNECE—completed the Applicant's mid-point review for the 2014-2015 performance cycle in Inspira. In his mid-point comments, the FRO stated that a mid-term review with the Applicant had been conducted on 10 September 2014, when the latter's expected functions were "revisited" and he was asked to "accelerate his activities" in respect of four specific areas.

5. On 16 and 17 December 2014, SED staff participated in a retreat during which additional feedback with respect to expectations of the role of Regional Adviser was shared.

6. On 8 January 2015, the Applicant's FRO provided the former with a performance improvement plan ("PIP") to be implemented from 9 January to 31 March 2015 ("the first PIP"). Said PIP stated, *inter alia*, that the Applicant's performance under it would be assessed in April 2015, in conjunction with his 2014-2015 end-of-year performance appraisal.

7. From 26 to 30 January 2015, the Applicant was on annual leave.

8. On 6 March 2015, the Applicant requested management evaluation of the "decision to place [him] on a PIP".

9. On 10 March 2015, the Officer in Charge, Management Evaluation Unit, Office of the Under-Secretary-General for Management, rejected the Applicant's request for management evaluation as not receivable, on the ground that "the matter of the implementation of a PIP constituted a preliminary decision", therefore making the Applicant's request premature.

10. From 13 to 20 March 2015, the Applicant was on annual leave.

11. On 1 April 2015, the Applicant's FRO provided the Applicant with a second PIP, which was to run until 30 June 2015. This PIP identified shortcomings in the Applicant's performance, building on the first PIP, and set new deadlines for achieving the expected results. It also stated that "progress on [the PIP would] be reviewed and discussed monthly in meetings between [the Applicant, his FRO and his Additional Reporting Officer ("ARO")], but no later than five working days after the respective deadlines", and that "[the Applicant's] performance under this plan [would] be assessed by the end of June 2015".

12. On 27 April 2015, the Applicant signed a letter of appointment extending his fixed-term appointment from 3 May to 30 June 2015; the end of the extension period coincided with that of the second PIP.

13. On 5 May 2015, the Applicant's FRO completed in Inspira the Applicant's end-of-cycle performance evaluation covering the period from his initial appointment until 31 March 2015; the FRO rated the Applicant's performance as "D - Does not meet performance expectations" and commented that:

> A second PIP has been implemented that builds on the acceleration that was perceived under the first PIP. The plan is intended to provide [the Applicant] with addition time and clarity on what is needed in order to raise [his] performance to expected levels.

14. On the same day, the Applicant rebutted his 2014-2015 performance evaluation.

15. By email of 7 May 2015 to the Applicant, and after a first scheduling attempt had not materialized since the Applicant had advised that he was not feeling well, the Applicant's FRO followed-up with him on his availability to discuss progress on the second PIP.

16. On 11 May 2015, the Applicant went on extended sick leave.

17. By email dated 19 May 2015 to the Applicant, his FRO regretted not to have had the opportunity to meet to discuss progress on the second PIP, and shared with the Applicant his and the Applicant's ARO observations on the PIP as at that point in time.

18. By memorandum dated 22 June 2015, a Human Resources Officer, Human Resources Management Service ("HRMS"), United Nations Office at Geneva ("UNOG"), informed the Applicant that his appointment had been extended until 31 August 2015, "for the purpose of completion of the rebuttal process" as per ST/AI/2010/5 (Performance Management and Development System).

19. By email of 28 August 2015, the same Human Resources Officer informed the Applicant that his appointment would be extended for a further month, i.e., until 30 September 2015, "for the purpose of [his] utilization of sick leave entitlements as per Staff Rule 6.2 and ST/AI/2015/3", given that UNOG Medical Service had certified his sick leave for this period. The email specified that the extension of the Applicant's contract was "purely administrative in nature and [did] not give rise to any further leave entitlement … nor [did] it reverse or impact the decision to not extend [the Applicant's contract] as communicated to [him] by Memorandum of 22 [June] 2015."

20. On 1 October 2015, the Applicant returned from sick leave. His contract was subsequently extended on a monthly basis for administrative purposes in October, November and December 2015.

21. On 18 December 2015, the Rebuttal Panel issued its report upholding the Applicant's 2014-2015 performance rating of "D - Does not meet performance expectations".

22. By memorandum dated 21 December 2015, the Executive Secretary, ECE, advised the Chief, HRMS, UNOG, that "[b]ased upon the report of the Rebuttal Panel dated 18 December 2015, we recommend there be no further extension of [the Applicant's] fixed term appointment, which expires on 31 December 2015".

23. By memorandum dated 22 December 2015, a Senior Human Resources Officer, HRMS, UNOG, informed the Applicant that "[o]n the basis [of the 18 December 2015 Rebuttal Panel Report], ECE [had] confirmed … the decision not to renew [his] fixed-term appointment, which [would] expire on 31 December 2015".

24. On 23 December 2015, the Applicant submitted a request for management evaluation of the above-mentioned 22 December 2015 decision not to renew his fixed-term appointment beyond 31 December 2015. On the same date, he also filed the instant application for suspension of action.

Parties' contentions

25. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. A rating of "D - Does not meet performance expectations" cannot justify the non-extension of an appointment; pursuant to sec. 10.4 of ST/AI/2010/5 such rating justifies the termination of a contract only if a PIP "was initiated not less than three months before the end of the performance cycle". The Applicant's first PIP was less than three months in length; additionally, bearing in mind the Applicant's sick and annual leave during it, the PIP assessed his performance for three weeks less than the required three months;

b. The Administration cannot rely on the first PIP to justify the non-renewal decision on performance grounds; the Applicant's reading of sec. 10 (Identifying and addressing performance shortcomings and unsatisfactory performance) of ST/AI/2010/5 supports the conclusion that the first three paragraphs of the section describe a *process* to be followed

sequentially. This was not so in the instant case and renders the first PIP unlawful;

c. Furthermore, following completion of the first PIP and of his 2014-2015 performance evaluation cycle, the Administration did not decide to either terminate or not renew his appointment for performance reasons. Instead, it offered him "a further opportunity to deliver on the expected results as detailed in the first performance improvement plan." Having decided neither to terminate the Applicant nor to separate him for performance reasons, the Administration should be estopped from arguing that under sec. 10.3 of ST/AI/2010/5, failure to improve after the first PIP justified the non-renewal decision;

d. The Administration cannot rely on the second PIP to justify the non-renewal decision on performance grounds because the Applicant was never provided with the opportunity to complete and was never assessed against it; the Applicant was on sick leave as of 11 May 2015, less than half way into the second PIP, and the term running to 30 June 2015 was never completed. Furthermore, the Administration informed the Applicant about the non-renewal of his appointment on 22 June 2015, i.e., before the end of the second PIP period. It is manifestly unreasonable to purport to provide a staff member with an opportunity to correct performance issues and to, subsequently, decide to separate that staff member before such opportunity has been exhausted. Finally, the Applicant submits that, having chosen to implement a second PIP, the Administration indicated clearly to him that the first PIP combined with his performance evaluation was not the basis for a non-renewal decision, and that the Administration's intention, following the Applicant's 2014-2015 performance evaluation, was to allow him a further opportunity to rectify any alleged performance problems;

e. The Administration's actions demonstrate a desire to justify a non-renewal decision but no desire to address alleged performance issues;

Urgency

f. The requirement of urgency is clearly made out on the facts; the Applicant was informed of the decision challenged on 22 December 2015, with his contract expiring on 31 December 2015. He has acted in a timely fashion, and the urgency of the situation cannot be considered to be of his own making. Additionally, the Management Evaluation Unit will not be able to review his case prior to the implementation of the decision on 31 December 2015;

Irreparable damage

g. It is established jurisprudence that monetary compensation is insufficient to compensate the frustration, unhappiness and loss of chance of career development associated with the non-renewal of a fixed-term contract, and that loss of UN employment is not merely viewed in terms of financial loss but also in terms of the loss of career opportunities. The Applicant is on his first assignment with the United Nations and, should the decision stand, this significant career opportunity would be lost. Furthermore, he risks significant reputational damage that might further impact his career opportunities going forward; and

h. The Applicant risks losing his livelihood. He currently supports his wife and their four-year old child with his salary. He and his wife also support their elderly parents.

26. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The decision not to renew the Applicant's appointment is a proper exercise of administrative discretion, made in line with applicable rules and not motivated by any extraneous consideration; when a staff member holding a fixed-term contract obtains the lowest rating of "does not meet performance expectations", the Administration is entitled to not renew the staff member's contract on the ground of unsatisfactory performance. The

requirement of *prima facie* unlawfulness is met only if there are serious and reasonable doubts about the lawfulness of a contested decision, and the Applicant has failed to discharge his burden of establishing that the decision not to renew his appointment is *prima facie* unlawful;

b. The Applicant's performance was properly and fairly evaluated; he was given feedback on his work, and a mid-term discussion properly took place in September 2014. Additional feedback was provided to him during the SED retreat in December 2014;

c. The Applicant's placement under a PIP was proper, lawful and proportionate; a PIP is one of the remedial measures provided for in sec. 10.1 of ST/AI/2010/5 when performance shortcomings are identified during a performance cycle; the PIP was properly implemented in line with sec. 10 of ST/AI/2010/5;

d. The fact that the first PIP was implemented for slightly less than three months is not a flaw that vitiates the whole procedure, and was cured by the implementation of the second PIP; sec. 10.4 of ST/AI/2010/5 requires a PIP of not less than three months before the end of the performance cycle only in cases of *termination* of an appointment, whereas the case at hand concerns the non-renewal of a fixed-term appointment;

e. Despite the Applicant's leaves in the course of the PIPs, if one combines the PIP periods, the Applicant effectively worked under a PIP for a period exceeding four months. This period meets the requirements of sec. 10.4 of ST/AI/2010/5, the intent of which is to ensure that staff members are given sufficient time to improve their performance once a PIP is initiated; during this period, i.e., from 9 January to 11 May 2015, the Applicant did not meet the requirements of either PIP;

f. The rating of "does not meet performance expectations" was based on objective elements and confirmed by a Rebuttal Panel; additionally, the non-renewal decision was properly based on sec. 10.3 of ST/AI/2010/5. The first three paragraphs of sec. 10 of ST/AI/2010/5 do not describe a process

that is to be followed in chronological order; sec. 10.2 of the administrative instruction in question applies to cases where the performance rating is "partially meets performance expectations"; the applicable provision in the instant case is sec 10.3; and

g. The Respondent denies the Applicant's allegation that his sick leave had an impact on the decision not to renew his fixed-term appointment; the Respondent reiterates that the Applicant's unsatisfactory performance and inability to improve over a four month period under a PIP, as confirmed by a Rebuttal Panel, were the sole justifications for the non-renewal decision.

Consideration

27. Pursuant to art. 2.2 of its Statute and art. 13.1 of its Rules of Procedure, the Tribunal is competent to hear and pass judgment on an application filed by an individual requesting the Tribunal:

> [T]o suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

28. The three aforementioned requirements are cumulative and must thus all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)). Each of them will be analysed in turn.

Prima facie unlawfulness

29. With respect to the first condition, the Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see *Hepworth* UNDT/2009/003; *Corcoran* UNDT/2009/071; *Corna* Order No. 90 (GVA/2010); *Berger* UNDT/2011/134; *Chattopadhyay* UNDT/2011/198; *Wang* UNDT/2012/080; *Wu* Order No. 188 (GVA/2013)).

30. In this respect, the Tribunal held in *Corna* Order No. 90 (GVA/2010) that:

> [T]he combination of the words "appears" and "prima facie" shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt. This was echoed in Corcoran, UNDT/2009/071, in which the Tribunal held that "since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that prima facie [unlawfulness] in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision".

31. In the instant case, the decision not to renew the Applicant's fixed-term appointment beyond 31 December 2015, as expressed in the memorandum dated 22 December 2015, is based on a performance rating of "does not meet performance expectations" for the 2014-2015 appraisal cycle, which was upheld by a rebuttal panel on 18 December 2015.

32. The Tribunal recalls that staff regulation 4.5(c) and staff rule 4.13 provide that "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal". In *Ahmed* 2011-UNAT-153, the Appeals Tribunal held that "if based on valid reasons and in compliance with procedural requirements, fixed-term appointments may not be renewed."

33. It is well established that unsatisfactory performance constitutes a legitimate basis for the non-renewal of a staff member's fixed-term appointment (see e.g., *Ahmed* 2011-UNAT-153). The Appeals Tribunal further held that a staff member whose performance was rated as "partially meets performance expectations" has no legitimate expectancy of renewal of his or her contract (*Said* 2015-UNAT-175, *Dzintars* 2011-UNAT-175, *Jennings* 2011-UNAT-184). This principle applies *a fortiori* when a staff member is given the lowest rating of "does not meet performance expectations".

34. The above being said, the Tribunal is particularly concerned with the fact that, on the one hand, the Applicant was offered an additional opportunity to improve his performance after the end of his 2014-2015 performance appraisal cycle by being presented with a second PIP, whereas, on the other hand, the latter

appears neither to have been completed nor to have been evaluated prior to the contested decision being made.

35. In this respect, the Tribunal has to examine whether the contested decision was taken in compliance with the requirements of ST/AI/2010/5.

36. Pursuant to sec. 10.1 of ST/AI/2010/5, a time-bound PIP may be instituted to address a performance shortcoming identified during a performance cycle; it must include clear targets for improvement, provision for coaching and supervision by the first reporting officer, in conjunction with performance discussions with the staff member under evaluation that should be held on a regular basis.

37. Sec. 10.3 of said administrative instruction further provides that, if the performance shortcoming was not rectified following the remedial actions indicated in sec. 10.1, a number of administrative actions may ensue, including the non-renewal of an appointment for unsatisfactory service in accordance with staff regulation 9.3.

38. In turn, sec. 10.5 of ST/AI/2010/5 provides:

> Should unsatisfactory performance be the basis for a decision for a non-renewal of a fixed-term appointment and should the appointment expire before the end of the period covering a performance improvement plan, the appointment should be renewed for the duration necessary for the completion of the performance improvement plan.

39. It is undisputed that at the end of the Applicant's 2014-2015 performance appraisal cycle on 31 March 2015, a second PIP effective from 1 April 2015 to 30 June 2015 was instituted as a follow-up of the first PIP, and that it was intended to give the Applicant further time to deliver on targeted results. The Applicant's 2014-2015 ePAS confirms that despite a rating of "does not meet performance expectations", he was offered an additional opportunity to improve through a second PIP. Indeed, in his end-of-cycle comments, the Applicant's FRO stated that "[t]he plan [was] intended to provide [the Applicant] with additional time and clarity on what is needed in order to raise his performance to expected

levels." As per sec. 10.5 of ST/AI/2010/5, the Applicant's fixed-term appointment was extended from 3 May 2015 until 30 June 2015, to allow for the completion of the second PIP.

40. However, it appears from the parties' submissions and the documents annexed thereto, that the second PIP was not completed and that the Applicant's performance was not appraised as per the modalities set forth in the second PIP.

41. Firstly, the records shows that the Applicant only worked under the second PIP for five and a half weeks, as he went on prolonged sick leave on 11 May 2015. Furthermore, although the Applicant returned from sick leave on 1 October 2015, there is no indication that he actually resumed his functions of Regional Adviser. Rather, the evidence suggests that from 22 June 2015, the Applicant's appointment was renewed exclusively to allow him to either complete the rebuttal process or exhaust his sick leave, and that the Applicant's return from sick leave on 1 October 2015 was solely for the purpose of completing the rebuttal process. The only extension of the Applicant's appointment made in connection with a PIP was the one he signed on 27 April 2015 extending his contract until 30 June 2015.

42. Secondly, the Applicant's performance was not evaluated as per the modalities set forth in the second PIP, which included monthly discussions between the Applicant and his FRO and ARO, as well as a final appraisal at the end of the second PIP. As per this PIP, the Applicant's FRO contacted the Applicant at the beginning of May 2015 to schedule a monthly meeting to follow-up on and discuss about his performance. This meeting did not take place as the Applicant went on prolonged sick leave as of 11 May 2015.

43. On 19 May 2015, the Applicant's FRO wrote to him by email to raise a number of concerns about his performance and concluded by stating:

> I do hope you will be able to return soon in order to continue working to develop a robust regional advisory programme. The programme is essential for the success of the UNECE energy sub-programme, and especially now on the periphery of the open-ended consultations your full engagement could be effective.

44. As per the record, this is the last communication with the Applicant in respect of his performance appraisal under the second PIP and, indeed, the last note on file in this regard. Therefore, it appears that the second PIP was not brought to a close through a final evaluation, as per the terms of the second PIP.

45. The Tribunal does not have to assess whether the institution of a second PIP was useful or required before the Administration decided not to renew the Applicant's fixed-term appointment for performance reasons, given that a first PIP had already been implemented and the Applicant had received a rating of "does not meet performance expectations" at the end of his 2014-2015 performance appraisal cycle.

46. However, once the Administration chose to establish a second PIP, it was bound to fully comply with the applicable procedure (see, e.g., *Kucherov* UNDT/2015/106; *Eldam* UNDT/2010/133). The Tribunal is of the view that since the Administration elected to offer the Applicant an additional opportunity to improve his performance, as acknowledged by the Respondent in his reply, it had to abide by its engagement and allow for the completion of the second PIP before deciding not to renew the Applicant's appointment, as required by sec. 10.3 and 10.5 of ST/AI/2010/5.

47. As noted above, whereas the Applicant's appointment was technically extended to cover the three-month period of the second PIP, the Applicant's sick leave interrupted its implementation after only five and a half weeks, and the second PIP appears not to have been revived, despite the fact that the Applicant returned from sick leave on 1 October 2015. In this respect, the Tribunal emphasises that sec. 10.5 of ST/AI/2010/5 requires the extension of an appointment until the completion of a PIP; this is particularly important in circumstances such as those of the present case—where the interruption of a PIP is justified by legitimate reasons provided by the staff member—since the duration of an appointment may not necessarily coincide with that of a PIP. Furthermore, sec. 10.3 of the administrative instruction in question provides that termination may ensue if a remedial action, such as the implementation of a PIP, has not rectified the performance shortcomings.

48. Also, the Tribunal notes that the contested decision, as formulated in the Memorandum of 22 December 2015, appears to be based solely on the rating given at the end of the Applicant's 2014-2015 performance appraisal cycle, without any consideration of the fact that a second PIP, covering an additional three-month period, had been instituted. It is inconsistent to, on the one hand, provide the Applicant with an opportunity to improve his performance by instituting a second PIP and, on the other hand, to base the decision not to renew the Applicant's contract on an evaluation that predates the second PIP, without allowing for the completion of the latter.

49. Accordingly, the Tribunal finds that the case raises serious and reasonable doubts about the contested decision's compliance with the requirements of sec. 10.3 and 10.5 of ST/AI/2010/5. This procedural flaw appears *prima facie* to vitiate the contested decision.

Urgency

50. If not suspended, the Applicant's non-renewal will become effective on 31 December 2015. The urgency is therefore obvious. Further, the Tribunal is satisfied that the urgency is not self-created and that the Applicant promptly contested the decision once it had been notified to him.

Irreparable damage

51. It is settled law that loss of career opportunity with the Organization amounts to harm that cannot be adequately repaired through financial compensation (*Saffir* Order No. 49 (NY/2013), *Farrimond* Order No. 200 (GVA/2013), *Moise* Order No. 208 (NY/2014)). Also, the Tribunal has repeatedly ruled that harm to professional reputation and career prospects, as well as harm to health, or sudden loss of employment, may constitute irreparable damage (*Calvani* UNDT/2009/092, *Villamoran* UNDT/2011/126, *Ullah* UNDT/2012/140).

52. Given that the Applicant's current fixed-term appointment is the first he had with the United Nations, and that the non-renewal of his appointment is based on poor performance, the Applicant's professional reputation may foreseeably be tarnished and his career prospects with the Organisation may certainly be limited. The Tribunal finds that these damages caused to the Applicant would be irreparable and could not be adequately compensated at a later stage.

Conclusion

53. In view of the foregoing, it is ORDERED that the decision of 22 December 2015 not to renew the Applicant's fixed-term appointment beyond 31 December 2015 be suspended pending the outcome of the management evaluation.

(*Signed*)
Judge Thomas Laker
Dated this 31st day of December 2015

Entered in the Register on this 31st day of December 2015
(*Signed*)
René M. Vargas M., Registrar, Geneva