



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

BHARDWAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Katrina Waiters, UNFPA
Yun Hwa Ko, UNFPA

Introduction

1. On Friday, 10 May 2019, the Applicant, a Technical Adviser at the P-5 level with the United Nations Population Fund (“UNFPA”) in New York, filed an application requesting urgent relief under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, “the decision of the Administration not to renew her appointment on the basis of unsatisfactory performance”. Due to the complexity of this very fact specific case, for the sake of completeness and judicial economy, the detailed facts and submissions have been reproduced almost in full below.

2. In the reply duly filed on 14 May 2019, the Respondent submits that the contested decision is not *prima facie* unlawful, there is no urgency and the Applicant will not suffer any irreparable harm.

Relevant background

3. Without prejudice to any factual findings made subsequently in this Judgment and solely for the purpose of providing context, the Applicant’s presentation of the factual background is set out below:

... [The Applicant] is a P-5 Technical Adviser for the United Nations Population Fund (UNFPA).

... In 2016, [the Applicant] was subject to a performance evaluation from her former supervisor, [name redacted, Ms. LL]. [The Applicant] was assessed as follows:

- a. Overall Rating for Work Plan Outputs – Partially Achieved Outputs;
- b. Overall Rating for Core Competencies – Developing Proficiencies;
- c. Overall Rating for Functional Competencies – Developing Proficiencies;

d. Overall Rating for Development Outputs – Fully Achieved Outputs;

... [Ms. LL], in her final comments for the 2016 [Performance Appraisal Evaluations, (“PAD”)], stated “I am glad Staff Member perceived my support. She needs to improve contribution to collective work and increase her voice and contributions to the team and when interacting with partners or representing UNFPA in global platforms.” [reference to annex omitted].

... In 2017, [the Applicant] undertook a performance evaluation under her new supervisor and First Reporting Officer, [name redacted, Ms. AK]. [The Applicant] was assessed as follows:

a. Overall Rating for Work Plan Outputs – Fully Achieved Outputs;

b. Overall Rating for Core Competencies [–] Fully Achieved Outputs;

c. Overall Rating for Functional Competencies – Developing Proficiencies;

d. Overall Rating for Development Outputs – Fully Achieved Outputs;

... [Ms. AK], in her final comments for the 2017 PAD, stated:

I think we have worked well together to redeem past difficulties and apply a new approach. I appreciate the way we have been able to discuss and find solutions to how things can improve. [The Applicant] is a very direct and warm person with good interpersonal skills. I am looking forward to see how we can together find ways for [the Applicant] to take on the work on strategic direction and roll out the MHTF [unknown abbreviation] business plan and continue to support this development. [reference to annex omitted].

... In January 2018, [the Applicant] commenced her new evaluation cycle. During the Mid-Point Evaluation, [Ms. AK] referenced the following regarding her assessment as of 2 August 2018:

a. Work Plan Output Progress – “Progressing although some indicators have yet to be started. The coordination of the global MHTF meeting has mainly been driven by other parts of

the team. Output on management not relevant at this stage as there are no direct reports”

b. Developmental Plan/Output Progress – “Progressing as planned”

c. Competency Progress – “No specific comments to report” [reference to annex omitted].

... Despite this neutral Mid-Point Evaluation and overall positive 2017 PAD, [the Applicant] was forced to undergo a Performance Improvement Plan [“PIP”]. [The Applicant] was presented with a PIP and instructed to sign it as a precondition for the extension of her contract.

... [The Applicant] subsequently was never given any feedback on the PIP, nor was she provided with any final evaluation regarding this time-specific evaluation. Indeed, [the Applicant] was not even presented with a copy of the PIP for her own records.

... On 28 January 2019, [the Applicant] submitted a complaint regarding the management of her unit and the way [Ms. AK] had led the team. [The Applicant] referenced the poor office environment, workplace harassment and bullying behavior. [reference to annex omitted].

... No action regarding this document was ever taken by the Administration.

... In February 2019, [the Applicant] was evaluated on her performance for 2018. [The Applicant] was assessed as follows:

a. Overall Rating for Work Plant Outputs – Partially Achieved Outputs;

b. Overall Rating for Core Competencies - Developing Proficiency;

c. Overall Rating for Functional Competencies – Developing Proficiency

d. Overall Rating for Development Outputs – Fully Achieved Outputs.

... [Ms. AK] in her final comments for the 2018 PAD stated:

Although progress has been made over the last year there is still a gap between what the position and job

description requires and the [staff member (“SM”)] delivers. As stated last year this is not about the SM as a person or professional. It is really about a mismatch between the skill sets and previous experience and what this adviser position requires. There is no doubt that the SM has contributed to all of the required skill sets necessary for the programme... An improvement plan was put into place in 2018 to try to address some of these challenges and although progress has been made the assessment remains developing proficiency.

... Following [Ms. AK’s] evaluation, the Applicant filed a Rebuttal Request challenging her 2018 evaluation.

... On 17 April 2019, the Rebuttal Panel upheld the findings of the 2018 PAD [reference to annex omitted].

... On 23 April 2019, [the Applicant] was notified that her fixed-term appointment was not going to be renewed on the basis of unsatisfactory performance. [The Applicant] was informed that she would be separated as of 30 May 2019 [reference to annex omitted].

... [The Applicant] is eligible for retirement on 11 September 2019.

... On 10 May 2019, [the Applicant] submitted her request for Management Evaluation [reference to annex omitted].

Consideration

Legal framework

4. Article 2.2 of the Statute of the Dispute Tribunal provides:

2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

5. Article 13.1 of the Tribunal's Rules of Procedure states:

The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to 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.

6. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

7. It also follows from the language of art. 2.2 of the Tribunal's Statute and art. 13.1 of the Rules of Procedure that the suspension of action of a challenged decision may only be ordered when management evaluation of that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159; *Benchebbak* 2012-UNAT-256). As stated in *Onana* 2010-UNAT-008 (affirmed in *Kasmani* 2010-UNAT-011; *Benchebbak* 2012-UNAT-256), the Dispute Tribunal may under no circumstances order the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed. An order for a suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented (*Gandolfo* Order No. 101 (NY/2013)).

Prima facie unlawfulness

8. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was

contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011); *Villamorán* UNDT/2011/126).

9. The Applicant's principal submissions may be summarized as follows:

a. It is a well-established principle that unsatisfactory performance constitutes a legitimate basis for the non-renewal of a staff member holding a fixed-term appointment. Indeed, it is recognized jurisprudence that a staff member whose performance is rated as partially meets expectations has no legitimate expectancy of renewal of his or her contract;

b. However, when not being renewed, a staff member may challenge such a decision if there are grounds that the Administration have not acted fairly, justly, or transparently, or that the decision was motivated by bias, prejudice, or improper motive. In not renewing the Applicant's appointment, the Administration failed to act in good faith, in particular because:

i. The Applicant's 2017 evaluation did not exhibit substantial concern as to merit the necessity of a PIP. A review of her 2017 final evaluation demonstrated that three out of the four criteria assessed met the required level of performance. At the same time, the comments raised by Ms. AK did not suggest that she had any particular concerns regarding the Applicant's performance. Indeed, the 2017 PAD is replete with positive comments regarding the Applicant performance. According to Ms. AK, the Applicant had for 2017 been described as hardworking, a doer, team-oriented, and having a sound knowledge base on maternal newborn health;

ii. Ms. AK undertook a mid-point review for the Applicant's 2018 PAD. A review of Ms. AK's comments does not indicate substantive deficiencies in poor performance to necessitate a PIP or the implementation of any other remedial measure. Indeed,

there is nothing in the Applicant's mid-point review to indicate the degree of unsatisfactory performance that could even necessitate non-renewal of her appointment;

- iii. The final evaluation of the Applicant's performance was preceded by her filing comments regarding the hostile environment she had encountered working in the office under the supervision of Ms. AK;
- iv. Subsequently, the Applicant was given a poor evaluation, contradicting her 2017 PAD and mid-point review. Consequently, the Applicant was informed that she would be separated from service as a result of unsatisfactory performance. Such a non-renewal therefore was predicated on a too short evaluation period commencing 3 August 2018 (the day after the mid-point review in which no short falls were revealed) until 31 December 2018;
- v. Whilst the Administration does retain the option of not renewing a staff member in circumstances of poor performance, it would appear that no account was taken of the Applicant's eligibility to retire having reached the age of 62 pursuant to staff rule 13.13(a). No consideration appears even to have been given to applying Special Leave provisions under staff rule 5.3(d), even in circumstances that evidence existed of poor performance. The Administration appears simply intent of ridding themselves of the Applicant, regardless of the cost.

c. A staff member cannot be separated on account of poor performance unless a PIP has been initiated and completed in a fair and transparent manner. The Applicant only witnessed the PIP document itself on one occasion, when she was asked to sign the document so that her contract could be renewed. Subsequently, the Applicant was not given the opportunity to engage with it;

indeed, she was not even aware that she had been evaluated on the PIP following its alleged completion. No meetings or discussions of any kind ever took place. Effectively, the PIP's implementation was not used for the intention of improving performance, but rather as a strategy to exhibit an element of legality in the non-renewal process. As established by the Dispute Tribunal in *Kucherov* UNDT/2015/106, once the Administration chose to establish a PIP, it was bound to fully comply with the applicable procedures of the PIP, but there is no indication that the PIP provided the Applicant the opportunity to improve performance, nor for that matter any indication that a full and fair evaluation ever took place on the outcome. Indeed, until now, no record of the PIP even exists within the Human Resources Unit of UNFPA.

10. The Respondent's principal submissions may be summarized as follows:
 - a. The Applicant bears the burden of identifying valid reasons that would lead the Dispute Tribunal to reasonably hold serious and reasonable doubts about the lawfulness of the contested decision;
 - b. Each of the requirements under art. 5 of UNFPA's "Policies and Procedures Manual" regarding separation from service ("PPM") has been precisely followed and have afforded the Applicant with a fair, impartial and transparent process. The Applicant received all required notices, collaborated regularly with her supervisor for development and improvement, and fully participated in the PAD rebuttal process. Further, while Applicant details her PAD ratings for three years, 2016, 2017 and 2018, sec. 5.13 of the PPM is clear that for decisions to not renew an appointment, only one year-end appraisal is required;
 - c. The Applicant alleges that she "submitted a complaint regarding the management of her unit and the way [her supervisor] had led the team. [Applicant] referenced the poor office environment, workplace harassment and bullying behavior". After a due diligence investigation, no evidence has been found that the Applicant has filed such a complaint with UNFPA's Office of

Audit and Investigation Services, the only entity charged with addressing complaints of harassment and general allegations of misconduct;

11. The Tribunal notes that parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers instantly filed before it. An application may well stand or fall on its founding papers. Likewise, a respondent's reply should be complete to the extent possible in all relevant respects. Whilst pleadings should contain all relevant material to support a party's case, they should not be unwieldy and burdensome, nor frivolous nor an abuse of process. Parties should bear in mind that the matter is not at the merits stage at this point of the proceedings, no hearing is contemplated, nor are further pleadings envisaged, unless the Tribunal orders otherwise.

12. The Tribunal is surprised that the Respondent takes the point that the PPM clearly articulates that a fixed term appointment automatically expires without prior notice on its expiration date, and that there is no expectancy of renewal of a fixed term appointment, when the law regarding the legal hierarchical effect of manuals, and that regarding fixed-term contracts and non-renewal has been long settled (see, for example, *Pinto* 2018-UNAT-878, para, 23, “[The Dispute Tribunal] erred in finding that the Hiring Manuals are binding on the Administration since, according to the established Appeals Tribunal jurisprudence, ‘rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative issuances’”; and regarding the submissions on fixed term contracts see *Obdeijn* UNDT/2011/032 upheld in 2012-UNAT-201, see also *Azzouni* UNDT/2010/005 and *Abdalla* UNDT/2010/140). The taking of knee-jerk unsustainable defenses when the law is clearly established and settled, not only delays the matter in hand, but other pending work that the Tribunal and all parties are engaged in. The Tribunal shall say no more about this matter.

13. The Tribunal observes that in the letter dated 21 April 2019 from the UNFPA Director of the Division for Human Resources to the Applicant regarding the non-

renewal of her fixed-term appointment, it was stated that her “appointment will be extended until 31 May 2019 and that it will not be renewed beyond that date because of unsatisfactory performance”.

14. The Tribunal further notes that in the Applicant’s PAD for 2018 (which is undated, but presumably finalized at the end of the year 2018): (a) her “overall rating for work plan outputs” was indicated as “partially achieved outputs (the second lowest rating of four possible ratings); (b) her “overall rating for core competencies” was indicated as “developing proficiency (the second lowest rating of four possible ratings); (c) her “overall rating for functional competencies” was indicated as “developing proficiency” (the second lowest rating of four possible ratings); and (d) her “overall rating for developmental outputs” was indicated as “fully achieved outputs” (the second highest rating of four possible ratings). While some needs for development were highlighted in her supervisor’s narrative comments, reference is also made to progress and the Applicant’s “will and strength to take on needs for improvement, loyalty, being able to see good intent and hurt feelings, and deciding to continue to try in spite of feedback that sometimes have been difficult”. No reference is made in the PAD to any PIP or the Applicant possibly facing a non-renewal of her fixed-term appointment unless her performance improves.

15. In the rebuttal report regarding the Applicant’s 2018 PAD dated 17 April 2019, in which the rebuttal panel upheld the performance appraisal, reference to the PIP is, however, made in the final “general observation” where it is stated that:

The panel spent much effort trying to reach potential colleagues recommended by [the staff member (“S/M”)] for additional interviews and information gathering. The panel was able to interview one colleague after four attempts to make contact with other colleagues. Some were unable for the interview due to missions/travels, but others did not wish to participate in the interview as they indicated they did not closely work with the S/M and so could not comment on S/M’s work plans/competencies or provide useful information to the rebuttal process.

The panel also noted that the supervisor has spent much time coaching the S/M and worked on a PIP with the S/M trying to improve

performance. Unfortunately, after all the reviews of documents and the interviews, the panel was not able to see the S/M demonstrating performance up to her role and expectations.

16. The Tribunal notes that under the PPM, no reference is made to a PIP in the context of the separation of a UNFPA staff member for “unsatisfactory performance”. However, the Tribunal agrees with the Applicant’s submission that if indeed it is decided to implement such remedial measure, the Administration is obliged to follow the directions included in the PIP and to execute its completion (*Kuchеров, supra*). In addition, this is also a matter of the staff member’s legitimate expectations (see, for instance, the Appeals Tribunal in *Sina* 2010-UNAT-094, affirming *Sina* UNDT/2010/060) and the general legal doctrine of good faith and fair dealing.

17. However, the Applicant submits that she was only presented with the PIP once, namely when she signed it as a requirement for renewing her latest fixed-term appointment, that she was not provided with a copy of the PIP, that no follow-up was made with her in accordance with the PIP, and that no record of the PIP even exists. The Tribunal observes that there is no PIP in the documentation filed by either party.

18. The Respondent does not explicitly deny any of these factual contentions, but instead makes a vague and general disclaimer in the reply that, “The Respondent disputes all facts described in the Application unless expressly admitted in this reply”. Such disclaimer is entirely unhelpful, in particular as many of the factual circumstances mentioned by the Applicant have direct basis in the written documentation submitted in evidence. A bare denial pleading is consistent with a reply in a substantive case, not in response to an urgent application. The matter would have been better served if the Respondent stated precisely and concisely the facts actually disputed and/or additional facts relied upon, adequately supported as best as possible by documentation, remembering at all times that the matter is not at the merits stage.

19. The Respondent also submits that, in accordance with art. 5 of the PPM, but making no reference to the PIP, the Applicant received “all required notices”, “collaborated regularly with her supervisor for development and improvement”, and

“fully participated in the PAD rebuttal process”. The Respondent has, however, placed no evidence whatsoever for any of these submissions; at minimum, the Respondent could have produced a copy of the PIP. The reference in the rebuttal report to the supervisor “coaching” the Applicant and to the PIP, is a matter of substantial factual dispute, and the Respondent’s position is unsubstantiated. The Tribunal notes that, in accordance with the Appeals Tribunal in *Islam* 2011-UNAT-112, “when a justification is given by the Administration for the exercise of its discretion [regarding a non-renewal decision] it must be supported by the facts”. In the present case, the Respondent has entirely failed to substantiate how the process leading to the non-renewal decision was undertaken and therefore also the basis upon which it was justified.

20. In particular, the Respondent has not pleaded to the Applicant’s serious allegations regarding the non-existence of a valid PIP and failed to rebut such entirely. Indeed, this and other omissions in the Respondent’s reply to address pertinent aspects of the application other than with a bare denial lead the Tribunal to the inescapable conclusion that there are serious and reasonable doubts about the lawfulness of the contested decision.

21. Accordingly, on a *prima facie* basis and the papers before the Tribunal, the Respondent has not been able to rebut the Applicant’s allegation that the process leading up to the 2018 PAD that subsequently led to the decision not to renew her fixed-term appointment was unlawful.

Urgency

22. According to art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

23. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks

the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

24. The Applicant submits that the matter is urgent because her fixed-term appointment will expire on 31 May 2019 and she will thereafter be separated from service.

25. The Respondent contends that no urgency exists because the Applicant was informed on 23 April 2019 that her contract would not be renewed and she therefore waited more than two and a half weeks to file the present application. The Respondent further submits that this Tribunal has previously held that when a staff member seeks assistance on an urgent basis, s/he must come to the Tribunal at the earliest available opportunity. The onus is on the staff member to demonstrate the particular urgency of the case and the timeliness of their actions. Therefore, if any urgency exists, the Respondent contends that it was self-created by the Applicant and should be rejected

26. The Tribunal observes that the Applicant filed the present application on 10 May 2019, on which date she also filed for management evaluation, after learning of the contested decision on 23 April 2019 that her fixed-term appointment would not be renewed after 31 May 2019. Taking into account the particular circumstances of the case, including its complexity and the Administration's lack of making proper written records available, the Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention with the looming deadline of 31 May 2019.

27. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

28. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. However, it is clearly settled law that, depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (*Adundo et al.* UNDT/2012/077; *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013); *Finniss* Order No. 116 (GVA/2016)).

29. The Applicant submits that, in the present case, if the impugned decision is implemented, she will suffer harm due to the loss of employment and in relation to her career prospects. Specifically, she will lose the opportunity to advance her career at UNFPA, and such harm cannot be compensated for by a monetary award.

30. The Tribunal is surprised by the Respondent's submission that the Applicant has failed to establish irreparable harm as she remains employed by UNFPA and the contested decision is currently under review pending management evaluation, as an application under art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure is precisely for matters of this nature, during the pendency of management evaluation.

31. The Respondent further submits that there is no risk of irreparable harm defined as a loss that cannot be adequately compensated through a monetary award, because the Applicant only argues that she will be harmed by the loss of employment, but neither provides the requisite evidence nor demonstrates with specificity that irreparable damage will occur. That the Applicant's argument is therefore purely speculative.

32. The Tribunal notes that the Applicant's imminent separation from UNFPA, and therefore also employment with the Organization, is evidenced by the UNFPA Director

of the Division for Human Resources' letter dated 21 April 2019 in which the Applicant is informed about the non-renewal of her fixed-term appointment upon expiry on 31 May 2019. Furthermore, this matter is not at the merits stage requiring proof of damages, and the case law in this regard is well-settled as stated above. The Respondent's argument in this regard is therefore spurious.

33. The Respondent further contends that since the Applicant argues that she is eligible for retirement on 11 September 2019 and "that no account was taken of her eligibility to retire having reached the age of 62 pursuant to Staff Rule 13.13(a)" and the Administration should have given consideration "to applying Special Leave provisions under Staff Rule 5.3(d)", she is clearly not seeking future career prospects with UNFPA if her intent is to retire on or near her next birthday. The Respondent appears to have totally misconstrued the argument as the Applicant is clearly referring to the possible disentanglement of her full retirement benefits on her due retirement date 6 months from now.

34. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

Conclusion

35. The Tribunal finds that the conditions for suspension of action under art. 2.2 of its Statute have been satisfied for granting the application for suspension of action. Accordingly, the decision not to renew the Applicant's fixed-term appointment shall be suspended pending management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 17th day of May 2019