



Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

QUINONEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON SUSPENSION OF ACTION
PENDING MANAGEMENT
EVALUATION**

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. On 18 October 2019, the Applicant, a Legal Assistant at the G-5 level with the Office of Legal Affairs, filed an application requesting under art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure suspension of action pending management evaluation of the decision not to renew his appointment beyond 31 October 2019.

2. On 23 October 2019, the Respondent filed a reply contending that two of the conditions for granting an order for suspension of action, *prima facie* unlawfulness and urgency, are not met in this case.

Factual background

3. During the performance cycles 2016/17 and 2017/18, the Applicant received the overall ratings of "successfully meets performance expectations". For the performance cycle 2016/17, he received the rating of "requires development" in planning and organizing. For the performance cycle 2017/18, he received the rating of "requires development" in professionalism, planning and organizing, and accountability. In both evaluations, he received some comments from his supervisors reflecting these performance shortcomings.

4. On 27 November 2018, during the performance cycle 2018/19, the Applicant's first reporting officer had a mid-point review during which performance shortcomings were discussed. In particular, the Applicant's first reporting officer advised him that improvement was urgently needed with regard to the processing and tracking of incoming and outgoing correspondence. The Applicant was also requested to properly record all his absences that he did not properly enter in the United Nations system of record ("Umoja").

5. In February 2019, the Applicant's first reporting officer had another meeting with the Applicant, and the performance shortcomings were discussed again. During this meeting, it was decided to establish a performance plan for three months, which was later extended for another month. While the first reporting officer noted that the Applicant showed improvements in some areas during this period, some performance issues persisted which hampered the effective performance of the legal officers. The first reporting officer also noted that the Applicant still failed to properly record all his absences in Umoja.

6. On 28 June 2019, the Applicant received a performance evaluation for the performance cycle 2018/19 in which he received the overall rating of "partially meets performance expectations". He received the rating of "requires development" in integrity, professionalism, teamwork, planning and organizing, and accountability.

7. The Applicant was placed on a performance improvement plan ("PIP") for a period of two months from 1 July 2019 to 31 August 2019.

8. On 5 and 6 September 2019, meetings were held between the Applicant and his supervisors to review the PIP, during which they informed him that his appointment would not be renewed due to unsatisfactory service. The Applicant was informed that his appointment, which was due to expire on 9 October 2019, had been extended through 31 October 2019 to allow him to prepare for his departure.

9. On 13 September 2019, the Applicant was notified in writing that his appointment would not be renewed beyond 31 October 2019 due to unsatisfactory service.

10. On 18 October 2019, the Applicant submitted a request for management evaluation and the present application for suspension of action.

Consideration

11. Under art. 2.2 of the Dispute Tribunal's Statute and art. 13.1 of the Rules of Procedure, 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 have been met.

Prima facie unlawfulness

12. In considering whether to suspend an administrative decision pending management evaluation, the Dispute Tribunal's Statute does not require the Tribunal to make a definitive finding that the decision is unlawful. The test is not particularly onerous since all the Tribunal is required to do at this stage is to examine the material in the application and to form an opinion as to whether it appears that, if not rebutted, the claim will stand proven. Any such opinion is not binding should the matter go to trial on the merits. It is merely an indication as to what appears to be the case at this preliminary stage.

13. In the present case, the issue is whether the decision not to renew the Applicant's appointment is *prima facie* unlawful based on the performance rating of "partially meets performance expectations".

14. The procedures for identifying and addressing performance shortcomings and unsatisfactory performance are set out in sec. 10 of ST/AI/2010/5 (Performance Management and Development System). Section 10 provides that when a performance shortcoming is identified, a supervisor should take remedial measures to address the shortcomings, which may include the institution of a time-limited PIP. If the performance shortcoming is not rectified following the remedial actions, and the overall performance rating is "partially meets performance expectations", a written PIP shall be instituted. If a PIP was initiated and an appointment expires before the end of the period covering a PIP, the appointment should be renewed for the duration

necessary for the completion of the PIP. Thereafter, the Administration can take the decision of the non-renewal of an appointment based on unsatisfactory service.

15. While the Applicant acknowledges that unsatisfactory performance, including a performance rating of “partially meets performance expectations”, constitutes a legitimate basis for a non-renewal decision, he submits that the Administration acted disproportionately and therefore unreasonably in this case. In particular, the Applicant submits that (a) he worked for the United Nations for eight years; (b) he received “meet expectations” evaluations in all performance evaluations until the 2018/19 reporting cycle; (c) he suffered from illness during the 2018/19 reporting cycle; (d) he received “outstanding performance” and “meets expectations” in some areas, which should have been considered; and (e) a PIP period for two-month was too short to expect a radical performance improvement.

16. Having reviewed the record on file and the Applicant’s arguments, the Tribunal finds that the Applicant does not meet the *prima facie* unlawfulness requirement in this case. The Applicant does not argue that the Administration violated any of the rules set out in ST/AI/2010/5, and the Tribunal finds, on a *prima facie* basis, that the Administration was in compliance with the requirements set out in ST/AI/2010/5 in addressing the performance shortcomings before taking the contested decision. As the record shows, during the 2018/19 reporting cycle, the supervisors took remedial measures to address the performance shortcomings as required under sec. 10.1 of ST/AI/2010/5 by holding meetings during which his supervisors identified the Applicant’s performance shortcomings, provided clear targets for improvement, and established a performance plan for four months in order to assist him in improving his performance.

17. After the Applicant received the rating of “partially meets performance expectations” in the 2018/19 performance evaluation, in accordance with sec. 10.2 of ST/AI/2010/5, his supervisors instituted a two-month PIP. As shown in the PIP document, the Applicant did not meet several performance targets, and the

Administration decided not to renew the Applicant's fixed-term appointment under sec. 10.3 of ST/AI/2010/5.

18. While the Tribunal notes the Applicant's various arguments, none of his arguments show, even on a *prima facie* basis, that the contested decision is unlawful since the elements raised by the Applicant, such as an institution of a longer PIP period, a consideration of prior performance evaluations, or a consideration of positive ratings in some areas, are not required under the applicable legal framework. While the Applicant argues that a two-month PIP period is too short, the Tribunal notes that he was put on notice of his performance shortcomings at least since November 2018 and his supervisors took actions to assist him to remedy the shortcomings. Also, the Applicant provides no explanation as to why he failed to record all his absences in Umoja, which was one of the identified performance shortcomings, despite repeated requests from his supervisors. Regarding his medical condition during the performance period, the Tribunal notes that the PIP document shows that his working hours were adjusted to accommodate his medical condition.

19. In all the circumstances as described above, the Tribunal finds that the Applicant has not satisfied the requirement of *prima facie* unlawfulness.

Urgency and irreparable harm

20. As the Applicant has not satisfied the requirement of *prima facie* unlawfulness, it is not necessary for the Tribunal to examine the two other conditions, namely urgency and irreparable harm. However, the Tribunal notes that the urgency in this case was self-created since the Applicant waited until 18 October 2019 to file the present application for suspension of action even though he was informed of the contested decision orally on 6 September 2019 and in writing on 13 September 2019. There is no explanation as to why the Applicant waited more than a month to file the present application.

IT IS ORDERED THAT:

21. The application for suspension of action is rejected.

(Signed)

Judge Joelle Adda

Dated this 24th day of October 2019