



Before: Judge Francis Belle

Registry: Geneva

Registrar: René M. Vargas M.

CHOCOBAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, AAS/ALD/OHR, UN Secretariat
Clementine Foizel, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision to terminate her continuing appointment for unsatisfactory service and without allowing her to exhaust her sick leave entitlements.

Facts and Procedural History

2. On June 2014, the Applicant was reassigned from New York to the United Nations Global Service Centre (“UNGSC”) in Brindisi as part of a confidential settlement agreement by which she was to work as an Administrative Officer (P-4 level) in the Immediate Office of the Director, UNGSC. The Applicant served there under a continuing appointment.

3. At the end of her 2017-2018 performance cycle, the Applicant received an overall rating of “Partially meets performance expectations”. She rebutted the rating, and, on 9 October 2018, the Rebuttal Panel upheld it further recommending that the Applicant’s FRO initiate a Performance Improvement Plan (“PIP”).

4. On 20 November 2018, the Applicant attended a meeting with the Acting Director, UNGSC, and the Officer-in-Charge, Human Resources Unit (“HRU”), UNGSC, to discuss the main findings and recommendations of the Rebuttal Panel. It was established that the PIP-related recommendation could not be implemented because the 2017-2018 performance cycle had been finalized and closed on 31 March 2018.

5. Nevertheless, the Acting Director, UNGSC, proposed a pro-active approach for the Applicant’s 2018-2019 performance cycle by way of a PIP to address any possible shortcomings on the assigned activities for that performance cycle. The Applicant argued, however, that there were no issues with her performance and that the delays in deliveries had been due to her absences from office, which in her view did not warrant a PIP.

6. As a result, the Acting Director, UNGSC, and the Applicant agreed to initiate instead a Performance Improvement Management (“PIM”) process, on a “time-bound gentleman agreement”, where the former would act as the Applicant’s FRO. It was also agreed that a progress meeting would be held in December 2018 and should the PIM indicate no improvement on the Applicant’s performance by 13 December 2018, a PIP would be initiated starting 1 January 2019.

7. On 19 December 2018, the Applicant had a performance review meeting with her FRO during which the latter informed her of a lack of performance improvement and presented her with a PIP. The PIP actions and targets were indicated, and the Applicant was from then on under a PIP for the 2018-2019 performance cycle.

8. On 14 January 2019, the Applicant, her FRO and a Human Resources Officer (“HRO”), HRU, UNGSC, held the first PIP review meeting. It was agreed that the PIP should end on 19 March 2019, after the delivery of several goals designed to address and evaluate the core competencies in the Applicant’s PIP, which was structured along a specific timeline.

9. However, between 18 January and 9 June 2019, the Applicant was on certified sick leave, followed by a period of half-time work combined with half-time sick leave from 10 June to 9 July 2019. She resumed her functions and the PIP on 10 July 2019, when she was cleared by Medical Services to return to full-time work.

10. On 10 and 11 July 2019, the Applicant had PIP review meetings with her FRO and the HRO, HRU, UNGSC. On 24 July and 30 July 2019 two other PIP review meetings were held to evaluate the Applicant’s progress.

11. Between 9 August and 26 August 2019, the Applicant was on home leave.

12. On 29 August, 4, 12 and 25 September 2019, the last four PIP review meetings were held.

13. In December 2019, the Applicant's FRO, who also acted as her newly appointed SRO, completed her 2018-2019 performance review covering a performance period running from 1 April 2018 to 30 September 2019. The Applicant received an overall rating of "Does not meet performance expectations".

14. On 8 January 2020, the Applicant rebutted the above rating.

15. By letter of 22 January 2020, the Applicant's FRO provided a written statement to the Rebuttal Panel explaining the Applicant's 2018-2019 performance evaluation.

16. On 29 May 2020, the Rebuttal Panel upheld the overall rating of "Does not meet performance expectations".

17. By email of 3 July 2020, the Chief Human Resources Officer ("CHRO"), UNGSC, on behalf of the Under-Secretary General, Department for Operational Support, requested approval to terminate the Applicant's continuing appointment due to unsatisfactory service.

18. On 28 July 2020, the Applicant submitted a medical note recommending her to have 15 days of rest, namely, up to 11 August 2020.

19. On 11 August 2020, the Assistant-Secretary General for Human Resources, Department of Management Strategy, Policy and Compliance, approved the termination of the Applicant's continuing appointment.

20. By email of 12 August 2020 (2 p.m. UTC+1), the CHRO, UNGSC, gave notice to the Applicant of the termination of her continuing appointment, effective immediately, due to unsatisfactory service pursuant to the provisions of staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii).

21. On 12 August 2020, at 8.05 p.m. (UTC+1), the Applicant read the above email. On the same day, at 9.04 p.m. (UTC+1), the Applicant sent an email to Medical Services sharing a negative result of her Covid test and requesting authorization to access UNGSC premises.

22. On 13 August 2020, the Applicant emailed the CHRO, UNGSC, acknowledging receipt of the termination notice.

23. By email of 17 August 2020, the Applicant asked the CHRO, UNGSC, to change her attendance records in Umoja and record that she was on certified sick leave from 24 July until 12 August 2020. The Applicant added that another certified sick leave request would follow given that on 13 August 2020, she had suffered a fall on the street and was under medical treatment for a broken nose and multiple contusions. On the same date, the Applicant sent an email to another HR partner with a medical note dated 12 August 2020 recommending 15 days of rest as of the note's date as a result of facial trauma.

24. On 24 August 2020, the Applicant's Counsel submitted a request for management evaluation concerning the decision to terminate the Applicant's continuing appointment for unsatisfactory service and doing so without exhausting her sick leave entitlements.

25. On 25 August 2020, the Applicant filed an application seeking suspension of action ("SoA") of the decision to terminate her appointment.

26. By Order No. 94 (GVA/2020) of 31 August 2020, the SoA was rejected given that the decision to terminate the Applicant's appointment had already been implemented.

27. During the management evaluation process, the Management Evaluation Unit ("MEU") requested clarification regarding the chronology of the accident given that the Applicant had written that the accident occurred on 13 August 2020, but the medical note indicated 12 August 2020.

28. On 6 October 2020, through Counsel, the Applicant explained that the sick leave related to a facial trauma and nasal bone accident that occurred on 11 August 2020 at night but was only reported to the doctor on 12 August 2020 in the morning when she also reported her Covid-19 test result. She further indicated that on 13 August 2020, she suffered a blackout outside of her home upon receipt

of the DHL package containing the letter of separation that required calling an ambulance.

29. On 16 November 2020, the Under-Secretary-General for Management Strategy, Policy and Compliance issued a decision endorsing the findings and recommendations of the MEU and upholding the decision to terminate the Applicant's continuing appointment.

30. On 6 January 2021, the Applicant filed a motion for extension of time to file an application concerning the decision referred to in para. 1 above.

31. By Order No. 5 (GVA/2021) of 12 January 2021, the Applicant's motion was granted.

32. On 16 March 2021, the Applicant filed her application on the merits.

33. On 4 June 2021, the Respondent filed his reply.

34. On 25 September 2021, the present case was assigned to the undersigned Judge.

35. By Order No. 177 (GVA/2021) of 10 December 2021, this Tribunal advised the parties that it finds that the matter can be determined on the papers without holding a hearing, and that it would be moving forward with the judgment.

Parties' submissions

36. The Applicant's principal contentions are:

- a. The decision to terminate her continuous appointment was unlawful, as she was not given full opportunity to meet the required standards considering her known health conditions and the strong medication she was receiving, which are both on record with the Division of Healthcare Management and Occupational Health and Safety;

- b. The Applicant's rights under sec. 10 of ST/AI/2010/5 (Performance Management and Development System) were violated, as both her FRO and SRO did not address her performance shortcomings during the performance cycle, nor tried to offer remedial measures to assist the Applicant in remedying such shortfalls. Instead, remedial measures were denied, as the Applicant sought multiple times to be moved to a more suitable position, which was denied by the UNGSC Administration;
- c. The issue of underperformance was related to two performance cycles, i.e., 2017-2018 and 2018-2019, during which the Applicant was requested to perform the functions of Project Manager instead of those of Administrative Officer although she occupied the latter position;
- d. The Applicant was blackmailed by the MEU who offered her USD4,000 to withdraw the management evaluation request;
- e. The Applicant and her family were unnecessarily retained in Italy until 22 November 2020 due to the Organization's separation from duty procedures;
- f. The Applicant's appointment was terminated during a period of approved sick leave; and
- g. As remedies, the Applicant requests:
 - i. Her reinstatement until at least she reaches early retirement age;
 - ii. Compensation for the overall stress, increased health and financial damage caused by the Organization's unlawful decisions; and
 - iii. Reimbursement of her August 2020 salary plus two months monthly salaries amounting to a total of USD30,000.

37. The Respondent's principal contentions are:

a. The application lacks merit because the contested decision is legal, reasonable, and procedurally fair. The Applicant was aware of the standards she was required to meet and all the procedures under the Staff Regulations and the Staff Rules for performance management and termination of continuing appointment for unsatisfactory service were followed;

b. Continuing appointments may be terminated on the grounds of unsatisfactory service pursuant to staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii). The procedures for identifying and addressing performance shortcomings and unsatisfactory performance are set out in sec. 10 of ST/AI/2010/5. If performance shortcomings are not rectified by a staff member following remedial measures indicated therein, the appointment may be terminated. Likewise, if a staff member receives a performance rating of "Does not meet performance expectations", the appointment may be terminated;

c. In this case, both scenarios occurred. The Applicant failed to remedy her performance shortcomings following the 2017-2018 performance evaluation, and the Applicant received a performance rating of "Does not meet performance expectations" for the 2018-2019 cycle. Thus, the procedures to terminate the Applicant's continuing appointment were made in accordance with all applicable regulations;

d. Equally, the decision to terminate the Applicant's continuing appointment for unsatisfactory service was also lawful as all the requirements were met. The Organization followed the procedures to assess the Applicant's performance and to proactively address her performance shortcomings. The Applicant failed to demonstrate improvement, despite the efforts and resources made available to her, including a comprehensive and detailed PIP for the 2018-2019 cycle;

e. The Applicant was given a fair opportunity to meet performance standards. The Applicant agreed in two separate settlement agreements to all the requirements related to her functions, including her relocation to Italy, her post assignment, and her Terms of Reference. It is thus fair and lawful to hold her accountable to the standards agreed upon by both parties to the settlement agreements;

f. In addition, the Applicant's performance record indicates that she was fully aware of the standards she was required to meet, and that both her FRO and SRO made appropriate allowances for the Applicant's absences on sick leave, only evaluating her performance after she was deemed fit for duty by the Medical Services. Thus, the Applicant's claims that her performance evaluation was affected by her illness are unfounded;

g. The Applicant's claims that she was not aware of her performance shortcomings are baseless. The FRO informed the Applicant about her shortcomings regularly throughout the two performance cycles, including during her final performance appraisal for the 2017-2018 cycle, the PIP review meetings in the 2018-2019 cycle, and her final appraisal for the 2018- 2019 cycle;

h. The Applicant's claim that she was retained in Italy by the Organization until 22 November 2020 is also without merit as the delay was caused by the Applicant herself, who waited to elect the date of her travel until she could find a pet-friendly flight;

i. The Applicant has equally no right to the extension of her appointment to exhaust her sick leave entitlement. A staff member's entitlement to sick leave ends on the date provided in the notice of termination, which happened on 12 August 2020, that is before the Applicant's accident. From that day onward, the Applicant had no further entitlement to sick leave;

j. Moreover, the Applicant's physician advised the Organization that he had drafted the note on 16 August 2020 following a phone call from the Applicant. Thus, the Applicant's medical note from 12 August 2020 was neither drafted on that day nor based on a medical examination;

k. In addition, the Applicant was not on sick leave at the time of her appointment. Her certified sick leave ended on 11 August 2020, and she was cleared to return to work on the date of her termination; and

l. The Applicant's claim that her sick leave entitlements had been approved is not factual. Email exchanges with the CHRO, UNGSC, on 24 August 2020, show that the Applicant's sick leave request was promptly denied based on her appointment being terminated (see annex 12 to the Respondent's reply).

Consideration

38. The parties have given two very different accounts of the circumstances leading to the Applicant's separation from service.

39. Firstly, the Applicant depicts herself as a staff member who was ill at all material times and claims that this alleged illness affected her work and led to the end of her employment with the Organization. Secondly, the Applicant asserts that she was never informed that she was underperforming and that neither her FRO nor her SRO ever informed her of or addressed performance shortcomings.

40. In addition, the Applicant claims that her contract could not have been terminated on 12 August 2020 because, at that time, she was on approved certified sick leave.

41. The Tribunal therefore must clarify these issues of fact to then proceed to rule on the legal issues that arise in this case.

Termination of appointment based on unsatisfactory performance

42. Having weighed both accounts of the factual background of the case, the Tribunal finds that there was clear evidence of unsatisfactory performance during the period leading to the Applicant's separation from service.

43. The Respondent states that in the Applicant's 2017-2018 performance cycle, she received a rating of "Partially meets performance expectations" and was informed of this by her FRO. The rating was later confirmed by a Rebuttal Panel.

44. During the 2018-2019 performance cycle, the Applicant's performance rating did not improve despite efforts made to provide her with the necessary assistance to better her performance. This assistance eventually came in the form of a PIM process and a PIP that did not give the expected results.

45. In his statement to the Rebuttal Panel, the FRO indicated that five goals were set for the Applicant's 2018-2019 performance cycle in connection with her functions as Administrative Officer/Strategic Planning Officer. One of the goals reflected administrative and strategic support to UNGSC, and the other four were focused on specific outputs central to the Applicant's role directly assisting the Director. According to the FRO, the PIP included clearly defined goals, directives and actions related to the competencies of Communication, Teamwork and Planning and Organizing.

46. After the Applicant resumed the PIP in July 2019, which was extended due to her being on certified sick leave, the record shows that eight detailed review meetings were held to discuss and review the progress of all actions and goals, and to act when/where required. During these regular meetings, the Applicant was given clear feedback on her progress. Some of the main issues were the delayed submission of required documents, insufficient in-depth analysis and investigation of assigned topics, presentation of third-party content (i.e., "copy-paste"), and draft documents that did not meet the required standards of content, expression, and style. Deadlines had to be adjusted frequently and the Applicant was aware throughout the process that she was not meeting the outlined objectives.

47. As a result, the FRO stated that all unsatisfactory ratings given to the Applicant were strictly related to her performance whilst undergoing the PIP and during the time she was fit to work full time. He also stated that the Applicant was given detailed feedback on all five goals and on her performance shortcomings. The Applicant's under-performance, thus, was apparent, documented, and actioned. Despite the Organization's efforts, she did not show the required improvement.

48. Based on the detailed and precise material provided by the Respondent, the Tribunal accepts the account of the Respondent in this regard. The Respondent was able to provide dates of assessment cycles, the forms of assessment, detailed goals, trainings, and standards expected from the Applicant, dates and minutes of all PIP review meetings, proof of continuous effort by the FRO to provide detailed feedback on each goal, to check on the Applicant's progress and to address her shortcomings as the PIP was in progress, in addition to the detailed rebuttal processes.

49. The Tribunal is therefore fully convinced of the accuracy of the information provided by the Respondent and, therefore, of the basis of the decision made to terminate the Applicant's continuing appointment pursuant to staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii).

Termination of appointment without exhaustion of sick leave entitlements

50. The Applicant argues that when her contract was terminated due to unsatisfactory performance, i.e., on 12 August 2020, she was on sick leave following an accident that resulted in contusions and facial trauma.

51. However, the Respondent has been able to demonstrate that the Applicant's contract was terminated on 12 August 2020, effective immediately, before the Applicant's accident that occurred on 13 August 2020.

52. Such fact is identified in the email exchange between the Applicant and the CHRO, UNGSC, dated 24 August 2020, where the Applicant herself states that her accident occurred on 13 August 2020.

53. Hence, at the time of the accident the Applicant was no longer a staff member of the Organization. As a result, her sick leave request was correctly denied on that ground.

54. In addition, despite her statement otherwise, the Applicant failed to demonstrate that any sick leave request beyond 12 August 2020 was ever approved as the above-mentioned email from 24 August 2020 shows.

55. There is therefore no basis for the Applicant's argument that she should have been retained in service to allow her to exhaust her sick leave entitlements prior to her termination.

56. In view of the foregoing, the Tribunal finds that the contested decision was lawful.

The Applicant's claim that she was unnecessarily retained in Italy

57. The Tribunal is convinced by the evidence on record that the Applicant's claim that she was unnecessarily retained in Italy by the Organization is without merit. In fact, it is clear from the email exchanges between the Applicant and Human Resources, UNGSC (see annex 15 to the Respondent's reply), that remaining at the duty station until 22 November 2020 was her choice because that was the day at which she found a pet-friendly flight. The Organization cannot be held responsible for delaying the Applicant's repatriation flight when the choice of flight was made by the Applicant herself.

The Applicant's claims of attempted blackmail by the Organization

58. In para. 12, page 46, of her application, the Applicant states that the Management Evaluation Unit attempted to blackmail her into dropping her management evaluation request in exchange of USD4,000. However, despite such strong claim, no evidence of this fact is provided nor detailed by the Applicant.

59. Therefore, the Tribunal is not convinced of these claims and accordingly rejects any remedial measure in relation to them.

Remedies

60. The Tribunal recalls its above finding of lawfulness of the contested decision. Additionally, the Tribunal find that the Applicant has not proven that she suffered harm as a result of the Respondent's alleged wrongdoing. She is therefore not eligible to receive compensation for damages.

61. The Tribunal further notes that, as per the application, the Applicant's claim for reimbursement of the sum of USD30,000 will be subject to a separate management evaluation process. The Tribunal therefore finds that this claim cannot be addressed in the current application.

Conclusion

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

(Signed)

Judge Francis Belle

Dated this 30th day of December 2021

Entered in the Register on this 30th day of December 2021

(Signed)

René M. Vargas M., Registrar, Geneva