



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/034

Judgment No.: UNDT/2010/105

Date: 7 June 2010

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KOUMOIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Self-represented

Paulette Djoman, Co-Counsel

Counsel for respondent:

Peri Johnson, Director, Legal Support Office/Bureau of Management
United Nations Development Programme (UNDP)

Lauren Alaie, UNDP, Co-Counsel

Introduction

1. The Applicant is a former staff member of the United Nations Development Programme (UNDP). His contract was not renewed beyond 31 December 2006 on the ground of non-performance. The Applicant appealed the decision to the Joint Appeals Board (JAB) which decided to make no recommendation. On 14 August 2008, the Respondent endorsed the decision of the JAB. The Applicant is now contesting the decision by the Respondent before the UNDT.

Relevant Fact Findings

2. On 13 January 2003, the Applicant joined the Organization on a 200-series project appointment for one year as a Regional Coordinator, L-5 level, at the United Nations Office for Project Services (UNOPS) in Dakar, Senegal. His appointment was renewed for an additional year in 2004. On 15 February 2005, the Applicant was extended for five months when his position was transferred to UNDP, Bureau of Development Policy (BDP), Global Environmental Facility (GEF) with a functional title of GEF Regional Coordinator, Regional Technical Advisor, Energy and Climate Change, West and Central Africa. In July 2005, his appointment was extended for a year and then on a two-week basis from 1 August 2006 until 31 December 2006.
3. On 9 March 2006, the Applicant and his immediate supervisor signed the Applicant's Results and Competency Assessment (RCA) for the year 2005 in which he received a rating of 'partially met expectations'. A Competency Review Group (CRG) met to review the Applicant's RCA on 14 March 2006 but no decision was taken at this time.

4. On 16 March 2006, the Applicant met with the GEF Executive Director and the GEF Deputy Executive Coordinator to discuss the issues of his performance as indicated in his 2005 RCA and his concerns with his immediate supervisor.
5. On 23 March 2006, the Deputy Director and Chief, Business Advisory Services, Office of Human Resources, Bureau of Management (BAS/OHR/BOM), notified the Applicant that his assignment with the BDP would reach completion on the expiration of his contract on 30 June 2006.
6. On 30 March 2006, the Applicant filed a complaint with the UNDP Harassment Focal Point, OHR/BOM, alleging harassment by his supervisor. The Applicant claimed that he had refused to take unethical steps on behalf of his supervisors and that as a result of this he became a victim of retaliation leading to a poor performance assessment and ultimately the non-renewal of his contract with UNDP.
7. On the same day, the Applicant submitted a “request for an Ethics/Administrative review of case brought forward by UNDP-GEF CC Regional Coordinator for West and Central Africa and formal action by EEG”.
8. On 2 April 2006, the Applicant sent a letter to the Director, Energy and Environment Group, BDP, in New York, requesting the suspension of the decision not to extend his contract claiming that the decision was retaliatory.
9. On 21 April 2006, the Human Resources Business Advisor of the BDP advised the Applicant that upon review of the documentation provided in support of his request for suspension of 2 April 2006 three separate issues emerged as follows: (a) his performance appraisal; (b) his complaint of

harassment and abuse of authority; (c) the non-renewal of his contract. The Applicant was advised on the suspension of action and administrative review procedure.

10. On 22 April 2006, the Applicant filed a request for administrative review of the decision not to renew his appointment.
11. On 23 April 2006, the Applicant requested a meeting with UNDP Administrator to seek resolution of his alleged harassment and discrimination complaint.
12. On 4 May 2006, the Applicant was advised by the Director, OHR/BOM, that his complaint against his supervisor did not fall within the scope of the then UNDP Policy on Prevention of Workplace Harassment, Sexual Harassment and Abuse of Authority as the Applicant raised work-related issues which are not considered allegations of harassment. The Applicant was also informed that OHR was open to reconsider his case if he provided OHR with written information about an incident of harassment/abuse of authority that was not related to performance issues.
13. On 19 May 2006, the Applicant submitted additional documentation in support of his complaint of harassment and retaliation to the Harassment Focal Point, OHR/BOM, and the CRG.
14. On 31 May 2006, the CRG met for a second time to review the additional material provided by the Applicant in support of his claim that his performance was not properly reviewed.
15. On 6 and 8 June 2006, the Applicant provided further material to the CRG.

16. On 9 June 2006, the CRG met for the third time to review the Applicant's additional material and confirmed the rating "partially met expectations".
17. On 19 June 2006, the Applicant filed a rebuttal of his 2005 RCA. On 22 June 2006, OHR advised him that his contract would be extended until 31 July 2006 for the purpose of the rebuttal process.
18. On 21 June 2006, the Applicant reported allegations of misconduct against his supervisor to the then Office of Audit and Performance Review (OAPR)¹.
19. On 22 June 2006, UNDP-OHR placed the Applicant on a Special Leave with Full Pay (SLWFP)
20. On 26 June 2006, an agreement was reached between the Applicant and the Respondent that the administrative review would be undertaken once the rebuttal against the RCA for the year 2005 was completed. On the same day, the Applicant submitted additional documentation for review by the CRG.
21. On 27 June 2006, the CRG met for the fourth time so that the Applicant could present his case personally to the CRG members. At the CRG's request, he provided additional information on 7 and 14 July 2006. The Applicant was allowed to bring a witness with him. During that meeting, the Applicant made allegations of harassment by his supervisor. The CRG requested the Applicant to provide additional information.
22. On 7 and 14 July 2006, the Applicant provided additional information to the CRG in response to the latter's request.

¹ Now called the Office of Audit and Investigations (OAI).

23. On 21 July 2006, OAPR advised the Applicant that they found no evidence in support of the allegations he had made against his supervisor.
24. On 28 July 2006, the CRG met for the fifth time and after review of the Applicant's case it confirmed the 'partially met expectations' rating. From 1 August 2006, the Applicant's contract was extended on a two-week basis in order to finalize the RCA rebuttal process. The Applicant was on SLWFP during this period.
25. On 12 August 2006, the Applicant signed the CRG final comments as communicated to him on 31 July 2006.
26. On 3 September 2006, the Applicant requested OHR/BOM to re-open his harassment case as he considered that the comments made by the CRG supported his complaint.
27. On 14 September 2006, the Director, OHR/BOM advised the Applicant that his request for reopening his harassment case was dismissed.
28. On 25 September 2006, the Rebuttal Panel started the review of the Applicant's RCA for the year 2005.
29. On 7 December 2006, the Rebuttal Panel issued its report upholding the 'partially met expectations' rating for 2005.
30. By letter from OHR/BOM on 18 December 2006, the Rebuttal Panel advised the Applicant that it had decided to uphold the rating and that his separation from UNDP was confirmed effective 31 December 2006.

31. On 9 January 2007, the Respondent responded to the Applicant's request for administrative review of 22 April 2006 and concluded that it could not find any factual or legal basis for overturning the decision not to renew the Applicant's appointment.
32. On 6 February 2007, the Applicant filed a Statement of Appeal with the JAB in New York contesting the non-renewal of his contract beyond 31 December 2006. On 28 March 2007, the Respondent filed a reply to the Applicant's Statement of Appeal.
33. On 4 September 2007, the Applicant requested the Ethics Office to review his case of whistle-blower retaliation.
34. On 15 January 2008, the UN Ethics Office advised the Applicant that pursuant to ST/SGB/2005/21 it did not have jurisdiction over UNDP staff members and informed him of the existing internal recourse mechanisms.
35. On 13 December 2007, the Applicant submitted his case to the UN Ethics Office pursuant to ST/SGB/2007/11. The UN Ethics Office advised the Applicant that it could only undertake a review on appeal after review from the UNDP Ethics Office.
36. On 17 April 2008, a JAB Panel was convened to review the Applicant's case.
37. On 19 April 2008, the UNDP Ethics Office reviewed the Applicant's case and found that the Applicant was afforded due process and that "it did not find evidence that would support [the Applicant]'s allegations that [he] was subjected to retaliation from management".

38. On 5 May 2008, the Chairperson of the UN Ethics Office decided not to review the case further.
39. On 18 June 2008, the JAB issued its report and unanimously decided to make no recommendation. The Applicant was communicated the report on 25 June 2008.
40. On 14 August 2008, the Applicant was informed of the Secretary-General's decision to endorse the decision of the JAB.
41. On 16 June 2009, the Applicant requested the United Nations Administrative Tribunal (UNAT) to waive the time-limits in his case.
42. On 17 June 2009, the Executive Secretary of the UNAT informed the Applicant that the President of the UNAT had decided to suspend the time-limits in the case until further notice.
43. On 31 August 2009, the Applicant filed an application with the UN Dispute Tribunal (UNDT) in New York. The case was transferred to the UNDT in Nairobi.
44. On 7 September 2009, the Applicant filed a motion in support of his application to the UNDT concerning the "receivability of his application and the competence of the UNDT", a "request to order the UN-Ethics Office Director to deliver his review and legal opinion of his case of whistleblowing retaliation", and a "request to order interim relief based on preliminary or final review of the case by the UNDT".

45. On 28 September 2009, the Applicant filed a Motion for Interim Relief on “[a]lleged exceptionally severed UNDP-GEF whistleblowing retaliation and discriminatory 200 series contract non-renewal”.
46. On 29 September 2009, the Applicant filed a second Application with the UNDT titled “[a]lleged exceptionally severed UNDP-GEF whistleblowing retaliation and discriminatory 200 series contract non-renewal”.
47. On 12 October 2009, the UNDT rejected the Applicant’s Motion of 28 September 2009 to order the Ethics Office to review his case.
48. On 15 October 2009, the UNDT granted an extension of time for the Respondent to file a reply until 24 November 2009.
49. On 20 November 2009, the Respondent filed a motion with the Tribunal explaining that it had not received a copy of the Application dated 29 September 2009.
50. The Tribunal held a pre-trial hearing on 9 December 2009 to identify the issues in this case. On 14 December 2009, the Tribunal found that the Respondent was technically no longer part of the proceedings as he had not filed a reply with the prescribed time-limits.
51. As provided for by Article 10 of the Tribunal’s Rules of Procedure, the Respondent filed on 16 December 2009 a motion requesting that he be allowed to take part in the proceedings on the basis that it did not properly receive the Application.
52. On 17 December 2009, the UNDT permitted the Respondent to take part in the proceedings and provided it with a copy of the Application in question.

The deadline set by the Tribunal to file the reply was by 25 January 2010. On 25 January 2010, the Respondent filed a reply.

53. On 26 January 2010, the Tribunal through its Registry sent to the parties a set of guidelines for preparing the review of the case.

54. On 28 January 2010, the Applicant made a request for summary judgment in the matter and reiterated his request on several occasions.

55. On 8 February 2010, the parties replied to the guidelines to the parties and informed the Tribunal that they did not request a hearing since they had sufficiently documented their submissions.

Applicant's Submissions

56. The decision not to renew his contract was based on bias, prejudice, discrimination and improper motives. His performance assessment and the decision not to renew his contract occurred against a backdrop of retaliation for his attempts to report misconduct on the part of his supervisors. Moreover, the Applicant was denied due process in the assessment of his performance.

57. The Applicant requests the UNDT to “order the Director of the UN Central Ethics Office and Chairman of the UN Ethics Committee to produce his legal review of the case based on the prior submission dated 13 December 2007. However, the United Nations Central Ethics Office denied him protection as whistleblower to which he was entitled.

58. He also requests that the UNDT calls the former Executive Secretary of the JAB, the Chair of the RCA Rebuttal Panel, the Assistant Administrator and Director of UNDP Bureau of Management, former Chief of Staff and

Executive Office Director, former Director of the then Office of Legal and Procurement Support, and former Director of Energy and Environment Group to testify and certify that they reviewed the documents submitted to them.

59. In addition, the Applicant requests the UNDT to order (i) his reinstatement with direct promotion to the D-2 level as the new UNDP-GEF Executive Coordinator and Director of Environmental Finance; (ii) retroactive payment of salary at the D-1 level from July 2006 through June 2007 and at the D-2 level from June 2007 until date of assumption of duty; (iii) that all negative performance evaluations be expunged from the Applicant's personnel file; (iv) that the judgment be inserted in his file; (v) all applicant benefits be reimbursed to him including children's education expenses for the year 2006; (vi) that the Secretary-General apologize to the Applicant; and (vii) that the Applicant be awarded financial compensation in the amount of four years of pensionable salary.

Respondent's Submissions

60. The non-renewal of the Applicant's 200-series appointment was a legitimate and proper exercise of the Organization's discretion.
61. The Applicant did not have an expectancy of renewal of a project appointment. The Applicant held a contract of a temporary nature which according to Staff Rule 204.3 does not carry any expectancy of renewal.
62. There is a long-standing jurisprudence from the United Nations Administrative Tribunal in this regard. As noted by the JAB, the jurisprudence of the UNAT has consistently upheld that employment with the Organization ceases on the expiration date of fixed-term appointments, as captured in Judgement No. 1191 of 2004. In *Handelsman* (UNAT/1998/885)

and *Seaforth* (UNAT/2004/1163), the Tribunal has recognized the distinction between posts governed by 200-series Staff Rules and those governed by the 100-series Staff Rules in that “200-series system could not function as intended, if staff members appointed under the 200-series had the same guarantees concerning employment and career development as staff members appointed under the 100-series”.

63. Pursuant to Staff Rule 209.2 (c), the Respondent may separate a staff member appointed under a 200-series post “without prior notice and without regard to either the quality of services performed by the staff member or the staff member’s personal attributes”. Although not legally required to do so, the Respondent gave a three-month notice to the Applicant on 26 March 2006 that his contract would not be renewed beyond its expiry.
64. The Applicant’s performance was thoroughly, properly and fairly assessed. The Respondent notes that for its review the Rebuttal Panel carefully examined the extensive documentation submitted by the Applicant and conducted interviews with ten people including the Applicant, his supervisor, members of the CRG and persons external to the CRG process to get independent corroboration of the Applicant’s performance. The Respondent also stresses that the Rebuttal Panel’s findings were consistent with the findings of the CRG. The Respondent also observes that in examining the process the JAB found no evidence in support of the Applicant’s allegations and it is not the JAB’s mandate to assess the Applicant’s performance.
65. The Respondent acted in good faith and with due regard to due process at all times. The Applicant has failed to show otherwise.

66. Concerning the Applicant's allegations of harassment against his supervisor, the complaint was investigated and reviewed, but there was no evidence to substantiate the allegations.

67. The Respondent therefore requests the UNDT to reject this application in its entirety.

Considerations

68. The Applicant avers that he suffered from "exceptional severe whistleblowing retaliation and discriminatory non renewal of contract on the part of UNDP-GEF". The main issues that arise in the present matter are first whether the termination of the employment of the Applicant on the ground of non-performance can be sustained and secondly whether the Ethics Office was right in rejecting the allegation of harassment filed by the Applicant. For a proper understanding of these issues, the Tribunal will set out the relevant rules that were applicable to the Applicant as a staff member employed by UNDP at the time that his appraisal performance was done. The performance was at the relevant time governed by the UNDP's Results and Competency Assessment (RCA) 2004-2005 Guidelines². The rebuttal process was governed by the UNDP's Dispute Resolution and Rebuttal Procedures under the RCA System.

The Performance Appraisal

69. Under the applicable rules³, at the end of each reporting year, the Applicant like any other staff member had to be evaluated on his performance. In 2005 the Applicant received a rating of "partially met expectations".

² The Guidelines were revised and became effective on 1 July 2006

³ UNDP "Results and Competency Assessment (RCA) Guidelines for the year 2004-2005"

70. Pursuant to UNDP “Results and Competency Assessment (RCA) Guidelines for the year 2004-2005”, the annual performance assessment of staff members takes place from February to March, at the conclusion of the performance year. The staff member completes the Self-Assessment of Performance of the RCA form and the section of the Learning Plan. After the staff member completes and submits his or her Self-Assessment, the supervisor rates the staff member’s performance in achieving each of the key results. As regards the Competency, the supervisor should supplement his or her own direct observations or written documentation of the staff member’s performance with feedback from many others who have worked directly with the staff member. The supervisor then makes a recommendation to the CRG. In the present case, the supervisor recommended the rating “partially met expectations” for the year 2005 on 9 March 2006.
71. The CRG’s role is to make a final recommendation and assign a rating to the overall performance of the staff member. It also ensures that the appraisal process has been carried out in a timely manner. If a staff member is unsatisfied with the final overall rating, he or she is entitled to rebut the appraisal before a Rebuttal Panel. When a case is submitted to the RCA Rebuttal Panel, the Panel will conduct an investigation.
72. It is the view of the Tribunal that, based on the evidence, the Management has correctly applied the procedure related to the Applicant’s performance appraisal for the year 2005 and communicated the final rating to the Applicant. The latter availed himself of the existing rebuttal mechanisms. In the light of the foregoing, the Applicant’s allegations that he was denied of due process in his yearly performance appraisal is totally frivolous. As a matter of fact, the Management went out of his way to afford the Applicant with as much latitude as possible to comment and challenge the rating of “partially met expectations”.

Allegations of Discrimination and Harassment

73. The Applicant contends that he was harassed and discriminated by his first supervisor. The evidence he led related to a great number of correspondences in which the Applicant and his colleagues expressed divergent opinions on work-related issues.

74. The Tribunal notes that in the UNDP “Results and Competency Assessment (RCA) Guidelines for the year 2004-2005”, one cannot find any reference to discrimination and harassment. The applicable rules can be found in the UN Secretariat policy, namely ST/SGB/2005/21⁴ on “Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations”. It is noted however that the “Results and Competency Guidelines for the year 2005- 2006” refers to ST/SGB/2005/21. In the light of the applicable rules and the evidence led by the Applicant, it is the view of the Tribunal that it could not find evidence of discrimination and harassment.

Allegations of Retaliation

75. The Tribunal considers appropriate ST/SGB/2005/21⁵ on “Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations” which provides a definition of retaliation as “any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy”. It further reads that “[w]hen established, retaliation is by itself misconduct.”⁶

⁴ Dated 19 December 2005

⁵ Dated 19 December 2005

⁶ See paragraph 1.4 of ST/SGB/2005/21

76. Pursuant to ST/SGB/2005/21, an individual who believes that retaliatory action has been taken against him because he or she has reported misconduct should forward all information and documentation available to the Ethics Office. If the Ethics Office finds that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to the Office of Internal Oversight Services (OIOS) for investigation⁷. If the Ethics Office finds that there is no credible case of retaliation, but finds that there is an interpersonal problem within a particular office, it will advise the complainant of the existence of the Office of the Ombudsman and the other informal mechanisms of conflict resolution in the Organization⁸.

77. The Applicant claims that he was not afforded protection from the UNDP Ethics Office and the UN Secretariat Central Ethics Office to which he is entitled. In this regard, the Tribunal notes that the UNDP Ethics Office examined the Applicant's complaint but did not find it to be a case of retaliation. The Ethics Office thus advised the Applicant that it did not have jurisdiction over allegations related to performance issues pursuant to UNDP policy on the Prevention of Workplace Harassment, Sexual Harassment and Abuse of Authority. The Applicant then turned to the UN Secretariat Ethics Office, the latter which examined the Applicant's complaint but did not find evidence of retaliation against him. In the light of the foregoing, the Tribunal does not find that both Ethics Offices violated the Applicant's rights to whistleblower protection.

78. As a matter of fact, it transpires from the documentary evidence that the UNDP Ethics Office and the UN Ethics Office exchanged plenty of communications with the Applicant and examined the Applicant's case. Pursuant to ST/SGB/2005/22 of 30 December 2005, the UN Ethics Office is

⁷ See paragraph 5.5 of ST/SGB/2005/21

⁸ See paragraph 5.8 of ST/SGB/2005/21

an independent office which purpose is “to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations (...)”. Amongst other things, the Ethics Office is responsible to protect the staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations. Nevertheless, the Ethics Office “[does] not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances (...)”. The Tribunal found evidence that the Applicant was properly advised of the existing conflict resolution mechanisms.

79. Furthermore, the Tribunal could not find evidence that the Applicant actually reported retaliation to the competent authorities during his time of employment with UNDP before he was informed that his contract would not be extended. Although the Applicant’s submissions are voluminous and largely repetitive, the Tribunal could not find evidence to substantiate the Applicant’s allegations that he denounced his supervisors of unethical behaviours or attempts on their part to pressurize him from taking unethical steps.

Allegations of Expectancy of Contract Renewal

80. The Applicant claims that he has a legal expectancy of continued employment and that he should be promoted to the D2 level. The Tribunal observes that the Applicant was appointed under the 200-series type of contract. According to the former Staff Rule 204.3, contracts governed under the 200-series appointment, are temporary appointments for Project personnel. Their contracts shall expire without notice on the date specified in the respective letter of appointment. In other words, such appointment does not carry any expectancy of renewal.

81. The Tribunal further takes note of the Applicant's argument that he should be granted a permanent contract for completing five years of continuous service. Based on the Applicant's employment history, the Tribunal recalls the provisions of former Staff Rule 204.3 (c) which reads that "Project personnel in intermediate-term status who complete five years of continuous service and whose appointments are extended for at least one further year shall be considered to be in long-term status with effect from the date on which they complete five years of continuous service". In the present case, the Applicant joined the Organization on 13 January 2003 and his contract was not renewed beyond 31 December 2006, which is clearly less than five years. Thus, the Applicant did not meet the aforementioned criteria to be considered for a long-term status within the Organization.

Conclusion

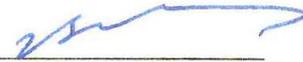
82. In the light of the foregoing, the Tribunal is satisfied that the Applicant was afforded a fair review of his performance for the year 2005 and that his right for protection from the UN Ethics Office was not violated. The Tribunal does not consider that the Applicant's allegations of discrimination, harassment and retaliation are substantiated.

83. Although the Tribunal is sensitive to claims of discrimination and retaliation, it is also of the view that some conduct of the Applicant was inappropriate. The Applicant unduly put pressure on the Registry.

84. The Tribunal finally notes that the Applicant filed a motion on 28 January 2010 for summary judgment pursuant to Article 9 of the Tribunal's Rules of Procedure. The Applicant further contacted on several occasions the Tribunal through its Registry to follow-up on his motion. That motion of the Applicant

was totally misconceived. Article 9 of the Rules of Procedure clearly states that a party may move the Tribunal for summary judgment when there is *no* dispute as to the material facts. Any party is entitled to a judgment as a matter of law. However, the Applicant had not shown in any way that there was no dispute on the facts and thus entitled to summary judgment. The Tribunal therefore did not give any consideration to the motion.

85. For the foregoing reasons, the application is **rejected in its entirety**.



Judge Vinod Boolell

Dated this 7th day of June 2010

Entered in the Register on this 7th day of June 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi