



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/108

Judgement No.: UNDT/2011/080

Date: 5 May 2011

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

FRADIN DE BELLABRE

v.

**SECRETARY-GENERAL
OF THE UNITED NATIONS**

JUDGEMENT

Counsel for Applicant:

Helen Morris, OSLA

Counsel for Respondent:

Jerôme Blanchard, ALS/OHRM, United Nations Secretariat

Application

1. In an application registered on 2 December 2009, the Applicant contests the decision of 22 May 2009 whereby the Chief Civilian Personnel Officer of the United Nations Stabilization Mission in Haiti (“MINUSTAH”) refused to renew his fixed-term P-3 level appointment beyond 31 July 2009.
2. He asks the Tribunal:
 - (a) For rehabilitation and the restoration of his honour;
 - (b) For action to be taken against those responsible;
 - (c) For reinstatement with MINUSTAH at the P-4 level;
 - (d) For the retroactive payment of his salary since 31 July 2009.
3. He asks, in addition, that a number of documents be disclosed and that the case be handled by a French-speaking judge.

Facts

4. The Applicant entered on duty at MINUSTAH on 28 January 2008 on a six-month fixed-term appointment (series 300 of the Staff Regulations being then in effect) as a P-3 level Coordinator at the Joint Operations Centre (hereinafter “JOC”). His superior, the Chief of JOC, a P-5 level staff member, also took office shortly after.
5. On 28 July 2008, his appointment was renewed until 31 July 2009.
6. On 12 and 24 November 2008 respectively, the Applicant and his supervisor established the Applicant’s work and drew up his progress report in the electronic performance appraisal system (hereinafter “e-PAS”) for the period from 1 April 2008 to 31 March 2009.
7. On 1 April 2009, the Applicant’s supervisor and Chief of JOC wrote to the Principal Deputy Special Representative of the Secretary-General to advise him that he wished to file a formal complaint about the Applicant’s conduct, which he described as “unacceptable, unprofessional and unethical”, and to call for appropriate measures, including dismissal from “JOC/MINUSTAH”. That complaint was not communicated to the Applicant.
8. On 7 and 12 May 2009 respectively, the Applicant’s supervisor and the second assessor electronically signed his e-PAS for the period from 1 April 2008 to 31 March 2009, with the remark “Results partially meet performance expectations”. In so doing, the second assessor endorsed a number of criticisms of the Applicant’s conduct made by the latter’s supervisor, noting in particular that his “interpersonal skills are so lacking that he becomes a disruptive element in the team”. The Applicant electronically signed the e-PAS on 13 May 2009 stating that he wanted to make a rebuttal to his rating.
9. In a letter of 22 May 2009, the Chief Civilian Personnel Officer at MINUSTAH notified the Applicant of the decision not to renew his appointment beyond 31 July 2009. No explanation was given as to the reasons for non-renewal.
10. On 21 June 2009, the Applicant submitted his objections to the rating contained in his e-PAS.
11. On 21 July 2009, the Applicant wrote to the Secretary-General requesting a management evaluation of the decision not to renew his appointment. On 22 July 2009, he asked this Tribunal to order the decision suspended, which request was rejected on 30 July 2009 by judgement UNDT/2009/004.
12. On 4 September 2009, the Under-Secretary-General for Management replied to the Applicant’s request for management evaluation, informing him that the Secretary-General had

decided to grant him two months' net base salary as compensation, on the basis that the Applicant's rights had been violated since the decision not to renew his appointment had been taken before the objection procedure was completed.

13. On 29 September 2009, the review panel ruled on the objection procedure initiated by the Applicant on 21 June 2009. It concluded that the "room for improvement" rating for the fundamental value "integrity" and the core competencies "sense of responsibility", "client focus" and "willingness to improve", as well as the "poor" rating for the core competency "team spirit", were justified, and confirmed the overall rating "partially meets performance expectations".

14. In an e-mail dated 2 December 2009, the Applicant submitted to the New York registry of this Tribunal an application, in French, with 105 attachments.

15. As the Applicant had expressed the desire that his case be handled by a French-speaking judge, on 11 December 2009 the Tribunal informed the parties of its intention to transfer the case to the Geneva registry. As the parties made no objection, the case was transferred from New York to Geneva by order of 23 December 2009.

16. The Respondent submitted its Answer to the application on 21 January 2010 and, on 22 March 2010, Counsel for the Applicant submitted comments. The Applicant himself also commented on 27 March 2010; however, at the Respondent's request, the Tribunal decided not to take those comments into account, so informing the parties on 7 April 2010. Also on 7 April, the Respondent replied to the comments of Counsel for the Applicant.

17. On 3 May 2011, the Tribunal held a hearing on the merits of the case, attended in person by the Applicant and his Counsel and, by video link, by Counsel for the Respondent.

Parties' contentions

18. The Applicant's contentions are:

(a) The complaint of 1 April 2009 drafted by his supervisor had been used as a pretext for not renewing his contract; yet he had not been made aware of it in advance, and only after having made an application to the Tribunal was he able to gain access to it. That infringed on his rights;

(b) His fundamental rights were violated by the impugned decision, since it was taken before the objection procedure had been completed;

(c) The evaluation procedure established by Administrative Instruction ST/AI/2002/3 was not complied with, especially since the workplan he had presented was not commented on by his supervisor; the latter had not respected the minimum time between approval of the workplan and the progress report; his supervisor had not met with him either on the progress report or at the end of the evaluation cycle; no performance improvement plan was drawn up to address the shortcomings identified;

(d) The non-renewal of his contract on the basis of one partially negative evaluation was disproportionate;

(e) The impugned decision was arbitrary and vengeful, and the non-renewal was in fact a disciplinary sanction. The Applicant challenges most of the criticisms contained in his supervisor's complaints;

(f) Staff members have a right to be treated fairly and in accordance with existing procedures. It is not up to the Applicant to prove that, if the performance appraisal procedures had been complied with, the decision as to whether to extend his contract would have been different. It is up to the Administration to demonstrate that all procedures were followed and that the Applicant was treated fairly;

(g) The case law (*Azzouni*) on loss of mutual trust cannot be applied in this case because the Applicant was not informed of the grievances against him and the evaluation process was marred by numerous irregularities that infringed on the staff member's rights.

19. The Respondent's contentions are:

(a) In accordance with rules 301.1, 304.4 (a) and 309.5 (a) of the Staff Regulations in force, a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment, and ends automatically and without prior notice on the expiry of the period specified in the staff member's letter of appointment. The Administration is not required to justify the decision not to renew such an appointment;

(b) It is up to the Applicant to prove that the reason for the non-renewal decision is illegal, and this he has not done. In this case, the Applicant contends that the decision is "the logical consequence of a settling of accounts", as his relationship with his supervisor had greatly deteriorated over the period in question. However, it appears from the facts of the case that beginning in June 2008, the Applicant's performance deteriorated, he behaved rudely and aggressively to his supervisor, whose instructions he ignored, and that he verbally abused colleagues. The Applicant himself says in his complaint that he felt that his superior was "incompetent, timid", that he "was so hypocritical that he [the Applicant] no longer trusted him either on a professional or a personal level" and had therefore "decided to bypass him". Hence, a conflict situation and a loss of mutual trust existed, justifying the termination of the Applicant's employment under the case law (*Azzouni*);

(c) The Applicant's rights were not violated by the fact that the non-renewal decision was taken before the procedure for objections to his e-PAS was successfully completed. A fixed-term appointment does not carry any expectancy of renewal, regardless of whether an objection procedure has been initiated. In any event, the Applicant was duly compensated for any procedural error by the Secretary-General's decision to grant him two months' net base salary upon the conclusion of the management evaluation, even though the Applicant had suffered no untoward effect;

(d) The procedure of objection to the Applicant's rating ended on 29 September 2009. While the review panel considered that the rating procedure was not complied with inasmuch as the Applicant's workplan was not discussed and no interview took place at the time of the progress report between the Applicant and his supervisor, the panel nevertheless found the rating "results partially meet performance expectations" to be justified;

(e) Following the supervisor's report of 1 April 2009 complaining of the Applicant's behaviour, the latter received another assignment for the remaining two months of his contract; that can in no way be considered a disciplinary sanction. While it is true that he did not have access to the complaint of 1 April 2009, through the evaluation procedure the Applicant had ample opportunity to respond to the criticisms, particularly in his statement of objection of 21 June 2009;

(f) There is no reason to grant the Applicant's request to be informed of the comments submitted by the Administration on 10 August 2009 to the Management Evaluation Unit.

Judgement

20. The Applicant challenges the decision not to extend his appointment beyond its expiration date of 31 July 2009.

21. Rule 304.4 of the Staff Regulations in force at the material time states that appointments in the 300 series "do not carry any expectancy of renewal or of conversion to any other type of appointment". Further, under the provisions of Rule 309.5, such appointments "shall expire automatically without prior notice on the expiry of the period specified in the Letter of Appointment".

22. It is clear from the above provisions that decisions concerning the extension of such appointments fall within the discretion of the Secretary-General. However, such a decision, even though it cannot be regarded as a disciplinary measure, must not be arbitrary or inspired by improper motives and must not violate guarantees of due process.

23. In this case, the Administration has clearly stated that the unsatisfactory nature of the Applicant's performance was the basis for the decision not to renew his appointment. Since the Applicant contends that the procedure followed in appraising and rating his performance was improper, the Tribunal has a responsibility to verify that.

24. At the material time, the system for staff performance appraisal and rating was governed by Administrative Instruction ST/AI/2002/3 of 20 March 2002, which states, in Section 1, that application of that system is not mandatory for staff employed under the 300 series of the staff rules. However, once the Administration has decided to use a procedure governed by an enactment, it is bound by its provisions in their entirety.

25. Section 8.3 of Administrative Instruction ST/AI/2002/3 provides that as soon as a performance shortcoming is identified, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, such as the development of a performance improvement plan.

26. It is clear from the facts as they were related above that the Applicant, after being recruited on 28 January 2008 on a six-month fixed-term appointment, had that appointment renewed on 28 July 2008 until 31 July 2009.

27. On 12 November 2008, the Applicant and his supervisor drew up his workplan for the period from 1 April 2008 to 31 March 2009 and, a few days later, on 24 November 2008, a progress report was established in his e-PAS that contained no criticism of the Applicant's work. Only on 7 May 2009, at the end-of-cycle appraisal, did the Applicant's immediate supervisor harshly criticize his work and performance, those criticisms being confirmed by the next higher supervisor on 12 May 2009. Subsequently, in a letter of 22 May 2009, the Chief Civilian Personnel Officer at MINUSTAH declined to renew his contract beyond 31 July 2009.

28. So, in defiance of the above-mentioned provisions, which state that as soon as a shortcoming is identified in a staff member's work, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, the Applicant received at the end of the cycle the rating "results partially meet performance expectations" without being officially informed, through the appraisal procedure, of the criticisms made by his immediate superior, and hence without being given the opportunity to alter his behaviour. While in its defence the Administration argues that the Applicant's supervisor had warned him several times during the period in question that he was not happy with his behaviour, we find from the evidence on file that those criticisms were not made in the context of the appraisal procedure as required under Administrative Instruction ST/AI/2002/3, in particular at the time of the progress report, and so the Applicant was not given the opportunity to improve his performance, including his working relationship with his immediate supervisor and colleagues.

29. Thus, the Applicant's professional conduct during the period from 1 April 2008 to 31 March 2009 was evaluated improperly; and, since the unsatisfactory nature of the Applicant's conduct was the reason for the decision not to renew his contract, the Tribunal can only decide to rescind the impugned decision.

30. Hence, without any need to rule on whether the Administration was required to extend his contract until the end of the objection procedure, the refusal to renew the Applicant's contract beyond 31 July 2009 must be rescinded.

31. Since the rescission relates to an appointment decision, the Tribunal must, under Article 10.5 (a) of its Statute, set an amount of compensation that the Respondent may elect to pay in lieu of the

renewal of the Applicant's appointment. To determine the amount of that compensation, which is meant to be commensurate with the material damages suffered by the Applicant, the Tribunal must consider, given that the renewal of his appointment was not a right of the Applicant, what the chances were of his obtaining such a renewal had the performance appraisal procedure in his case been properly conducted.

32. In this case, given the evidence on file and the Applicant's own statements at the hearing, the Tribunal finds that even if the Applicant's immediate superior had asked him, in the context of the appraisal and rating procedure, to alter his behaviour at work, there is very little chance that that approach would have been successful and altered the end-of-cycle appraisal. Indeed, the Applicant's opinion of his immediate superior and of the operation of the service was so negative, as he again confirmed at the hearing, that the relationship of trust needed in the work could be improved only with great difficulty and so, in any case, the Applicant's chances of obtaining a renewal of his contract were very poor.

33. Thus, the Tribunal considers that the compensation payable by the Administration under Article 10.5 (a) of the Tribunal's Statute should be set at two months' net base salary calculated as of 31 July 2009.

34. As regards the non-pecuniary damages sustained by the Applicant and in view of the considerations above, it is appropriate to order the Administration to pay him one month's net base salary calculated as of the same date, 31 July 2009.

35. As regards the Applicant's requests for the Tribunal to rehabilitate him and restore his honour, there is no provision in the Tribunal's Statute whereby it could rule on such matters. In addition, regarding the Applicant's request that action be taken against those responsible for his situation, Article 10.8 of the Statute provides: "The [...] Tribunal may refer appropriate cases to the Secretary-General of the United Nations [...] for possible action to enforce accountability". Supposing that it was the Applicant's wish to do so, the Tribunal considers that in this case it would not be appropriate to invoke that provision.

Decision

36. In view of the foregoing, the Tribunal DECIDES:

- (a) The decision not to renew the Applicant's contract is rescinded;
- (b) If, rather than implement the decision to rescind, the Respondent opts to pay compensation, it shall pay the Applicant two months' net base salary as of 31 July 2009;
- (c) The Respondent is ordered to pay the Applicant, on account of non-pecuniary damages, one month's net base salary as of 31 July 2009;
- (d) The Respondent shall deduct from the above-mentioned sums such amounts as it has already paid to the Applicant following the management evaluation;
- (e) The above compensation shall bear interest at the United States base rate, to run from the date this judgement becomes enforceable until payment of the compensation. An increase of five percentage points shall be added to the United States base rate 60 days after the date this judgement becomes enforceable;

(f) All the Applicant's other claims are dismissed.

(*signed*) _____

Judge Jean-François Cousin

So ruled this 5th day of May 2011

Entered in the Register on 5 May 2011

(*signed*) _____

Víctor Rodríguez, Registrar, Geneva
