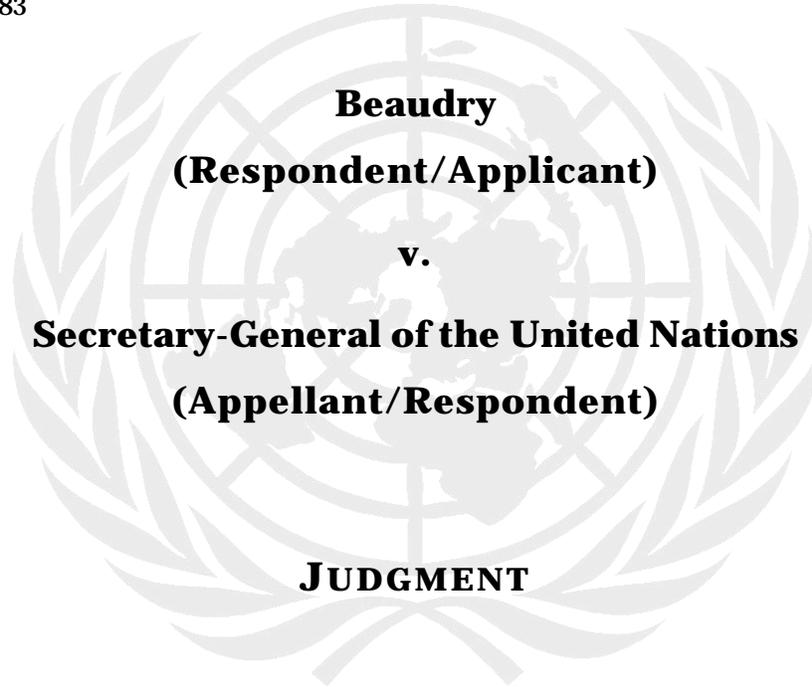




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-083



**Beaudry
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Kamaljit Singh Garewal
Judge Inés Weinberg de Roca

Judgment No.: 2010-UNAT-085

Date: 27 October 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Bart Willemsen and Kevin Browning

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. This is a case involving the non-renewal of an appointment of limited duration under the 300 series of the former Staff Rules. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that the decision not to renew the appointment of Louise Beaudry (Beaudry) was in breach of her contractual rights for which she was entitled to compensation, and that the Organization should consider waiving the applicable time limit to allow her to rebut the comments of her second reporting officer and the ratings for some of the core values and competencies in her performance evaluation for 2007-2008, despite the fact that she did not challenge her overall performance rating. This Tribunal vacates the UNDT's Judgment and allows the Secretary-General's appeal, holding that Beaudry acknowledged and accepted in writing the recommendation for non-renewal of her appointment, and that the rebuttal of the performance evaluation requested by her was not permissible under the applicable Administrative Instruction, as she did not seek to challenge her overall performance rating.

Facts and Procedure

2. Beaudry joined the United Nations in October 2004 as a Training Officer with the United Nations Mission in Burundi on an appointment of limited duration under the 300 series of the former Staff Rules. Her appointment was extended through to 2007. On 21 June 2007, Beaudry joined the United Nations Stabilization Mission in Haiti (MINUSTAH) on an appointment of limited duration for six months. She was appointed as a Training Officer, at the P-4 level, and Chief of the Integrated Mission Training Centre (IMTC). Beaudry's appointment was extended from 21 December 2007 until 31 October 2008.

3. From July 2007, issues arose relating to Beaudry's management of the IMTC team. Beaudry was dissatisfied with the response of her supervisors to these issues, the Chief of Mission Administrative Services (CAS), her first reporting officer, and the Chief of Mission Support (CMS), her second reporting officer. In June 2008, Beaudry's electronic performance appraisal system (e-PAS) record was completed for the period from

21 June 2007 to 31 March 2008 and she received an overall performance rating of “fully successful performance”. She signed her e-PAS record for 2007-2008 on 17 June 2008.

4. On 23 July 2008, the CMS decided not to renew Beaudry’s appointment. On 23 September 2008, Beaudry requested an administrative review of the decision and on 25 September 2008, Beaudry submitted a request to the Secretary-General under former Staff Rule 112.2(b) for a waiver of the 30-day time limit to submit a rebuttal of her e-PAS record for 2007-2008. She sought to challenge the ratings for some of the core values and competencies she was required to have and the comments of her second reporting officer, the CMS.

5. Beaudry’s request of 22 October 2008 to the Joint Appeals Board (JAB) for suspension of action of the decision not to renew her appointment was denied, and she was separated from service on 31 October 2008. By letter dated 4 December 2008, the Administrative Law Unit informed Beaudry that her request for administrative review was not successful. On 4 February 2009, Beaudry filed an appeal before the JAB contesting the decision not to renew her appointment and the decision not to waive the time limit to submit a rebuttal of her e-PAS record. Following the introduction of the new internal justice system, the appeal was transferred to the Dispute Tribunal.

6. The Dispute Tribunal issued Judgment No. UNDT/2010/039 on 4 March 2010. The Dispute Tribunal ruled in favour of Beaudry on the question of liability and found that the decision not to renew her appointment was in breach of her contractual right of due process and she was entitled to compensation. Beaudry’s primary case was that the decision of the CMS not to renew her appointment was based on an error of significant fact, namely his mistaken opinion that she consented to the non-renewal. The Dispute Tribunal found that the decision of the CMS not to renew Beaudry’s contract was “marred by a significant lack of good faith”. He “made his decision almost wholly upon the basis of a mistake and he did so because he failed to make an elementary enquiry of [Beaudry], which not only fairness but also a reasonable approach to ascertaining the material facts required.” Further, there was a failure by the CAS to record the reasons for the recommendation not to renew Beaudry’s appointment and then by the CMS to record the reasons for his decision. When Beaudry “sought to exercise her rights to administrative review ... she had to do so in ignorance of the truth, or at least the asserted truth, about the reasons for not renewing her contract. ... [T]his constituted a substantial breach of [Beaudry’s] contractual right of due process.”

7. The Dispute Tribunal also found that equality and fair dealing required that the practice of allowing a staff member to rebut individual evaluations of particular competencies in an e-PAS record, even where the staff member does not dispute the overall performance rating, should be applied to Beaudry's request for rebuttal. The Dispute Tribunal further held that if there was a decision not to allow an exception under former Staff Rule 112.2(b) to permit Beaudry to rebut her e-PAS for 2007-2008 after the expiry of the applicable time limit, it was rescinded; if there was no such decision, then one must be made. The Dispute Tribunal ordered the Assistant Secretary-General of the Office of Human Resources Management to "consider whether, in all the circumstances, there should be an exception in [Beaudry's] case of the time-limit provided by sec 15.1 of ST/AI/2002/3, such as to permit her now to commence rebuttal proceedings in respect of her e-PAS for 2007-2008, should she wish to do so. [Beaudry] is to inform the [Secretary-General] within seven days of her decision."

8. The Dispute Tribunal issued the Judgment on compensation on 18 August 2010 (Judgment No. UNDT/2010/146).

9. The Secretary-General filed an appeal against Judgment No. UNDT/2010/039 on 19 April 2010. Beaudry filed an answer to the appeal on 3 June 2010. On 7 September 2010, Beaudry filed a request for an oral hearing.

Submissions

Secretary-General's Appeal

10. The Secretary-General submits that the Dispute Tribunal erred on a question of law and exceeded its competence in finding that the Administration has a duty to provide reasons for non-renewal of fixed-term appointments and appointments of limited duration. The jurisprudence of the former Administrative Tribunal consistently affirmed that fixed-term appointments and appointments of limited duration carry no expectancy of renewal and the Administration has no duty to give reasons for non-renewal of such appointments.

11. The former Administrative Tribunal undertook close judicial scrutiny of the non-renewal of a fixed-term appointment or appointment of limited duration in three circumstances: (i) where the Administration created an expectancy of renewal by a firm commitment to renew the appointment; (ii) where the non-renewal decision was vitiated by

violations of due process, arbitrariness or other extraneous motivations on the part of the Administration; or (iii) where the Administration gave reasons for the non-renewal, in which case the reasons offered and the evidence must be consistent. The Secretary-General argues that none of these circumstances apply in this case. No commitment was made by the Administration to renew Beaudry's appointment of limited duration; as confirmed by the Judgment, the non-renewal decision was not motivated by any prejudice or improper motives; and the Administration did not offer any reasons for non-renewal in this case, which was found to be the primary failing by the Dispute Tribunal.

12. The Secretary-General contends that the Dispute Tribunal erred on a question of law in interpreting the decision of the former Administrative Tribunal in UNAT Judgment No. 1052, *Bonder* (2002) as giving rise to a general obligation to provide reasons for non-renewal of fixed-term appointments. Further, the facts of this case can be distinguished from the *Bonder* case.

13. The Secretary-General submits that the Dispute Tribunal erred on a question of law and exceeded its competence in requiring the Administration to waive the time limits and permit Beaudry to rebut the evaluation of her core values and competencies in her e-PAS record for 2007-2008. The Dispute Tribunal did not identify any exceptional circumstances that would warrant the exercise of the Secretary-General's discretion under former Staff Rule 112.2(b) to grant an exception. Further, Beaudry has no right to challenge the evaluation of her core values, core competencies and managerial competencies under the Administrative Instruction on the performance appraisal system (ST/AI/2002/3) and, accordingly, the Administration is entitled not to waive time limits to enable Beaudry to exercise a right that is not provided for in the Organization's rules.

14. The Secretary-General requests that the Appeals Tribunal make a number of findings and vacate the Judgment of the Dispute Tribunal in its entirety.

Beaudry's Answer

15. Beaudry contends that the Secretary-General has failed to identify an alleged error of law or fact by the Dispute Tribunal that would permit the Appeals Tribunal to overturn the Judgment. Beaudry argues that the primary holding of the Judgment rests upon the finding that the decision not to renew her appointment was vitiated by a significant mistake of fact

and was therefore unlawful. The appeal is directed at a statement in the Judgment that the Secretary-General must provide reasons for a decision not to renew a fixed-term appointment, at least when such reasons are requested by the staff member. Beaudry contends that this statement is *obiter dictum*, having no impact on the primary holding, and is not appealable.

16. Beaudry submits that the Secretary-General has not appealed the critical findings of fact made by the Dispute Tribunal regarding the circumstances in which the decision not to renew her appointment was made, and those findings are therefore *res judicata*. As the appeal is directed to an issue which does not found the legal or factual conclusions of the primary holding, Beaudry requests that the Appeals Tribunal affirm the Judgment.

17. Beaudry contends that the appeal in relation to the Dispute Tribunal's orders concerning the time limit for a rebuttal of her e-PAS record is premised on a misconception of the Judgment and ought to be summarily dismissed.

Considerations

18. As a preliminary matter, this Tribunal rejects Beaudry's request for an oral hearing as there is no need for further clarification of the issues arising from the appeal of the Secretary-General.

19. Beaudry joined the United Nations subject to an appointment of limited duration under the 300 series of the former Staff Rules. Former Staff Rule 304.4(a) stated, in part, that "[a]ppointments under these Rules carry no expectancy of renewal or of conversion to any other type of appointment." Further, under Rule 304.4(b), appointments for activities of a limited duration, such as Beaudry's appointment, "may be granted for a period not exceeding three years, subject to renewal, exceptionally, for a final period of one year".

20. As established by this Tribunal in *Syed*,¹ fixed-term appointments and, by extension, appointments of limited duration, have no expectancy of renewal or conversion to any other type of appointment. After a maximum of four years, a staff member holding an appointment of limited duration could not have any expectation of renewal of the

¹ *Syed v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-061.

appointment, because the Staff Rules governing such appointments did not provide for the continuation of the appointment.

21. If, prior to the abolishment of the 300 series of the Staff Rules, there was a practice of renewing appointments of limited duration beyond the four year maximum term, this would have been in violation of the Staff Rules and not in accordance with the interests of Member States of the United Nations in the proper management of human resources.

22. After reading the testimony of the witnesses who gave evidence at first instance, this Tribunal wishes to observe that, as part of their duties, managers should be aware of whether or not staff members are interested in the renewal of their appointments. But an expression of interest by a staff member in the renewal of his or her appointment does not create a right of renewal.

23. There is little or no discussion in the Judgment about the nature of Beaudry's appointment of limited duration, Beaudry's length of service under appointments of limited duration (a period of four years appears to have elapsed between her first appointment in October 2004 and her separation from service on 31 October 2008) or the fact that on 21 July 2008, Beaudry signed a document entitled "Request for extension of appointment of international staff member". By signing this document, Beaudry acknowledged her performance rating of "fully successful performance" and, at the same time, the recommendation of her supervisor for no further extension of her appointment.

24. The document is decisive documentary evidence in this case. The document establishes that Beaudry was informed of her performance rating on 21 July 2008. There was evidence that Beaudry was actively seeking employment at this time elsewhere in the United Nations and her supervisors were aware of her efforts. In this context, the document establishes that Beaudry knew that her immediate supervisor did not recommend the renewal of her appointment and that the section of the form for providing details of the justification for the recommendation for non-extension was not completed. Nonetheless, Beaudry signed and acknowledged the recommendation against the renewal of her appointment, whatever the reasons.

25. In light of this evidence, the appeal filed by the Secretary-General should be allowed. Beaudry signed the document, thereby acknowledging that renewal of her appointment was not recommended, and the Administration was entitled to rely on her acknowledgment and acceptance of the recommendation of non-renewal. The UNDT erred on a question of fact resulting in a manifestly unreasonable decision in finding that the non-renewal of Beaudry's appointment was in breach of her rights.

26. Accordingly, there are no grounds to support the ruling in the UNDT's Judgment that Beaudry is entitled to compensation for the non-renewal of her appointment of limited duration.

27. The UNDT ordered the Administration to consider if there should be an exception granted to allow Beaudry to submit a rebuttal of her e-PAS record for 2007-2008 after the applicable time limit. Beaudry did not seek to challenge her performance rating of "fully successful performance"; instead she sought to challenge the critical comments made by her second reporting officer and the evaluation of some of the core values and competencies in her e-PAS record. Under Section 15 of the Administrative Instruction on the performance appraisal system (ST/AI/2002/3), a staff member can only challenge his or her performance rating. A staff member is not entitled to challenge the core values, core competencies, managerial competencies or comments which support that rating without challenging the rating itself. Beaudry's proposed rebuttal of her e-PAS record for 2007-2008 is not permissible under the Administrative Instruction and, accordingly, there is no basis for the orders of the UNDT with respect to her request for a waiver of the time limit to allow her to submit a rebuttal of her e-PAS record.

28. This Tribunal considers that there is no need to address the other issues raised by the Secretary-General's appeal and Beaudry's answer, or addressed by the first instance Judgment, *brevitatis causa*, as the consideration of these issues would not affect the outcome of the appeal.

Judgment

29. In view of the foregoing, the Tribunal vacates the Judgment under appeal and affirms the impugned decision not to renew Beaudry's appointment of limited duration.

Dated this 27th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Simón, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar