



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/109

Judgment No.: UNDT/2010/006

Date: 15 January 2010

Original: English

Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

PARMAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

George Irving

Counsel for respondent:

Steven Dietrich, ALU

Peri Johnson, UNDP

Natalie Boucly, UNDP

Introduction

1. The applicant was an employee of the United Nations Development Programme (UNDP), initially employed on a 200 series appointment that was later converted to a 100 series fixed-term appointment. In August 2005, he went to work for the Office of Internal Oversight Services (OIOS) of the United Nations Secretariat on loan from UNDP. He stayed with OIOS until 30 September 2006, when he was separated from service upon expiration of his contract. The applicant contests UNDP's decision not to extend his contract beyond its expiry date on 30 September 2006.

The facts

2. Between 1996 and 1999, the applicant worked with UNDP on several special service agreements and appointments of limited duration, and worked with the United Nations Office for Project Services from January 2000 to December 2001.

3. The applicant joined UNDP on a 200 series appointment at the L-4 level in January 2002. On 1 March 2003, the applicant's appointment was converted to a 100 series contract at the P-4 level. The letter of appointment, signed by the applicant on 17 May 2003, stated—

This Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment on the Staff of the United Nations Development Programme.

4. The applicant's appointment was subsequently extended on two occasions, until 31 August 2005. In July 2005, the applicant was selected for a temporary appointment as a programme evaluation officer in OIOS.

5. On 29 July 2005, the Office of Human Resources Management of the United Nations Secretariat sent a facsimile to the Office of Human Resources of UNDP, requesting the release of the applicant "on reimbursable loan to the Secretariat, as soon as possible, through 31 December 2005".

6. On 15 August 2005, the applicant enquired by email with the Office of Human Resources of UNDP whether “UNDP, given [his] contractual status as a 100 series staff member, would give him three months to look for a post, if by the 31st December 2005 there was no post available for [him] and/or OIOS was not seeking to extend [his] position”. The reply, sent to the applicant next day, stated:

The three months search period is an entitlement extended to long serving staff members, i.e. beyond 5 years of service on 100 Series appointment. In reviewing your records, it [was] revealed that your appointment on 100 series with UNDP/BRSP [Bureau for Resources and Strategic Partnerships] began on 29 January 2002 [sic]. As you do not fall under the long-serving category the three months search period will not be applicable to you.

7. A note for the file, dated 22 August 2005 and prepared by two UNDP human resources officers, shows that on 22 August 2005 the officers met with the applicant “to ensure that [he] understands the nature of his loan and that his contract will not be renewed by BRSP beyond 31 December 2005, unless he is able to identify suitable placement either with UNDP or elsewhere in the UN system”. The note stated:

[The applicant] said that he had a clear understanding of the non-renewal of his contract through his discussion with the Director of BRSP. He also said that the only thing he needed clarification was why he is not able to get a three months search period as 100 Series staff member. In addition to the e-mail of 16 August 2005, we again explained to him that he is not a long serving staff member in view of the fact that his appointment on 100 Series with BRSP began only on 29 January 2002 [sic]. The three months search period is applicable to staff member who have served beyond five years on a 100 Series and that it is not applicable to him as he has not met the five years of service. He was further informed that he will separate from the organization, unless he actively searched and finds a suitable assignment within and outside the “Quarry Exercise” prior to the expiry of his appointment on 31 December 2005.

[The applicant] was also informed that he will receive a letter from OHR informing of the above condition and requires his signature as an indication of his understanding. He said that it is clear to him now and has no problem in signifying his understanding.

He was also made aware that OHR will advocate on his behalf in search for a suitable positions and that he should send his updated cv. He was thankful for the concern that was expressed to him.

8. In a letter dated 23 August 2005 and addressed to the applicant, the Deputy Director and Chief of the Business Advisory Services of UNDP's Office of Human Resources stated:

As you are aware, the Management of BRSP have informed us of their concurrence to your release and the non-renewal of your current fixed term appointment, expiring on 31 December 2005, which is also the end of the temporary reimbursable loan assignment with the United Nations.

Given UNDP's constrained post environment, please be informed that your re-absorption to UNDP at the end of your reimbursable loan period will depend on the availability of posts at that time. You should actively search for suitable opportunities in UNDP and elsewhere in the UN system prior to your contract expiry date. Vacancy postings are regularly updated on: <<http://ntra.undp.org/ohr/jobs/index.htm>>. Should you need to access the website from outside UNDP's network, please request a password. You should keep the HR Business Advisory Services . . . fully informed of your search efforts, and provide an updated CV and/or P-11, so that we may advocate on your behalf.

If no suitable placement is identified, we would be obliged to separate you at the end of your loan period, i.e. 31 December 2005. If, however, the UN [Secretariat] requests extension of your assignment beyond the four months period, we will extend your appointment for the corresponding period not to exceed the maximum of a one year period from the date of your assignment, 22 August 2005, to facilitate continuation of your assignment.

I realize that the above terms are sobering but please be assured of our support in your job search.

9. By memorandum dated 24 August 2005, UNDP informed OIOS and the applicant of its agreement to release him on a reimbursable loan. In its memorandum, UNDP stated:

[W]e are pleased to confirm UNDP's concurrence to the release of [the applicant] on a reimbursable loan to the United Nations [Secretariat] effective 22 August 2005 through 31 December 2005, in accordance with the Inter-Agency Agreement concerning transfer, secondment or

loan of staff among the organizations applying the United Nations common system of salaries and allowances.

[The applicant's] return rights at the end of his loan will be based on the terms of agreement between him and UNDP.

10. Following this communication, the applicant assumed his temporary appointment with OIOS. With UNDP's agreement, the applicant's appointment with OIOS was extended several times—on 28 December 2005, 24 March 2006, and 8 August 2006. Each extension authorisation from UNDP specified that the applicant's return rights to UNDP would be based on the terms of agreement between him and UNDP. All extension authorisations were copied to the applicant.

11. On 9 May 2006, the Director of the Office of Human Resources of UNDP sent an email to the applicant, stating:

As explained to you in my previous e-mail of 3 March 2006, the six months extension of your reimbursable loan was approved as a final one, and I very much regret to inform you that I cannot agree to any further extension beyond 30 September 2006 as we have been more than flexible in accommodating your loan arrangement. If the UN is keen in extending your reimbursable loan, I strongly suggest for you to negotiate a new offer.

It is true UNDP encourages inter-agency movement, in addition to the wider opportunity for personal and professional growth and career development, the exchange is critical for strengthening the cohesiveness and effectiveness of the UN System's response to the global challenges. However, the longer term mobility exchange is extended to long serving staff members. . . .

I do hope that you will understand my position on the further extension request and that it will not deter you from actively searching for a suitable placement within UNDP either in the QUARRY or AD HOC positions until the end of your current loan period, i.e. 30 September 2006 as an internal candidate.

12. The last extension was granted by UNDP on 8 August 2006. In its memorandum dated 8 August 2006, the Deputy Director and Chief of the Business Advisory Services of UNDP's Office of Human Resources stated:

I am pleased to confirm UNDP's concurrence to the final extension of [the applicant's] reimbursable loan to the Office of Internal Oversight Services, United Nations Secretariat through 30 September 2006, in line with the Inter-Organization Agreement (now known as Inter-Agency Mobility Accord).

Should the services of the staff member continue to be required by the OIOS/UN beyond 30 September 2006, the Inter-Organization Exchange on transfer should apply as UNDP can no longer accommodate a further extension.

[The applicant's] return rights to UNDP will be based on the terms of agreement between him and UNDP.

13. The Tribunal understands from the respondent's submission that, effective 22 August 2006, UNDP extended the applicant's fixed-term appointment through 30 September 2006.

14. This was followed by a series of exchanges involving the applicant's supervisor in OIOS and the Acting Executive Officer, OIOS, as well as the applicant, about the possibility of extending the applicant on a reimbursable loan or on secondment to OIOS for an additional period of three months.

15. On 20 September 2006, the Chief of the applicant's section in OIOS sent an email to the Acting Executive Officer, OIOS, copied to the applicant, concerning a possible extension of his appointment beyond 30 September 2006. The email stated:

a. The [Internal Audit Division's] P4 post against which [the applicant] is held and which is "extrabudgetary" . . . can be made available through to end-Dec.

b. From UN side, secondment will not be contractual option for a 3-month period.

c. [The applicant] will himself have to be responsible for resolving any problems connected to his status vs. UNDP.

. . .

I have asked [the applicant] to either:

1. Secure UNDP agreement to extension for subject 3-month period on continued reimbursable-loan basis.

2. Resign from UNDP and accept a 3-month (delete assignment from) temporary appointment with UN/OIOS on “11-month contract” terms.

This to clarify my position—in the face of traveling next week, when his current contract expires.

16. However, in an email sent by OIOS to the applicant on 28 September 2006, he was informed by the Executive Office of OIOS of the expiration of his reimbursable loan from UNDP. The email stated:

[Y]our reimbursable loan to OIOS will not be extended and no request for temporary appointment is forthcoming. Therefore, we will notify UNDP . . . tomorrow of your annual leave balance as of 30 September 2006, the expiration date of the current arrangement.

17. The applicant’s contract expired on 30 September 2006.

18. On 26 October 2006, the applicant filed a request for administrative review of the decision by OIOS not to offer him a contract extension of between 3 and 11 months. The review was completed on 1 December 2006. Dissatisfied with the outcome, on 3 January 2007 the applicant filed an incomplete statement of appeal with the Joint Appeals Board (JAB), which was followed by a complete statement of appeal filed on 1 February 2007.

19. Following UNDP’s unsuccessful challenge to the receivability of the application, UNDP filed a reply to the appeal on 30 June 2008.

20. On 8 April 2009, the JAB majority issued its report, declining to make a recommendation in this case in favor of the applicant. On 6 May 2009, the applicant was informed of Secretary-General’s decision concurring with the findings and conclusions of the majority of the JAB that the applicant’s rights as a staff member were not violated.

21. On 28 July 2009, the applicant filed an application with the Dispute Tribunal. The respondent was subsequently informed by the Registry of the Tribunal that his reply was due 31 August 2009. On 31 August 2009, the Registry received two

separate submissions from UNDP and the Administrative Law Unit of the United Nations Secretariat, both on behalf of the Secretary-General.

22. The Tribunal held a directions hearing on 23 October 2009 to identify the issues in this case and give directions to the parties as to the further conduct of the matter. At the hearing, the Tribunal was advised by the applicant that he is currently working as a consultant for UNDP. Following the directions hearing, the proceedings were suspended to allow the parties to pursue mediation. On 10 December 2009, counsel for the respondent informed the Registry that the “efforts at informally settling this case were proving unsuccessful” and requested the Tribunal to proceed with this case on the merits on the basis of written submissions.

23. On 22 December 2009, the Tribunal ordered the parties to advise the Tribunal whether they consent to the case being dealt with on the papers, with no further hearings. Both parties consented.

The issues

24. The applicant makes a number of claims in relation to the ending of his contract. I note, however, that in his 26 October 2006 request for administrative review the applicant contested the “administrative decision taken on the 28th September [2006] of rescinding the 3–11 month contract extension as per the email communications between . . . Chief of the Inspection Unit [the applicant supervisor] and . . . [the] Acting Executive Officer, UNOIOS”. Requests for administrative review and management evaluation are mandatory first steps in the appeal process (*Crichlow*, UNDT/2009/028). Therefore, the scope of the applicant’s appeal before the Tribunal is limited to the alleged decision to rescind “the 3–11 month contract extension”. Accordingly, the main issue before me in this case is whether there was an undertaking by the Organization to extend the applicant’s contract beyond 30 September 2006 and whether the decision not to extend his contract was proper. I will also consider related claims and the underlying circumstances that led to that decision.

Applicant's submissions

25. The applicant submits that:

a. The decision to separate him was in violation of the UN policy on inter-agency mobility. The Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances (the "Inter-Organization Agreement") provides that staff members on loan retain their contractual rights with the releasing organization. Some continuity of service must be maintained, which entails a lien on a post or a general lien with a reasonable effort to accommodate a returning staff member. The applicant also asserts that he was later informed that the post he had occupied had been moved to Geneva.

b. The applicant should have been afforded special consideration when applying for other positions. Although the respondent suggests a concession was granted to allow the applicant to be considered as an internal candidate for three months, it is not at all clear what preferences he was accorded or if this was ever implemented in practice. UNDP made no good faith effort to find a suitable placement for the applicant that would safeguard his contractual status, even on a temporary basis.

c. OIOS and UNDP owed a duty of care to the applicant under staff regulation 4.4, which provides preferential treatment to those already serving in the Organization. UNDP has denied the applicant the minimal guarantees of fairness in making the discretionary decisions affecting the applicant and violated the principle of good faith between the parties. The applicant was also treated unfairly when he was employed by OIOS.

d. The applicant was entitled to a reasoned and honest explanation for separating him from service. Decisions regarding the non-renewal of appointments are subject to the terms of appointment and may not be

exercised without regard to due process and fundamental fairness, nor should they be influenced by extraneous or prejudicial factors.

e. In this case, the respondent has the burden of proof in showing that the applicant's rights were observed. Specifically, the respondent must show that the applicant, as a long-serving staff member, was considered for available posts and that the applicant was not found suitable for any of them prior to separation.

f. UNDP should have allowed the applicant to utilise his accumulated annual leave of 52.5 days to search for another assignment. The applicant would have reached five years of continuous service if UNDP had not ended his employment without allowing him to avail himself of more than 50 days of unused annual leave. Instead, the applicant found himself unemployed "with two days notice".

g. He should have been considered as a long-service staff member with more than five years of service, which, under UNDP rules, means that he would be entitled to certain benefits and protections not available to staff with less than five years of service. The applicant received a Certificate of Service from UNDP in 2006 upon completion of five years of service, confirming that he served for at least five years.

26. Although in his written submission to the Tribunal of 28 July 2009 the applicant stated that "[t]here was considerable initial confusion over the legal status of the Applicant while with OIOS", at the directions hearing held on 23 October 2009 the counsel for the applicant stated from the Bar that it was not in dispute that the applicant was, in fact, on reimbursable loan to OIOS.

27. The applicant seeks rescission of the decision of the Secretary-General rejecting the applicant's appeal; retroactive reinstatement in service from 30 September 2006; compensation for the damage suffered; and award of costs.

Respondent's submissions

28. The Tribunal received two separate submissions in this case from two counsel for the respondent. The submissions received from the Administrative Law Unit (ALU) of the United Nations Secretariat are summarized below:

a. The applicant was informed that his temporary appointment with OIOS was due to expire in May 2006, which was several months prior to the expiration of his contract on 30 September 2006.

b. OIOS made no promise to the applicant to extend his assignment with OIOS beyond its expiration date. There was no agreement that the applicant's contract would be extended further and no offer of appointment. Therefore, the applicant had no basis to expect that the Secretariat would retain him beyond the time limits of the loan agreement with UNDP.

c. The applicant was clearly on loan from UNDP to OIOS and there is no basis to claim that he was or should have been on secondment.

d. There is no evidence on record to show that the applicant's due process rights were violated. The applicant has failed to demonstrate how the Organization acted unfairly towards him. Both OIOS and UNDP informed the applicant of the terms and conditions of the final reimbursable loan arrangement well in advance of its expiration date.

e. The award of the applicant's costs is not warranted in this case.

29. The submission received from UNDP can be summarized as follows:

a. The applicant was fully informed of the terms of the reimbursable loan agreement both prior to and during his work with OIOS.

b. The applicant was given more than a reasonable period in which to apply for jobs but failed to do so despite the clear advice received from the

respondent. Throughout the period of his reimbursable loan, the applicant had access to the respondent's internal vacancy listings and could apply for posts as an internal candidate. However, the applicant applied for only one position prior to the expiration of his contract on 30 September 2006.

c. The applicant is not a long-serving staff member because he does not have five years of continuous service with the respondent on a 100-series fixed-term contract. The provisions of UNDP's Due Process Guidelines for Displaced Staff Members apply only to long-serving staff, defined as staff serving continuously on fixed-term appointments for a minimum of five years. Because the applicant was granted a 100 series fixed-term appointment on 1 March 2003, and separated on 30 September 2006, his continuous service did not exceed "3 years and 7 months". The applicant's reference to the Certificate of Service given to him by UNDP is no proof that he was considered to have five years on continuing service with UNDP. Such certificates are given to all staff members irrespective of their types of contract, and take account of employment periods on 200 and 300 series contracts. This does not make a staff member "long-serving" for the purpose of the Staff Rules.

d. The applicant was informed of the expiration of his contract well in advance and had no legitimate expectation that his contract would be renewed after 30 September 2006. The respondent's decision not to extend the applicant's contract beyond its expiry date was a legitimate and lawful exercise of the discretion it enjoys in such matters.

e. UNDP complied with all due process requirements and never acted in bad faith against the applicant. The burden of proof in showing that the Administration acted improperly rests on the applicant. The applicant's allegations of prejudice are uncorroborated and "couched in very vague terms".

f. The applicant fell short by one year and five months of the five-year mark (which would have entitled him to certain protections available to long-serving staff members).

g. There was no duty on the part of UNDP to allow a staff member to use accrued annual leave for the sole purpose of remaining a staff member. The respondent lawfully commuted the applicant's annual leave to cash, in accordance with staff rule 109.8. Further, in the event that the respondent had exceptionally acceded to the applicant's request, the applicant would still have fallen short of the five years' continuous service, contrary to his claims. In any event, by decision of 13 October 2006, the respondent exceptionally decided to allow the applicant to be considered as an internal candidate when applying for suitable vacancies from his separation through 31 December 2006; this period totalled 90 days, which was a far more generous offer than the 50 days of annual leave.

h. The post occupied by the applicant was not moved to Geneva. The post remained in New York, and was unencumbered for some time as there was no need for any of the services associated with the post. In 2009, the post was re-classified to a P-5 post and advertised through a competitive process.

i. The applicant's plea for costs must fail as the applicant has not demonstrated any manifest abuse of the proceedings by the respondent.

Contested administrative decision

30. First, the Tribunal examined whether UNDP or the United Nations Secretariat were required, as a matter of law, to employ the applicant beyond 30 September 2006. Staff rule 104.12(b)(ii), applicable at the time, provided that fixed-term appointments did not carry any expectancy of renewal or of conversion to any other type of appointment. The applicant asserted in his pleadings that the Inter-Organization Agreement provided that staff members on loan retain their contractual rights with the releasing organization.

31. The Tribunal examined the applicable staff regulations, rules, and administrative issuances, as well as UNDP's inter-agency mobility policy and the Inter-Organization Agreement. UNDP's inter-agency mobility policy states as follows:

The purpose of this Chapter is to set out the policies and procedures governing UN Inter-agency movements to and from UNDP.

...

Inter-agency movements should be viewed as a beneficial experience for all the parties involved (i.e. the staff member, the releasing organization and the receiving organization).

...

Loan: A loan is the temporary move of a staff member from one organization to another for a maximum two year period, during which he/she will be paid and administered by the releasing organization, and is subject to the functional and general supervision, policies and procedures of the receiving organization.

There are two types of loan:

- a) reimbursable when the receiving organization reimburses the releasing organization for the loan of the staff member; and
- b) non-reimbursable when the receiving organization does not reimburse the releasing organization for the loan of the staff member.

32. The mobility policy further specifies that staff members on loan remain "employed by the releasing organization" and that "UNDP applies the terms and conditions defined in the Inter-Organization Agreement". This Agreement defines "loan" as follows—

[T]he movement of a staff member from one organization to another for a limited period, normally not exceeding one year, during which he will be subject to the administrative supervision of the receiving organization but will continue to be subject to the staff regulations and rules of the releasing organization.

33. The Inter-Organization Agreement further states:

III. Contractual Relationships between the staff member and the Organizations

...

Loan

10. (a) When a staff member is loaned, he will be under the administrative supervision of the receiving organization, but will have no contractual relationship with it, continuing to be subject to the staff regulations and rules of, and retaining his contractual rights with, the releasing organization.

...

IV. Entitlements of the Staff Member

A. Service Credit

12. . . . In the case of a loaned staff member, service in the receiving organization will be counted as service in the releasing organization.

...

C. Annual Leave

14. . . .

(c) So far as possible, the receiving organization will enable a seconded staff or loaned staff member to take, before his return to the releasing organization, all the annual leave which he accumulates during his service with it.

...

(d) When a staff member returns to the releasing organization, he will carry with him his accrued leave credit at the date of his return.

34. As the applicant correctly pointed out in his submission, the Inter-Organization Agreement provides that the applicant retained his contractual rights with the releasing organization, in this case UNDP, while on loan to OIOS. However, these contractual rights were limited to the duration of the contract with UNDP—i.e., until 30 September 2006. The applicant has failed to demonstrate that he had grounds for a legitimate expectation that his contract would be renewed. Further, the Inter-Organization Agreement, quoted above, does not support the applicant's contentions.

35. The terms and conditions of employment of a staff member may be express or implied and may be evident from correspondence and surrounding facts and circumstances (see discussion in *Wilkinson et al.* (UNDT/2009/089); United Nations Administrative Tribunal Judgment No. 95, *Sikand* (1965)). Therefore, having found that neither UNDP nor the United Nations Secretariat were under an obligation to extend the applicant's appointment beyond 30 September 2006, I examined the documentary evidence provided by the parties to evaluate whether there was an express or implied promise by the Organization to employ the applicant beyond 30 September 2006.

36. Upon close examination of the email exchanges, I find that, although these communications were aimed at exploring the possibility of a solution allowing the applicant to stay with OIOS beyond 30 September 2006, it was clear from these exchanges (as well as from UNDP's communications with the applicant) that, if no solution were to be found, the applicant's contract would expire on 30 September 2006. For instance, in the applicant's supervisor's email to the Acting Executive Officer, OIOS, dated 20 September 2006 and copied to the applicant, the supervisor referred to his discussions with the applicant "in the face of traveling next week, when his current contract expires" and stated that he had asked the applicant to either secure an agreement from UNDP to extend his loan or resign from UNDP and accept a three-month appointment with OIOS. This shows that, although OIOS attempted to assist the applicant in finding a solution to his situation, there was no express or implied promise constituting an enforceable agreement that the applicant's contract would be extended beyond 30 September 2006.

Due Process Guidelines

37. The Due Process Guidelines of UNDP, dated 5 February 2005 and edited in March 2006, provide a number of protections to staff on permanent appointments and long-serving staff, including a three-month period afforded to the affected staff members to conduct an active job search, which may include "3–4 weeks off . . . on official business to prepare for/conduct a search".

38. The Due Process Guidelines specify that these protections are afforded only to permanent staff and staff who have been serving continuously on fixed-term appointments for a minimum of five years:

Eligibility

As with previous separation programmes, the present arrangements are applicable to regular staff on UNDP Letters of Appointment, who either hold a permanent appointment or have been serving continuously on fixed term appointments (100 series) for a minimum of five years. This five-year period does not include periods of work on SSA, Service Contract, ALD appointments or 200 series.

The programme is not applicable to staff of UNFPA, staff on contracts limited to UNOPS service, locally-recruited staff of WFP or staff that UNDP administers on behalf of other agencies.

39. The case file demonstrates that the applicant received a fixed-term appointment with UNDP on 1 March 2003. At the time of the expiration of the applicant's contract on 30 September 2006, he had three years and seven months of continuous service on a fixed-term 100 series appointment. The applicant was one year and five months short of reaching the five-year mark and was therefore ineligible to be covered by UNDP's Due Process Guidelines.

40. I note that even if UNDP were to allow the applicant to use the 52.5 days of unused annual leave to prolong his stay with the Organization—which would be a discretionary decision by UNDP since it was under no obligation to do so—it would have been insufficient for him to reach the five-year eligibility mark.

41. As part of his submission, the applicant asserted that UNDP was required to maintain a lien on his post, which would allow the applicant to stay beyond 30 September 2006. I find this position to be misguided. Firstly, this argument is irrelevant as the applicant's contract was set to expire on 30 September 2006, and it would be of no significance if UNDP maintained a lien on his post as he stayed with OIOS until the last day of his contract. Secondly, although the Due Process Guidelines envisage the possibility of lien in certain instances (see Section III), the applicant was not covered by the Guidelines for the reasons stated in this judgment.

The Tribunal was not provided with any evidence that could be interpreted as containing an express or implied promise by the respondent, or constituting any agreement between the parties, that a lien on his post would be maintained by UNDP. In fact, the records show that at the time of the events in question, the applicant was advised that no lien would be maintained on his post and therefore he should have had no misgivings about it.

42. Although the applicant alleges that “there is no indication he was given any special consideration as a staff member with a general lien and in need of placement”, he fails to show that there was—or should have been—a lien of any type on his post.

43. In its contemporaneous communications with the applicant, UNDP maintained that, firstly, the applicant’s return rights would be based on the terms of agreement between him and UNDP, and, secondly, that the applicant’s contract would not be renewed. There is no evidence, nor was it submitted by the applicant, that he contested UNDP’s position at the time of these communications or that he actively tried to reach an agreement with UNDP to modify its position on the issue of extension as expressed therein. Therefore, I understand that, at the time of the events, it was understood by both parties that the applicant’s contract would not be renewed beyond 30 September 2006, and that, should he wish to remain in the Organization’s employ, he must apply for other positions.

44. In the present case the applicant has failed to demonstrate that UNDP or the United Nations Secretariat violated any regulations, rules, or administrative issuances. The applicant was fully aware of the approaching expiration of his contract and should have taken steps to apply for positions in the United Nations system. The applicant was informed of the need to apply for positions in the United Nations on several occasions, including in August 2005 and May 2006. As the Tribunal stated in *Luvai* (UNDT/2009/074), “it is a well-established principle that equity aids the vigilant”. It appears from the submissions of the parties that the applicant applied only for one post while on loan with OIOS. The applicant was interviewed with respect to that vacancy in June 2006, but was not selected.

45. The applicant contends that OIOS and UNDP owed a duty of care to him under staff regulation 4.4, because it provides preference to those already in the service of the Organization. Staff regulation 4.4 provides—

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.

46. I cannot agree with the applicant's interpretation of staff regulation 4.4. As discussed by the Tribunal in *Sefraoui* (UNDT/2009/095), staff regulation 4.4 provides that, generally, “no *a priori* favour is to be accorded to either the external or the internal candidate”. This staff regulation does not confer any absolute (as distinct from qualified) preference in favour of members already in service in filling vacancies, and certainly does not create an obligation on the part of the Administration to extend or renew the contracts of staff members on fixed-term appointments.

Allegations of unfair treatment and prejudice and the burden of proof

47. The applicant alleges unfair treatment by the respondent and states that the decision not to extend his appointment was influenced by extraneous or prejudicial factors. Both parties made extensive submissions on the issue of burden of proof. The applicant maintains that the respondent has the burden of proof in showing that the applicant's rights were observed. The respondent asserts that the burden of proof in showing that the Administration acted improperly rests on the applicant. The Tribunal has issued several judgments addressing the issue of the burden of proof.

48. In *Luvai*, the Tribunal held that where allegations of impropriety are raised, the burden of proof is on the one making the allegations. In *Bye* (UNDT/2009/083), the Tribunal, relying on the jurisprudence of the United Nations Administrative Tribunal, made a similar finding, stating that “anyone alleging harassment, prejudice, discrimination or any other extraneous factor of improper motivation of a particular

decision, has the *onus probandi* of such an assertion. . . . This is in fact in line with a well-known maxim of law that the party who alleges a fact bears in principle the burden of proving its veracity”.

49. In *Nogueira* (UNDT/2009/088), the Tribunal held that

[t]he burden of proof is of course on the Applicant to establish that the discretion [of the Secretary-General in matters of appointment and non-renewal] has been exercised injudiciously. Once the Applicant has stated his case, it remains open to the Respondent to rebut the Applicant’s contentions or to state their own case. The Tribunal must then consider the evidence in its entirety and determine if he who avers has made out a case on a balance of probabilities.

50. Most recently, in *Sefraoui*, the Tribunal held that, although the pronouncements in *Bye* and in the judgments of the Administrative Tribunal with respect to the burden of proof provide some rules of practical reasoning, they do not completely satisfy the Tribunal’s needs in cases that come before it. The Tribunal concluded that by placing the burden of proof on either party it would necessarily assume that the administrative decision is *a priori* wrong or right. *Sefraoui* suggests matters could be determined by the Tribunal more prudently by moving away from the burden of proof terminology and instead, by focusing on the preponderance of evidence—

26. A rule that the staff member bears the onus of proving the impugned decision is wrong is simply another way of saying that there is a presumption, which can be rebutted, that administrative decisions are right. It is easy to see why this rule should apply in resolving civil litigation in general, but it is far from obvious why this should be so in the very restricted litigation conducted in the Tribunal, where all plaintiffs are staff members, there is only one defendant, the sole issue is the correctness of an administrative decision that affects a staff member's employment and, furthermore, either party can require the persons involved in making the decision to be identified and called to give evidence.

. . .

28. It seems to me that, as a matter of fundamental principle, neither the staff member nor the Secretary-General should be in a favoured position. As a practical result of the rule of equality before the law,

the appropriate starting position is that there are no assumptions either way. . . . Accordingly, the general rule should be that the case is determined by the preponderance of evidence.

51. I find that, generally, the rule expressed in *Bye* and *Nogueira*—that the party who alleges a fact bears in principle the burden of proving its veracity—is a useful general starting point. Although in some cases before the Tribunal the evidentiary burden of proof and the ultimate burden of proof may be useful tools of reasoning, it seems that the Tribunal should focus not on the shifting of the burden of proof between the parties, but on the evidence provided by the parties in support of their cases (I should stress that this discussion concerns non-disciplinary cases). The Administration has a contractual obligation to make decisions for reasons that are accurate, reasonable and proper (*James* (UNDT/2009/025) and *Sefraoui*). When a staff member brings a case against the Administration alleging that a decision he or she is contesting was improper, and the Administration fails to rebut the staff member’s allegations, the Tribunal will be entitled to draw negative inferences from the Administration’s silence (see *Nogueira* and *Calvani*, UNDT/2009/092). In its review of each case the Tribunal will be required to draw conclusions from the evidence presented by both parties and the outcome of the case will be determined by the preponderance of evidence.

52. In this case, I need not engage in an extensive analysis of whether the applicant’s case is more probable than the respondent’s case. The applicant has failed to present any evidence of any sort of prejudice or bias against him; therefore, the applicant’s claims in this respect must fail.

Notice of the non-extension of the applicant’s contract

53. Staff rule 109.7, applicable at the time, provided that “[a] temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment”. The letter of appointment, signed by the applicant on 17 May 2003 and effective 1 March 2003, contained no special provisions concerning notice of expiration and stated, “This Fixed-Term

Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”.

54. I find that, although not required by the staff rules, the Organization provided the applicant with ample and adequate notice of the expiration of his contract. On 9 May 2006, the Director of the Office of Human Resources of UNDP sent an email to the applicant, stating that UNDP was not in a position to agree to any further loan agreement with OIOS beyond 30 September 2006 and that “[i]f the UN [Secretariat] is keen in extending your reimbursable loan, I strongly suggest for you to negotiate a new offer”. This communication to the applicant is unambiguous and makes it clear that his contract would not be extended. This was followed by a memorandum from UNDP to OIOS, dated 8 August 2006, copied to the applicant, stating that “UNDP can no longer accommodate a further extension”.

55. On 28 September 2006, OIOS confirmed to the applicant that his loan to OIOS would not get extended. The applicant asserts that this meant that he received a two-day notice of his separation. This is, of course, not the case. The email of 28 September 2006 was only one of many exchanges and was preceded by several emails stating in unambiguous and clear terms that the applicant’s contract would not be extended beyond 30 September 2006. Further, although it appears that, in September 2006, OIOS attempted to search for a solution to extend the applicant’s stay, it is apparent from the records provided by both parties that no offer had been extended to the applicant.

Application for costs

56. Under article 10.5 of its Statute, the Tribunal may award costs where it determines that a party “has manifestly abused the proceeding before it”. As the Tribunal held in *Crichlow*, article 10.5 “does not expressly prevent the Tribunal from making an award of costs but it generally limits such awards to cases where the Tribunal finds that in the course of the proceedings there has been an abuse of the

process by a party”. I find that neither party abused the proceedings in this case. Consequently, I see no grounds to order the award of cost.

Conclusion

57. The decision not to extend or renew the applicant’s appointment was proper and did not violate any rights of the applicant. The application is dismissed in its entirety.

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 15th day of January 2010

Entered in the Register on this 15th day of January 2010

(Signed)

Hafida Lahiouel, Registrar, New York