



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/034/
UNAT/1679
Judgment No.: UNDT/2010/201
Date: 19 November 2010
Original: English

Before: Judge Ebrahim-Carstens
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

GLASGOW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Clarence Clarke, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former General Service level staff member in the Office of Programme Planning, Budget and Accounts (“OPPBA”), appeals the decision not to renew her fixed-term appointment beyond 29 January 2007. The main issues for determination in this case are whether the application is receivable and, if so, whether the non-renewal of the Applicant’s contract was proper.

2. Four case management Orders were issued by the United Nations Dispute Tribunal in this case: Order No. 125 (NY/2010) (25 May 2010), Order No. 140 (NY/2010) (4 June 2010), Order No. 144 (NY/2010) (7 June 2010), and Order No. 296 (NY/2010) (9 November 2010). The application, the Respondent’s reply and subsequent submissions constitute the pleadings and the record in this case. With the consent of the parties, this case was decided on the papers before the Tribunal.

Facts

3. On 30 January 2006 the Applicant joined OPPBA as a G-3 level Budget Clerk on a one-year appointment.

4. The Applicant was first informed of the non-renewal of her appointment during her mid-point performance review meeting with her supervisors on 29 November 2006. At that meeting she was told that her contract would not be extended beyond the expiration date. The decision not to renew her appointment was formally communicated to the Applicant, in writing, on 6 December 2006. Shortly thereafter, on 8 January 2007, the Applicant received an appointment with the United Nations Joint Staff Pension Fund (“UNJSPF”).

5. The Applicant’s electronic performance appraisal system (“e-PAS”) report was initiated by her in April 2006. The mid-point review was finalised on 18–20 December 2006. The mid-point review comments stated:

[W]hile the staff member has met with satisfaction Goal 1 in respect of the required actions for the Officer-in-Charge of the Service, in respect of the tasks assigned by the Assistant of the Director, PPBD [Programme Planning and Budget Division], an additional Supervisor, the need to improve performance has been noted.

...

While satisfied with her performance of Goal 1 of the Work Plan, I was aware of performance shortcomings otherwise and reviewed the situation with the additional supervising officer ... and the Director, PPBD on 22 November 2006. The results of this discussion were communicated to the staff member in a meeting with me and [Special Assistant to the Director, PPBD] ... on 29 November 2006.

6. As the Applicant left OPPBA prior to the completion of the annual performance review cycle, OPPBA continued with the finalisation of her e-PAS report after her departure. On 4 April 2007 the Applicant's additional supervisor (Special Assistant to the Director, PPBD) added her final comments to the Applicant's e-PAS report, expressing her dissatisfaction with the Applicant's performance and stating that "[t]here had been problems with the accuracy of data entered by [the Applicant] in the databases, on which her attention had been called many times by the Office of the Director" and providing additional examples of errors and mistakes by the Applicant and noting that "it was not apparent that [the Applicant] was ready to admit her shortcomings in order to improve her performance".

7. The end-of-cycle appraisal was completed by the Applicant's First Reporting Officers on 9 April 2007. The First Reporting Officer noted that he was satisfied with how the Applicant carried out the tasks given by him, but in the light of the criticism of the Applicant's performance in relation to other tasks, he evaluated the Applicant's competencies as "developing" and gave her an overall ranking of "partially meet[ing] performance expectations".

8. The Second Reporting Officer signed off on the Applicant's e-PAS report on 23 May 2007, providing the following comment:

The First Reporting Officer's rating of [the Applicant's] performance of the above referenced goal as satisfactory does not reflect the experience of the staff in my immediate office, who receive [the Applicant's] outputs related to the administrative databases used for performance reporting to OIOS and other oversight bodies. Her attention has been called to errors due to lack of focus and attention to detail. As the Programme Manager and Second Reporting Officer, taking into account my responsibility to ensure the fair and consistent implementation of PAS by supervisory staff within the Division acting as first reporting officers, it is my conclusion that [the Applicant's] overall performance cannot be said to fully meet expectations.

Given the particular demands and requirements of the Division includ[ing] intensive intergovernmental servicing, the position may not have been the best fit for [the Applicant's] skills. NOTE: [The Applicant] has since found another position within the UN system and I wish her every success.

9. On 1 August 2007 the Applicant signed off on her final e-PAS report, which contained her supervisors' comments and rated her as partially meeting performance expectations. She provided no comments to her supervisors' evaluations.

10. The Applicant filed a request for administrative review on 25 June 2007 and a full statement of appeal to the Joint Appeals Board ("JAB") on 20 November 2007. On 10 December 2008, the JAB adopted its Report No. 2023 in relation to the Applicant's statement of appeal. By letter dated 19 January 2009, the Deputy Secretary-General transmitted a copy of the JAB Report to the Applicant and informed her, *inter alia*, that:

The JAB, after reviewing your submissions, stated that with regard to the non-renewal of your appointment, you were informed on 6 December 2006 that your contract would not be renewed but you did not file a request for administrative review until 25 June 2007. The JAB noted that you had to have been aware of the performance issues as they were noted in your performance appraisal on which you signed off on 20 December 2006. The JAB therefore rejected your argument as to there being exceptional circumstances and noted that it was your responsibility to file your request for administrative review in a timely manner.

...

The JAB unanimously concluded that the appeal was not receivable as it was time-barred and therefore unanimously recommended that no action be taken as to the present appeal.

The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case. The Secretary-General agrees with the conclusions of the JAB and has decided not to take any further action in this matter.

11. On 17 March 2009 the former UN Administrative Tribunal received the Applicant's appeal against the decision not to renew her appointment. The Respondent's reply was received on 18 September 2009. On 7 January 2010 the parties were advised that the case had been transferred to the New York Registry of the UN Dispute Tribunal.

12. On 25 May 2010 the Dispute Tribunal issued Order No. 125 (NY/2010), directing the parties to file a jointly-signed submission on factual and legal issues. The parties failed to come to an agreement on the joint submission and, by Order No. 144 (NY/2010), they were directed to file separate submissions. The Applicant's submission was filed on 8 June 2010, and the Respondent's was filed on 21 June 2010.

Applicant's submissions

13. The Applicant requests the Tribunal to find that her request for administrative review had been timeous and to find her appeal receivable. She further asserts that the decision not to renew her appointment was unlawful as she was not informed of the true reason for the non-renewal of her appointment. The Applicant alleges that her supervisors' comments in the end-of-cycle appraisal section of her e-PAS report in April and May 2007 demonstrated that the true reason for the non-renewal of her appointment was her alleged poor performance. The Applicant asserts that this reason was not given to her in December 2006, when she was informed of the decision not to renew her appointment, and that her mid-point review, completed on 20 December

2006, was reasonably favourable and did not indicate any performance issues capable of resulting in non-renewal of her contract.

Respondent's submissions

14. The Respondent submits that the application is not receivable as the Applicant failed to comply with the time limits stipulated in former staff rule 111.2(a). The Applicant was informed of the contested decision on 6 December 2006 and had until 6 February 2007 to request a review of the administrative decision. The review was requested only on 25 June 2007. No exceptional circumstances were presented by the Applicant to justify the delay.

15. The Applicant's allegation that she was not aware of the issues with her performance until 23 May 2007 is without merit, since, as the JAB correctly stated in its report, "[t]he [Applicant] had to have been aware of the performance issues as these were noted in [her] mid-year review in her PAS which was signed off on 20 December 2006". The mid-point review clearly stated that the Applicant's performance had "shortcomings" and required improvements.

16. The Applicant was not entitled to a renewal of her fixed-term appointment. The contested decision was based on legitimate grounds and was not tainted by extraneous factors.

17. The Applicant's claims concerning the evaluation of her performance and her e-PAS report ratings are not receivable as she did not avail herself of the rebuttal procedures under ST/AI/2002/3.

Consideration and findings

18. Based on the record before the Tribunal, the Applicant was informed on 6 December 2006, in writing, that her contract would not be renewed beyond its expiration date. The Applicant's request for administrative review should have been

filed within two months of the date of notification of the decision, or by 6 February 2007. However, she filed her request for administrative review on 25 June 2007, more than four months after the deadline.

19. The Applicant claims that she was not aware of what she alleges to be the true reasons for her non-renewal until 23 May 2007, when the final e-PAS report was provided to her for review, comments, and signature, and therefore her request for administrative review was filed on time. The Tribunal does not find this submission persuasive. It is clear from the e-PAS report, including the mid-point review, that the Applicant was made aware at the time she was working in OPPBA of the criticisms regarding her performance. Therefore, it would have been reasonable for the Applicant to conclude at the time that performance-related factors may have been considered by the Administration in deciding not to renew her contract. Nevertheless, the Applicant did not challenge the non-renewal of her contract at the time she was informed of the decision, or timeously thereafter.

20. The final e-PAS report not only contained a discussion of the Applicant's performance shortcomings, but also rated her overall performance as only partially meeting expectations. At the time of the mid-point and end-of-cycle reviews the Applicant did not express any disagreement with her supervisor's comments or her final ranking. Furthermore, she did not seek to rebut her final e-PAS report and ranking through the formal rebuttal mechanism available under ST/AI/2002/3. This performance evaluation therefore stands unchallenged and must be accepted by the Tribunal as final (see sec. 15.4 of ST/AI/2002/3, which states that "[t]he rating resulting from an appraisal that has not been rebutted, or from the rebuttal process, shall not be subject to further appeal"). There is also no evidence before the Tribunal that the performance evaluation procedures were not followed in any way.

21. As the Appeals Tribunal held in *Costa* 2010-UNAT-036, the Dispute Tribunal does not have the power to waive or suspend the time limits for requests for administrative review or management evaluation. The Statute of the Dispute Tribunal

(see art. 8.1), as well as the Staff Rules (see staff rule 11.2), draw a clear distinction between *requests* for administrative review and management evaluation, on the one hand, and the actual administrative review and management evaluations, on the other. Requests for review or evaluation and the actual reviews and evaluations have different sets of deadlines and it is unclear whether the limitations in art. 8.3 of the Statute were intended to apply to the deadlines for *requests* for review or evaluation. However, in terms of the Appeals Tribunal's judgment in *Costa* this application is plainly not receivable. I will add, nevertheless, that even if I were permitted to consider whether the deadlines should be waived, the Applicant has failed to provide any exceptional circumstances in this case justifying the delay in her filing of the request for administrative review.

22. Although I need not discuss the Applicant's general claim for relief as the application must be dismissed as not receivable, I find it appropriate to make the following observation. Even if this application were receivable and even if the Applicant succeeded on the merits, it is highly unlikely that she would have been awarded any compensation. Actual economic loss depends on the particular circumstances of each case, and I note that, with effect from 8 January 2007, even before the Applicant's contract expired, she had moved to a higher-level position in UNJSPF. Accordingly, her transfer to UNJSPF and subsequent earnings would have been taken into account as a mitigating factor, which would have made an award of any damages for economic loss unlikely. Further, the Applicant did not make any submissions with respect to emotional distress and, for the reasons stated above, there is no basis to conclude that performance evaluation procedures were not followed.

Conclusion

23. The Applicant failed to file a timeous request for administrative review. This application is therefore not receivable and is rejected in its entirety.

(Signed)

Judge Ebrahim-Carstens

Dated this 19th day of November 2010

Entered in the Register on this 19th day of November 2010

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry