



UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2010/054 (UNAT 1702)
Judgment No.:	UNDT/2012/055
Date:	19 April 2012
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

VAPORIDIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Bibi Eng, UNEP
Joerg Weich, UNON

Introduction

1. By application filed on 23 June 2009 before the former United Nations Administrative Tribunal, the applicant contests the decision of 19 December 2008 whereby the Secretary-General rejected her appeal against the decision not to renew her contract.

2. She requests the Tribunal to order the United Nations Environment Programme (“UNEP”) to reinstate her and to order the Respondent to compensate her for the injury sustained as a result of the decision she is contesting.

Facts

3. The Applicant entered the service of the UNEP Mediterranean Action Plan (“MAP”) Office in Athens on 22 May 2001 as an Administrative Assistant at the G-5 level on a two-year fixed-term appointment. After her contract was extended several times, the appointment was once again renewed from 1 September 2007 to 31 December 2007.

4. Following her recruitment, the Applicant worked for a programme financed by the Global Environment Facility (“GEF”), launched in 2001 and originally intended to conclude in December 2003 but that lasted for five years. The Applicant’s services were retained after operations of the GEF-funded programme concluded in order to ensure its proper administrative closure. At the same time, at the beginning of 2006, she was assigned to complete several tasks relating to a new project called Project Development Facility-Block B (“PDF-B”).

5. During the latter half of 2007, the Applicant took several sick leave periods.

6. At a meeting on 13 December 2007, the MAP Coordinator (“Coordinator”) informed the Applicant that her contract would not be renewed beyond 31 December 2007. On the same day, she received a memorandum from the Human Resources Management Service at the United Nations Office at

Nairobi (“UNON”) informing her about the formalities of her separation from service.

7. On 19 December 2007, the Applicant wrote to the Coordinator to express her views regarding the meeting of 13 December 2007. In his reply, the Coordinator confirmed that her contract would expire at the end of December 2007 and informed her that, based on instructions from UNEP headquarters, it was not possible to extend appointments. He also stated that the decision was not based on the Applicant’s performance.

8. In December 2007, the Applicant sent several emails to the Administration, including the Human Resources Management Services at UNON, to request clarification regarding the decision not to renew her contract. These emails went unanswered.

9. On 24 December 2007, the Applicant requested the Secretary-General to review the decision not to renew her appointment beyond 31 December 2007 and requested the Nairobi Joint Appeals Board (“JAB”) to suspend said decision. Her contract was extended for 11 days in order to allow her to submit her request for suspension of action to the Geneva JAB, as the Nairobi JAB was not operational at the time. The Geneva JAB recommended that the Secretary-General should reject the Applicant’s request and he accepted that recommendation.

10. On 10 March 2008, the Applicant filed an appeal with the Nairobi JAB.

11. On 19 December 2008, the Deputy Secretary-General sent a copy of the Nairobi JAB report to the Applicant and informed her that, in line with the Board’s recommendations, her appeal had been rejected.

12. On 19 March 2009, the Applicant requested the former UN Administrative Tribunal to extend the deadline for filing her application; an extension was granted through 31 May 2009. Following another request submitted on 29 May 2009, a new extension was granted until 30 June 2009. The Applicant submitted her application on 23 June 2009.

13. Pursuant to General Assembly resolution 63/253, the case, which could not be decided by the Administrative Tribunal before its abolition on 31 December 2009, was transferred to the United Nations Dispute Tribunal on 1 January 2010.

14. By letter of 22 June 2010, the Tribunal informed the parties that it intended to decide the case by summary judgment. The Applicant objected to such a procedure by means of a motion dated 7 July 2010.

15. By Order No. 153 (GVA/2011) of 23 September 2011, the Tribunal summoned the parties to a hearing on 8 November 2011.

16. By Order No. 158 (GVA/2011) of 28 September 2011, the Tribunal instructed the Respondent to provide a copy of the contract, including a description of the duties, of the consultant who, according to the Applicant, had taken on her job functions beginning in January 2008. The Respondent did so on 10 October 2011.

17. On 3 February 2012, on her own initiative, the Applicant submitted comments on the Respondent's reply to Order No. 158 (GVA 2011).

18. The hearing, which had been initially scheduled for 8 November 2011, was deferred by request of the Applicant and was finally held on 8 February 2012, with the Applicant and her counsel attending via telephone and the Respondent's counsel attending via videoconference.

19. By Orders No. 31 (GVA/2012), issued following the hearing on 8 February 2012, and No. 42 (GVA/2012) of 23 February 2012, the Respondent was requested to submit: (1) written statements of the Coordinator and another staff member who attended the meeting of 13 December 2007 on whether the issue of the Applicant having taken sick leave during the second half of 2007 was mentioned in relation to the non-renewal of her appointment at the meeting, (2) any documents showing that the Coordinator received instruction not to renew the Applicant's appointment or, at least, to reduce MAP expenses, and (3) any document permitting to verify whether or not the post formerly encumbered by

the Applicant was abolished as of 31 December 2007. The Applicant was invited to offer her own comments on the materials submitted by the Respondent.

20. The Respondent provided the information requested by means of motions submitted on 23 February 2012 and 9 March 2012. Following an extension of the deadline, which was granted through Order No. 57 (GVA/2012) of 20 March 2012, the Applicant submitted her observations on 16 April 2012.

Parties' submissions

21. The Applicant's contentions are:

a. The real reasons for the refusal to renew her contract were conveyed to her during the meeting on 13 December 2007: namely, the fact that she had been ill, that her contract had already been extended several times over six and a half years, that the Coordinator did not want to renew her contract and, lastly, that she was behind the schedule for the completion of one of the projects on which she was working;

b. At the meeting, the Coordinator did not mention the end of the project or the lack of funds for the post as reasons for the decision. After the Applicant asked him to confirm the real reasons for the contested decision, he responded that the Administration was not obliged to communicate them to her. In addition, in an email dated 19 December 2007, he stated that the decision was not based on the Applicant's performance;

c. There are inconsistencies between what she was told on 13 December 2007, the contents of the email of 19 December 2007 and the information provided by the Administration to the JAB following her request for a suspension of action;

d. Before the JAB, the Respondent claimed that the reason for the non-renewal was a lack of funding for the position. However, the Coordinator had never mentioned this reason to her. During the meeting of

13 December 2007, she had distinctly understood that, although the project would continue, her contract would not be renewed. Moreover, the Coordinator never mentioned in any of his communications the abolition of the post owing to a lack of funding;

e. Although it may not be evident from the documents submitted, she worked on PDF-B for two years (2006-2007) while also discharging other functions. The Project, for which she had been working, continued through mid-2008; the only reason her contract was not renewed was so that her work could be carried out by a consultant. Contrary to what is claimed by the Respondent, the consultant who was hired on 2 January 2008 was responsible for completing the tasks related to PDF-B that had been assigned to the Applicant; it was thus clear that the Project did not end on 31 December 2007. Tasks 2 and 3 assigned to the consultant had previously been the Applicant's responsibilities. Furthermore, following the termination of her services, there remained four to six months of full-time work left in order to conclude the project;

f. The real reason for the non-renewal of her contract was the fact that she had been sick and the Administration feared that she would take additional sick leave, even though sick leave is a staff entitlement. The Administration had thus intended to punish her for having taken sick leave. The fact that the Administration at UNEP headquarters ordered the Coordinator not to extend appointments was given as one of the reasons for non-renewal of her contract; however, there is no rule justifying such reasoning;

g. Her performance had always been assessed as exceptionally good. She carried out the projects assigned to her in an exemplary manner. While her supervisor claims that there were shortcomings in her performance, he himself did not respect the appraisal process, as he did not conduct a mid-point review or take the measures required to address the alleged shortcomings;

h. Given that she worked for the Organization for more than five consecutive years, the decision as to whether or not to renew her contract should have been considered carefully;

i. The Respondent is attempting to tarnish her reputation by claiming that most of her arguments amount to an attempt to pressure the Organization to renew her contract.

22. The Respondent's contentions are:

a. The application is not receivable since it was submitted to the former UN Administrative Tribunal after the prescribed time limit of 90 days as from the date of receipt of the Secretary-General's decision;

b. The decision not to renew the Applicant's contract was a valid exercise of the Administration's discretionary authority. The reason for the non-renewal decision was that the project with which she had been working had come to a close, not the fact that she had taken sick leave. The Applicant bears the burden of proving that the contested decision was based on illegal motives and she has not done so.

c. The documents submitted demonstrate that the Applicant had been hired to work for a project that had come to a close. She was retained to work after the operational end of the project for which she had been initially recruited, and to this end, her job functions and salary payment had fallen under the budget of another programme, which did not provide for an administrative assistant and only included a line for "temporary assistance". That budgetary allowance had been exhausted and, in fact, had been exceeded at the point when the Applicant's contract was not renewed.

Consideration

23. The case file shows that, in response to requests made by the Applicant, the former UN Administrative Tribunal granted her additional time, until 30 June

2009, to file her application, which she submitted on 23 June 2009. Thus, contrary to what the Respondent maintains, as concerns the receivability *ratione temporis*, the application should be considered receivable.

24. On the merits, the Applicant is contesting the decision not to renew her contract beyond 31 December 2007. Staff rule 104.12(b)(ii) applicable at the time of the contested decision provided that “[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”.

25. While the Administration is not obliged to give a staff member the reasons for the non-renewal of his or her contract, if the latter brings an appeal before the Tribunal concerning the merits of the non-renewal, claiming that the grounds for the decision were unlawful, the Administration must inform the Tribunal of those grounds and provide justification for the decision.

26. In this case, the Respondent claims that the reason for the non-renewal of the Applicant’s contract was that the project on which she was working had come to an end, which the Applicant contests, claiming, *inter alia*, that after she left, a consultant was recruited to discharge the tasks that had been assigned to her.

27. The case file reveals that the Applicant held an administrative assistant post under the authority of the GEF manager, while the consultant hired in January 2008 was given the responsibilities of an expert, such as responding to comments received by the GEF secretariat on the project under way, assisting and coordinating the work of co-executing agencies in preparing a component of the project funded by the European Union, and preparing sub-project documents. It results, then, that the consultant’s duties, as listed in the job description attached to her contract, are of a higher level than those of an administrative assistant. Furthermore, the Applicant has not established that the tasks given to the consultant were the same that had been previously assigned to her.

28. The Respondent claims that the Applicant’s appointment was not renewed because there was no funding left for the post she held. In response to a request

from the Tribunal, on 23 February 2012 and 9 March 2012, the Respondent submitted motions which included documents that accounted for the funding for the post held by the Applicant and the lack of funds for the extension of her appointment beyond 31 December 2007. The Tribunal therefore considers that the Respondent has provided proof of its claims.

29. Lastly, while the Applicant claims that the real reason for the non-renewal of her appointment was the fact that she had to take extended sick leave in 2007, she has not provided any document or testimony that supports that allegation.

30. It follows from the above, that the Applicant has not discharged the onus of proving that the refusal to renew her contract was based on an unlawful motive and her application must therefore be rejected.

Conclusion

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

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 19th day of April 2012

Entered in the Register on this 19th day of April 2012

(Signed)

René M. Vargas M., Registry, Geneva