



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/006

Judgment No.: UNDT/2013/150

Date: 29 November 2013

Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

SAID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Miles Hastie, OSLA

Counsel for respondent:
Jorge A. Ballesteros, UNICEF

Introduction

1. The Applicant is a former staff member of the United Nations Children's Fund (UNICEF). On 14 February 2011, he submitted an Application to the Dispute Tribunal contesting the decisions by UNICEF not to renew his fixed term appointment and not to regularize the National Officer post he was serving on from level B (NOB) to level C (NOC).

Facts

2. In March 2009 a vacancy announcement for the post of a Water and Environmental Sanitation ("WASH") specialist at the NOC level was advertised. The Applicant applied for that position and following an interview he was granted a fixed term appointment at the NOB level as a WASH specialist in Nouakchott, Mauritania for a three month period. This was done on account of the purported lack of experience of the Applicant following a discussion on 26 February 2009.

3. The Applicant agreed to take up the post at the lower NOB level as he was unemployed and not in a position to negotiate. He signed the job offer on 4 March 2009. His employment was thereafter renewed from 1 June to 31 December 2009, from 1 January to 31 March 2010 and ultimately from 1 April 2010 to 30 June 2010. On 13 June 2010 he was informed that his appointment would not be renewed past its expiry date of 30 June 2010.

4. While encumbering the post at the NOB level the Applicant sought to have his position regularized at the NOC level.

5. In February 2010, UNICEF re-advertised the WASH specialist post with the same IMIS post number, again at the NOC level. The Applicant was told by Mr. Umberto Cancellieri, the Director of Operations of UNICEF in Mauritania, that the NOC post was being re-profiled for someone with an engineering rather than a social science background. However, the vacancy announcement reflected that the NOC

post was being advertised for someone with either an engineering or social science background; it was otherwise identical to the original NOC post that the Applicant was encumbering, even bearing the same IMIS number.

6. During a meeting that took place in March 2010, the Applicant was told that a new NOB post had opened and he was invited to apply for it. In an email dated 22 March 2010¹ Mr. Christian Skoog, the UNICEF representative in Mauritania, informed the Applicant that since he was interested in this new post he was prepared to recommend that the Selection Advisory Panel consider the Applicant's candidature without his being formally tested for it. It was made clear in that email that the recommendation would have to be approved by the Central Review Board (CRB). Pending that process the Applicant's contract was extended to 30 June 2010. That email itself was preceded by other emails² in which there were discussions about the performance of the Applicant and the rules governing fixed term contracts.

7. On 13 June 2010, the Applicant was informed that a candidate for the NOC post had been selected for the new NOB post. His candidacy for the 2010 NOC post was also unsuccessful. On 30 June 2010, he was separated from service.

8. The Applicant received one Performance Evaluation Report (PER) during his tenure at UNICEF, dated 24 January 2010. It evaluated his performance for the 10-month period from 1 March 2009 to 31 December 2009. (Annex 10).

9. The PER was largely positive. The Applicant was identified as having technically adapted well in his first year, having tenacity to obtain results in a difficult environment, and cooperating well with the team, office and partners, being engaged, responsible, honourable, and hard-working. On three of the five evaluation criteria, the Applicant was considered to have "fully met expectations". On the other two criteria, the Applicant was evaluated as having "met most expectations with

¹ Annex 7 to Application.

² Emails dated 15 March 2010; 11 March 2010; 9 March 2010.

some room for improvement”. The identified areas for improvement were to be developed in the Applicant’s “second year at UNICEF”.

10. The Applicant expressed partial disagreement with the ratings not found to meet expectations. However, he expressed his intention to enroll in training to improve his performance, in the same domain in which his supervisor was trained months before.

11. In an exchange of correspondence³ between the Applicant and Ms. Susana Sandoz, his first reporting officer (FRO), in August 2010 the Applicant asked Ms. Sandoz whether Mr. Canciallieri had told her to give him an overall 2 rating in his PER. Ms. Sandoz replied that what Mr. Canciallieri told her was the following: “If it was me, I would have given him all 2s”. Ms. Sandoz added that Mr. Canciallieri did not tell her to give the Applicant an overall 2 rating but that he was just expressing an opinion and was not issuing an order.

12. According to the Applicant, his relationship with Mr. Canciallieri was not easy from the beginning and appeared to influence his performance appraisals and his non-renewal. As an illustration of that the Applicant avers that when his laptop was rendered inoperable, he copied his supervisors on his request for a replacement. Mr. Canciallieri accused the Applicant of having “mistreated” his equipment⁴.

13. The Applicant had no explanation for this conduct and he avers that this could have stemmed from a possible personal animus from Mr. Canciallieri.

14. The Respondent did not seek to challenge the facts of the case as presented by the Applicant except to aver that he was challenging the inferences drawn by the Applicant from these facts.

15. The Tribunal held a hearing in this matter on 17 January 2013 at which the Applicant gave evidence.

³ Annex 11 to the Application

⁴ Annex 12 to the Application

Issues

16. The issues that have to be determined are whether there was a legitimate expectation for the Applicant's contract to be renewed and whether the appropriate procedure was complied with in relation to the evaluation of his performance.

Legitimate expectation

Applicant's submissions

17. The Applicant submitted that he had a legitimate expectation of renewal for the following reasons:

- a) His qualifications appeared to match those listed for the post;
- b) He was selected as the best candidate after a competitive process;
- c) He was told upon selection that his post could be regularized at the NOC-level;
- d) He repeatedly vocalized his desire to have his post regularized;
- e) He was performing NOC responsibilities under an NOC post for an NOB salary;
- f) His contract was renewed/extended 4 times;
- g) His performance evaluation was largely positive;
- h) To the extent that this evaluation suggested room for improvement, it indicated that he could improve in his second year of employment; and
- i) The Administration recommended that he apply for the new NOB post, and offered to waive testing in lieu of his request to have his post regularized.

Respondent's submissions

18. The Respondent justified the non-renewal of the contract of the Applicant on the ground that a fixed term contract does not carry with it an expectation of renewal and that the contract expired on the date set out in the terms of the acceptance document by the Applicant. That is unambiguously established in the rules approved

by the General Assembly and it is clearly reflected in the contracts signed by staff members, including the Applicant.

19. The Respondent further argued that there is clear jurisprudence on what is to be considered a legitimate expectation. None of those reasons claimed by the Applicant is included. At no point in time did the Respondent convey to the Applicant any message suggesting that his contract would be renewed. On the contrary, on several occasions the supervisors met with the Applicant and discussed the concerns they had, as well as the way forward.

Considerations

20. Is the Applicant's claim that he had legitimate expectation of a contract renewal justifiable?

21. Staff rule 9.4 on expiration of appointments stipulates that, "[a] temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

22. Thus, a staff member holding a temporary or fixed term appointment has no expectancy of renewal of his or her appointment.

23. Nevertheless, the United Nations Appeals Tribunal (UNAT) held in *Ahmed* 2011-UNAT-153 that if the Administration gives a staff member a legitimate expectancy of renewal of his or her fixed-term appointment, then that may be a good reason for the Tribunal to interfere with the non-renewal decision on the grounds of unfairness and unjust dealing with the staff member. Similarly where a decision of non-renewal does not follow the fair procedure or is based on improper grounds, the Tribunal may intervene. UNAT further held that unless the Administration has made an "express promise ... that gives a staff member an expectancy that his or her appointment will be extended", or unless it abused its discretion, or was motivated by

discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful.⁵

24. In *Abdalla* 2011-UNAT-138, UNAT expounded that in order for the applicant's claim of legitimate expectation or renewal of appointment to be sustained, it must not be based on mere verbal assertions, but on a firm commitment to renewal revealed by the circumstances of the case.⁶

25. UNAT is correct in holding that a legitimate expectation can be created by an express promise on the part of the Organization. Nevertheless, a promise can also be implied from the particular circumstances of a case or from what is held out to an individual. Limiting the renewal of a fixed-term contract to an express promise could impede the proper working of the Organization and result in unjust decisions for a staff member. In this connection, the Tribunal refers to the following extract from the case of *Perez De Castillo*⁷:

Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for -- and in practice invariably receives -- a decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an organisation that caused the Tribunal to adopt the principle that a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly.

⁵ See also Bowen UNDT/2010/197.

⁶ See also Balestrieri UNDT/2009/019.

⁷ Administrative Tribunal of the International Labour Organization Judgment No. 675 (1985).

26. While it is true that on the face of it a fixed term contract will expire on the date mentioned therein and the renewal is subject to the discretion of the Administration, the discretion cannot be exercised in an absolute manner and as pointed out by the Respondent in his pleadings, is subject to judicial scrutiny.

27. In the present matter, none of the reasons presented by the Applicant can be characterized as a firm commitment from the Respondent that his appointment would be renewed. The Tribunal finds that the Applicant merely relied on his own personal views of what the situation should be without providing any evidence of conduct on the part of the Respondent that could have led him to believe otherwise. Further, even if the evidence is examined from the light most favourable to the Applicant, the Tribunal cannot conclude that there was an implied promise. Consequently, the Tribunal finds that the Applicant's claim that he had a legitimate expectation that his contract would be renewed was not justifiable.

Performance of the Applicant

28. In *Obdeijn* 2012-UNAT-201, the United Nations Appeals Tribunal (UNAT) held:

It must be highlighted that, in the absence of an obligation on the part of the Administration to state the reasons which led to its decision, especially where the Administration exercises a discretionary power which creates adverse effects on staff members, the Tribunals' ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals would be compromised.

Consequently, the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

29. In *Sanwidi* 2010-UNAT-084, UNAT held that:

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.

30. In the present case the Respondent seems to be playing on two fiddles. First he submits that there is no legitimate expectation of renewal in the case of a fixed term contract. This is correct but is subject to the all-important rule that is well established in the jurisprudence of the new justice system, that some reason must be given where the staff member requests it or, *a fortiori*, the Tribunal orders it, to enable the Tribunal to exercise its power of review of an administrative action. The argument that no reasons should be given on the expiry of a fixed term contract is not an absolute rule. The matter depends on the circumstances of each case. If the reason is patent to the Applicant then there would be no need to give any. But where the situation is not clear it is incumbent on the Respondent to give reasons⁸. Here the evidence indicates that the Applicant was not in a position to know the reasons for the non-renewal except that the contract would die a natural death. This led the Respondent to fall back on that much used cliché that a fixed term contract expires on the date stipulated in the contract without more.

31. Secondly, the Respondent submits that the reason for the non-renewal was the non-performance of the Applicant. Where reasons are given they must be valid ones that can be supported by evidence. Was the reason given to the Applicant that he was not performing his duties satisfactorily a valid one?

32. The International Labour Organization Administrative Tribunal (ILOAT) stated that in dealing with such a situation it must determine:

⁸ See *Pirnea* UNDT-2011-059.

Whether the decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organization's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority⁹.

33. The Applicant was rated on the following competencies: Technical Knowledge; Planning; Setting Standards; and Monitoring Work (Quality of Work); Drive for Results (Quantity of Work); Team Work; and Communication. The rating scale ranges from 1 to 5. Rating 1 is given to a staff member who met few expectations; rating 2 is given where the staff member has met most expectations but there is room for improvement; rating 3 is the case of someone who has fully met expectations; rating 4 is awarded where the staff member has frequently exceeded expectations and rating 5 is given when a staff member continually and substantially exceeds expectations.

34. The Applicant was given a rating 3 for "Technical Knowledge" with the following comments:

Pour une première année de travail, l'sm (sic) a bien pu avoir et utiliser les connaissances techniques nécessaires pour l'exécution du programme WASH, même le côté suivi des travaux d'ingénierie. Il a rapidement compris le changement de paradigme pour l'assainissement participatif sans subvention.¹⁰

35. He was given a rating of 2 for "Planning, Setting Standards and Monitoring Work (Quality of Work)" with the following comments:

Le s/m doit contribuer de plus au développement d'un Plan d'action pour le volet d'assainissement et C4D, avec des objectives (sic) et un système de monitoring, ainsi qu'un plan d'action trimestriel pour

⁹ ILOAT Judgment No. 191, Ballo (1972), at pp.6-7.

¹⁰ "During the first year in the job the staff member showed that he has the necessary technical knowledge and managed to implement the WASH programme, including the engineering aspect. He quickly grasped the paradigm shift for participatory sanitation even in the absence of any subsidy."

arriver aux résultats partiels. Le S/M doit renforcer ces capacités en la préparation des rapports aux donateurs pour les rendre plus stratégiques, ainsi que le développement des indicateurs et un programme de suivi/évaluation avec un mécanisme de retro-alimentation. Il doit passer d'une vision d'implémentation sur le terrain à une vision plus stratégique des alliances et plaider pour l'exécution des interventions par autres.¹¹

36. The Applicant obtained a rating of 3 for “Drive for Results (Quantity of Work)” with the following comments:

L'engagement du s/m est constaté ainsi que la gestion du programme en fonction aux résultats. Il a la ténacité nécessaire pour avoir des résultats même dans un environnement difficile et il a produit une bonne quantité de travail dans la mise en oeuvre du Plan d'Action.¹²

37. On “Team Work” the Applicant scored a rating of 3 with the following comments: “Le s/m travaille bien en coopération avec les autres membres de l'équipe survie, du bureau et les autres partenaires”.¹³

38. On “Communication” he was given a rating of 2 with the following comments:

La rédaction des rapports en français doit s'améliorer ainsi que les contributions orales au cours de réunions internes et avec les partenaires. Sa capacité écrite en anglais est meilleure que la capacité de s'exprimer, oralement, en français c'est le contraire. Le s/m parle coramment deux langues du SNU, français et arabe, et adéquatement l'anglais.¹⁴

¹¹ “S/M should contribute more to the development of an action plan for the sanitation component with objectives and a monitoring system and a quarterly action plan to achieve partial results. The S/M must strengthen these capacities in the preparation of reports for donors in order to strategise better as well as an elaboration of indicators and a monitoring / evaluation mechanism with a retro-feeding. He must move from an implementation strategy in the field to a more strategic vision of alliances and advocacy for the implementation of interventions by others.”

¹² “The commitment of the s/m as well as the management of the program can be seen in the results produced. He has the required drive to obtain results even in a difficult environment. He has put in a lot of effort towards the implementation of the Action Plan”.

¹³ “The s/m works well in conjunction with the members of the survival group, the office and other partners”.

¹⁴ “He must improve his written French as reports are written in that language. He must also improve his oral communications during internal meetings with partners. His written English ability is better

39. Was the Applicant's performance so deficient as to justify the non-renewal of his contract? A close scrutiny of the ratings and comments accompanying them do not lead to the irresistible conclusion that the Applicant was a non-performer. On two of the competencies, he was given a rating of 2 on his performance which is that he "met most expectations" but that there was "room for improvement". Although he was not up to the required standards in some domains his situation was not that of a hopeless employee. The identified areas for improvement were to be developed in the Applicant's "second year at UNICEF". When a staff member is given such a grading with a caveat that he/she should improve there is an implicit undertaking by the Administration that the staff member will be allowed to continue in his/her employment and that he/she should take steps with the assistance of management as provided by the rules to improve. Improvement rests primarily with the staff member but the rules also require that the appropriate supervisor offers support or guidance to that staff member.

40. In any employment environment employees have strengths and weaknesses. The outstanding employee may exist but it is not a common occurrence. And it is precisely because employees may not perform according to required standards that rules exist to enable them to improve within a time frame under the guidance of their supervisors. The rules for the purposes of the present case are embodied in Chapter 7 of the UNICEF Human Resources Manual (the Manual). There is no indication and no iota of evidence that these rules were complied with in the case of the Applicant. Instead, he was written off and his post was advertised within a month of his PER being finalized.

41. In the case of *Nogueira* UNDT/2009/088 this Tribunal held:

The purposes of performance appraisal, as laid down in the relevant Administrative Instruction of the Organisation, are meant to pinpoint

than his ability to speak it whereas in French it is the opposite. The s/m is fluent in two languages of the UN namely French and Arabic and his spoken English is satisfactory".

the strengths and weaknesses of the staff member and to seek remedial action where that is required. This was not done. There is no evidence that the Applicant was informed of his shortcomings. All that the Respondent attempted to show was that the Applicant had failed to prepare a work plan or draw up his TOR. This matter has already been dealt with above.

42. The Tribunal also refers to a case decided by the ILOAT where it was held:¹⁵

A staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed. These are fundamental aspects of the duty of an international Organisation to act in good faith towards its staff members and to respect their dignity.

43. The Manual sets out the guiding principles on performance and evaluation of a staff member. One of the main objectives of the UNICEF PER is “to enable supervisors and their staff to take measures to improve performance”.¹⁶ The Manual also emphasizes that “in any job it is essential for a staff member to receive from the supervisor some feedback on whether performance has been successful so that adjustments can be made.”¹⁷ Further, the Manual stipulates that performance-related discussions between the staff member and the supervisor should be “part of a routing of regular, on-going, open dialogue between the two”.¹⁸ Making exception for general statements that the Applicant was told of his shortcomings, no constructive measure or action was taken by his supervisors to guide and enable him to improve in the areas where there was room for improvement. Even the second supervisor remained content with approving the ratings and comments of the first reporting officer, Ms. Sandoz, by writing: “Je suivi (sic) AOS (sic) dès son recrutement et connais suffisamment son travail. Le superviseur reconnaît (sic) qu’il reste encore beaucoup

¹⁵ ILOAT Judgment No. 2414 (2005).

¹⁶ Chapter 7 UNICEF Manual, Para. 7.1.4.(g).

¹⁷ Chapter 7 UNICEF Manual, Para. 7.2.15.

¹⁸ Chapter 7 UNICEF Manual, Para 7.3.14.

d'efforts nécessaires pour qu'il soit performant. Je suis donc d'accord avec ces commentaires".¹⁹

44. In *Nogueira*²⁰ this Tribunal observed:

From a reading of the relevant provisions relating to the PAS, it cannot be disputed that this mechanism exists in the interest of staff members, management and of the Organisation. For staff members, PAS procedures ensure that the members of the staff are rated fairly, guided in case of shortcomings and have an opportunity of challenging a rating that they do not agree with. For Management, PAS procedures enable it to enhance the work of its respective departments or sections by placing on them the onus of devising a work plan and making sure that the highest standard of efficiency is achieved through guidance and dialogue. For the Organisation, PAS procedures ensure that the aim and purpose of the Organisation as set out in Article 101(3) of the Charter is complied with.

45. The same reasoning should and is applied *mutatis mutandis* to the rules contained in the Manual on performance. Neither the first reporting officer and still less the second one made any effort to assist the Applicant to overcome his shortcomings the more so as he had been given a rating of 3 for three competencies out of five.

46. In light of the foregoing, the Tribunal finds that the Respondent failed to proffer a valid reason for the non-renewal of the Applicant's contract.

Judgment

47. The Tribunal concludes that all elementary rules of fairness in regard to performance and improvement were simply ignored by the Respondent leaving the

¹⁹ "I have followed AOS (sic) since he was recruited and I am quite familiar with his duties. The supervisor concludes there is still a lot of effort to that needs to be put in so that he can perform better. So I agree with those comments".

²⁰ UNDT/2009/088.

overall impression that the main aim of management was to hurriedly get rid of the Applicant.

48. In the light of the findings above the Tribunal orders the Respondent to pay to the Applicant the equivalent of three months net base salary, at the level he was entitled to before his appointment was not renewed.

49. Pursuant to article 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment

(Signed)

Judge Vinod Boolell

Dated this 29th day of November 2013

Entered in the Register on this 29th day of November 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi