



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

RUSSO-GOT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jameel Baasit, UNOPS
Kong Leong Toh, UNOPS

Introduction

1. On 5 February 2019, the Applicant, a former Project Manager at the United Nations Office of Project Services (“UNOPS”) on a fixed-term appointment, filed this application in which he contests the abolition of his post and the non-renewal of his fixed-term appointment.

2. On 8 March 2019, the Respondent duly filed his reply, submitting that the application is not receivable and, in any event, without merit.

3. On 13 May 2020, the Tribunal issued Judgment No. UNDT/2020/072 in which it found that the Applicant’s claim regarding the abolition of his post is not receivable *ratione temporis*, while his claim concerning the non-renewal of his post is receivable. Reference is made to Judgment No. UNDT/2020/072 for an account of the procedural history leading up to this and the Tribunal’s findings.

4. In Judgment No. UNDT/2020/072, the Tribunal further ordered (a) by 27 May 2020, the Applicant to file his closing statement on the merits regarding the administrative decision not to renew his fixed-term appointment, (b) by 3 June 2020, the Respondent to file his closing statement responding to the Applicant’s closing statement, and (c) by 8 June 2020, the Applicant to file a statement of any final observations responding to the Respondent’s closing statement.

5. The Tribunal finally instructed the parties that, unless otherwise ordered, on receipt of the last-mentioned statement or at the expiration of the provided time limit, the Tribunal would adjudicate on the matter and deliver Judgment based on the papers filed on record.

6. The parties duly filed the submissions as per Judgment No. UNDT/2020/072.

7. For the reasons set out below, the application is rejected.

Facts

8. In July 2016, the Applicant was employed as a Project Manager with UNOPS on a fixed-term appointment. According to the case file, his latest fixed-term appointment was to expire on 31 January 2019.

9. At a meeting on 25 October 2018, which was attended by the Applicant, a UNOPS Senior Portfolio Manager (the Applicant's "primary supervisor") and a UNOPS Chief of the Enterprise Project Management Office, the Applicant admits in the application that he was informed that "based on budget restriction[s], his post [would] be abolished", while the parties disagree whether he was also told that his fixed-term appointment would not be renewed (see Judgment No. UNDT/2020/072 for the Tribunal's factual findings regarding this meeting).

10. In a letter dated 22 January 2019, Mr. AE, a Human Resources Specialist working for UNOPS, informed the Applicant of the contested decision not to renew his fixed-term appointment as follows:

I refer to the 25 October 2018 meeting attended by you and [name redacted, Ms. YS], Senior Portfolio Manager, as well as [name redacted, Ms. JF], Chief Enterprise Project Management Office, at which it was noted that the Project Manager position that you are encumbering will cease to exist on 31 January 2019, and that we hoped that you would secure another post before then.

We regretfully note that the efforts to secure a post for you have not been successful.

In view of the foregoing, I must with deep regret now give you formal notice that your contract will not be renewed when it expires [close of business] 31 January 2019 and you will be separated from UNOPS effective that date.

Should you secure a new post on or before 31 January 2019, you will of course be offered an extension of your contract.

Consideration

Scope of the case

11. In accordance with Judgment No. UNDT/2020/072, the sole substantive issues at stake in the present Judgment are:

- a. Was it appropriate not to renew the Applicant’s fixed-term appointment in the given circumstances?
- b. If not, what remedies are the Applicant entitled to?

Was it appropriate not to renew the Applicant’s fixed-term appointment?

12. In the closing statement, the Applicant points to a number of alleged irregularities, which he claims render the non-renewal decision unlawful. His claims are reviewed as follows:

Was the reason provided for the non-renewal decision legitimate and correct?

13. The Applicant submits that Mr. MP (name redacted) “was laterally moved to the Applicant’s post”, which “demonstrates the availability of funding and the necessity of the Applicant’s post” and that the Applicant’s “project is still ongoing; [Mr. MP’s fixed-term appointment] has [been] renewed two times ... exceeding 5 years in total”. The Applicant further contends that his appointment was “renewable subject to satisfactory performance and funding availability”. Finally, the Applicant states that whereas the Respondent in his reply submitted that the non-renewal of the Applicant’s fixed-term appointment was based on “a document from [the] General Assembly”, the Respondent in his closing statement has “dropped” this submission, which demonstrates that “the decision was arbitrary and illegal”.

14. The Respondent submits that, with reference to *Nouinou* 2019-UNAT-902, the lack of funding is a valid reason for not renewing a fixed-term appointment and that “UNOPS records show that the Applicant’s post was only budgeted ... [from] 1 August 2018 [to] 31 January 2019”, which is demonstrated by “a cash flow report”. Also, the Respondent contends that the Applicant has “not provided any actual evidence that funding is available” and that “the Applicant has not even alleged that a UNOPS person told him that funding was available”.

15. The Tribunal notes that a fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice on the expiration date pursuant to staff regulation 4.5(c) and staff rules 4.13(c) and 9.4. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the relevant staff member’s request, and this reason must be lawful and based on correct facts (see, for instance, the Appeals Tribunal’s judgments in *Islam* 2011-UNAT-115 (paras. 29-32), *Pirnea* 2013-UNAT-311 (para. 34), *Obdeijn* 2012-UNAT-201 (paras. 33-39), *Matadi et al.* 2015-UNAT-592 (para. 16) and *Jafari* 2019-UNAT-927 (para. 35)).

16. In this regard, the Appeals Tribunal has consistently held that “[i]t is well settled jurisprudence that an international organization necessarily has the power to restructure some or all of its departments or units”, but that “the Administration has the duty to act fairly, justly, and transparently in dealing with staff members” (see, for instance, *Abdeljalil* 2019-UNAT-960, para. 19). In line herewith, the Appeals Tribunal has held that the Administration has “broad discretion to reorganize its operations and departments to meet changing needs and economic realities” (see *Timothy* 2018-UNAT-847, para. 25).

17. On the other hand, it is also trite law that the Administration’s discretion is not unfettered. When judging the validity of the exercise of discretionary authority, “the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate”, and the Tribunal can consider whether “relevant matters have been

ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”. It is not the role of the Dispute Tribunal to consider “the correctness of the choice made by the Secretary-General amongst the various courses of action open to him”, or “substitute its own decision for that of the Secretary-General”. See the Appeals Tribunal’s seminal judgment in *Sanwidi* 2010-UNAT-084, para. 40.

18. The Tribunal observes that the Respondent’s submissions imply that the reason for the non-renewal of the Applicant’s post is a question of whether funding existed for the post. This is surprising to the Tribunal as the non-renewal letter of 22 January 2019 explicitly states that the Applicant’s post will “cease to exist on 31 January 2019”, which rather suggests that a decision had already been made to abolish the Applicant’s post, no reference being made to any funding issues.

19. Albeit interlinked, the decision to abolish the Applicants post is, in principle, a distinctively separate decision from the decision not to renew his fixed-term appointment—the decisions are governed by different legal frameworks and supported by different factual circumstances. In this context, the question of funding for the post is specifically relevant to the question of whether the abolition decision was appropriate. As ruled in Judgment No. UNDT/2020/072, this decision is, however, not before the Tribunal in the present case, because it is not receivable *ratione temporis* as, in essence, the Applicant admitted in his application that he was notified about it at the 25 October 2018 meeting, but only filed his management evaluation request on 23 January 2019.

20. Also, the Appeals Tribunal has previously held that a review of one administrative decision cannot be reopened in the adjudication of another decision (see, for instance, *Santos* 2014-UNAT-415, paras. 26-29). Consequently, the Tribunal cannot now examine whether the abolition decision was appropriate. As abolition of a post is a valid reason for a non-renewal decision (as per *Abdeljalil*, cited above), the

question is, rather, whether as a matter of fact, it was correct that the Applicant's post was actually abolished or if it continued to exist after the non-renewal decision (in line herewith, see *Islam*).

21. The Applicant implies that the post was, in reality, not abolished since Mr. MP was reassigned to it, although providing no evidence to corroborate this. The Respondent makes no direct submissions on this point, but instead refers to a cash flow report. When perusing this report, which essentially outlines a budget, it explicitly follows that together with a number of other posts, the Applicant's post was only budgeted for the first and the second quarters of 2018, but not the third and the fourth quarters of 2018.

22. While the documentation is sparse, the Tribunal is convinced by the Respondent's submission and therefore finds that the Applicant's post was indeed abolished. The non-renewal of the Applicant's fixed-term appointment was therefore established on proven facts.

23. The Tribunal further notes that since a fixed-term appointment carries no expectancy of renewal and expires automatically at the end of its term, it makes no difference that it was renewable and had already been renewed twice, as otherwise argued by the Applicant (see, in line herewith, *Abdeljalil* 2019-UNAT-960, para. 21).

24. Accordingly, the reason that the Administration provided for the non-renewal was lawful.

Was the Applicant promised a renewal?

25. The Applicant appears to contend that "a proper and concrete offer of renewal" was made, while in response, the Respondent submits that this was not the case.

26. The Tribunal notes that the Appeals Tribunal has held that "[i]n order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained,

it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case”. A promise to renew a fixed-term appointment must therefore “at least be in writing” and contain “the essential elements of a proper and concrete offer of renewal, such as the duration of the extension”. See *Kellie* 2018-UNAT-875, paras. 41, 44 and 45.

27. The Tribunal notes that the Applicant has adduced insufficient evidence in support of his claim according to *Kellie* which, therefore, necessarily fails.

Was the notification of the non-renewal decision timely?

28. The Applicant submits that the Respondent “has not proved that the Applicant was appropriately informed about the non-renewal of his fixed-term appointment at the 25 October 2018 meeting”, because “the Administration failed to meet [its] obligations from the contract [to provide] written notification from the UNOPS Director with a minimum of 30 days. This was also in violation with an “agreement” between the Applicant and Ms. YS by which the Applicant was “to receive a notification letter with two months in advance [to allow him] to secure a position in or outside the United Nations system”.

29. The Respondent, again, fails to make any submissions in response.

30. The Tribunal notes that, as also established in Judgment No. UNDT/2020/072, the Applicant was not informed about the non-renewal of his fixed-term appointment at the 25 October 2018 meeting. This notification was only provided to him in the non-renewal letter of 22 January 2019 for which reason the appeal against this decision was also timely.

31. In this letter, the Applicant was then informed that his fixed-term appointment would expire on 31 January 2019, meaning only nine days later. While this notification period was indeed very short, the Applicant has failed to substantiate that an agreement existed according to which he would be entitled to a longer notification period. Rather,

it is clear that a fixed-term appointment expires automatically at the end of its term and from the other circumstances of the case follows that he should have been fully aware of this possibility.

32. Consequently, the Tribunal finds that the Applicant was properly notified of the non-renewal of his fixed-term position.

Was the non-renewal decision taken by a person with proper authority?

33. The Applicant submits that Mr. AE, a Human Resources Specialist working for UNOPS, took the decision to not renew his fixed-term appointment and that he did not possess appropriate authority to do so. While the relevant legal framework does not specify who has this authority, Applicant submits that “in accordance with the international jurisprudence and the United Nations Convention”, such authority rests with “the UNOPS Executive Director”.

34. Despite the Tribunal’s explicit directions in Judgment No. UNDT/2020/072 according to which the Respondent’s closing statement was to respond to the Applicant’s closing statement, the Respondent has made no submissions on this point.

35. The Tribunal notes that even if the legal framework does not specify who is authorized to make a decision of not renewing the Applicant’s appointment, this does not mean by default that all non-renewal decisions have to be taken by the UNOPS Executive Director. A written administrative decision of such importance as a non-renewal of a fixed-term appointment should, however, state its author.

36. When reading the non-renewal letter of 22 January 2019, it is not clear who actually took the non-renewal decision as it simply refers to “we” without establishing who “we” are. On the other hand, the non-renewal was formally communicated in an official letter by an appropriate official (a Human Resources Specialist) and its authenticity has not been questioned by the Applicant.

37. In this regard, the Tribunal further notes that for an irregularity to render a decision illegal, it must be more than immaterial and somehow have had an impact on the decision (in line herewith, see, for instance, *Mansour* 2018-UNAT-881, *Sall* 2018-UNAT-889 and *El Sadek* 2019-UNAT-900).

38. Accordingly, the Tribunal finds that while the letter should have stated the name of the decisionmaker, the failure to do so does not by itself make the decision unlawful given the other circumstances of the case, including that the provided reason was legitimate and lawfully established and that the non-renewal decision was otherwise appropriately communicated to the Applicant.

Was the non-renewal decision tainted by ulterior motives?

39. The Applicant submits that it is “incontestable that the Management Evaluation process was vicious by a member of the Management Evaluation team”, who “falsified the meaning of the 25 October 2018 meeting” in violation of art. 101.3 of the United Nations Charter.

40. The Applicant further contends that the Administration’s decision not to renew his fixed-term appointment “was based on bias or an improper motive against him and his human [] rights were violated”. The non-renewal decision “was made notwithstanding the fact that he had an overall rating of ‘fully met expectations’ in his latest performance evaluation”. He had also “saved over [USD2,800,000] for the Office of Information and Communications Technology budget, further suggests that the underlying reason for not renewing his appointment was [name redacted, Mr. EI’s] bias against the Applicant”, who “personally disliked the Applicant” after he had proposed certain cost saving measures regarding a specific telephone system.

41. The Respondent, despite the Tribunal’s orders in Judgment No. UNDT/2020/072, makes no submission in response thereto.

42. The Tribunal notes that according to the consistent jurisprudence of the Appeals Tribunal, it is for a party who alleges that ulterior motives tainted a decision to substantiate this claim by way of evidence (see, for instance, *Parker* 2010-UNAT-012 and *Ross* 2019-UNAT-944). When doing so, “[t]he mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence” (see *He* 2016-UNAT-686, para. 39).

43. The Tribunal notes that the Applicant has, however, presented no evidence in support of his claim of bias, not even any circumstantial evidence. His claim therefore necessarily fails.

Did UNOPS improperly fail to assign the Applicant to another post?

44. The Applicant submits that the Administration failed to “assign the Applicant to a suitable position, as was done for other UNOPS [colleagues]”. This “violated the Applicant’s basic right to a legal and fair recruitment or promotion procedure or equal access to employment” which “is arguably [to] be regarded as rights recognized under human rights basic rights”.

45. The Applicant contends that the Administration “failed to make good faith efforts to find the Applicant a suitable alternative post in its obligations vis-à-vis staff members on fixed-term appointments who face abolition of positions” and “[i]nstead of taking any active steps to assist the Applicant in locating a suitable post, the Administration placed the entire burden of finding another suitable post on him”.

46. The Applicant submits that he “applied for all available and suitable positions and tried to find communication channels with relevant stakeholders”. If “no suitable post at the Applicant’s grade was available, then at least the Administration could have offered his duties at a lower grade and/or widen the search parameters within the wide organization”. As a result, the Applicant contends that he “lost the opportunity of an

appointment to another position within the UN system with the prospect that he could secure ongoing employment, even after his then[-]existing contract expired”.

47. The Applicant claims that “[t]he Administration has violated agreements concluded and failed to inform the Applicant in a manner that shows dignity and respect”. He states that “[f]rom 1 December 2018 to 16 January 2019, [he] did not receive any information about new opportunities with UNOPS” as per a confidential settlement agreement of 1 August 2018 between the parties, which the Applicant submits in evidence. It is “indubitable that when the Respondent signed off [on] the agreement, he took into consideration to offer to the Applicant possibility to be moved laterally or through a short recruitment process in a maximum of two months”.

48. Disregarding the Tribunal’s orders in Judgment No. UNDT/2020/072, the Respondent made no submissions in this regard.

49. The Tribunal notes that, as also stated in para. 12 of Judgment No. UNDT/2020/072, under the jurisprudence of the Appeals Tribunal (see *Nouinou* 2019-UNAT-902, para. 31) and staff rule 9.6(e), the obligation for the Administration to undertake efforts to find an alternative post only extends to a situation where a staff member’s appointment is terminated and not, as in the present case, where it is not renewed. The Applicant therefore has no right to any such treatment. In addition, nothing else in the case file indicates that the Respondent did not fully comply with its obligations in this regard.

No illegality

50. Based on the above, the Tribunal finds that the Applicant has failed to establish any illegality in the decision not to renew his fixed-term appointment. There is therefore no basis for considering the issue of remedies (see, *Kebede* 2018-UNAT-874, para. 20).

Conclusion

51. The application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 16th day of June 2020

Entered in the Register on this 16th day of June 2020

(Signed)

Nerea Suero Fontecha, Registrar