



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

ABDALLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

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

Introduction

1. In an appeal submitted on 15 March 2010 to the United Nations Dispute Tribunal, the applicant contests the decision of the Chief, Human Resources Section (HRS), United Nations Assistance Mission for Iraq (UNAMI), not to renew his appointment beyond 3 February 2010.

Facts

2. Having served in the United Nations under several appointments since 1992, the applicant joined the United Nations International Independent Investigation Commission (UNIIC) on 19 August 2008, as a Language Assistant at the FS-5/A level. Following UNIIC downsizing, the applicant was reassigned to UNAMI where he was offered a three-month temporary duty assignment (TDY) as an Administrative Assistant at the FS-5 level, effective 1 May 2009.

3. Effective 1 July 2009, the applicant's contract was transitioned to a temporary appointment valid until 31 October 2009 under the provisional Staff Rules.

4. According to the applicant, during a meeting, which took place on 26 July 2009, the Chief, HRS, informed him that UNAMI would not be able to recruit him because there was no Language Assistant or Translator post at the FS-5 level. She also let him know that UNAMI had no post to offer him because his post would be abolished.

5. In October 2009, the applicant sent an e-mail to the Chief, HRS, asking about the status of his contract. In her reply, the Chief, HRS, informed him that UNAMI would not be able to recruit him because there was no Language Assistant or Translator post at the FS-5 level. She also pointed out that UNAMI had no post to offer him because the post he was appointed against would be abolished.

6. On 1 November 2009, his appointment was extended until 31 December 2009.

7. By memorandum dated 31 December 2009, the Chief, Human Resources Section, UNAMI, informed the applicant that his appointment would not be extended beyond 31 December 2009 due to “unavailability of the function of Interpreter/Language Assistant at the FS-5 level”.

8. By letter dated 14 January 2010 to the Secretary-General, the applicant requested a management evaluation of the decision not to renew his appointment.

9. By memorandum dated 18 January 2010, the Chief, Human Resources Section, UNAMI, informed the applicant that his date of close of business with the Organization had been changed to 3 February 2010.

10. By letter dated 26 January 2010, the applicant completed his initial request for management evaluation.

11. By letter dated 11 March 2010, the Under-Secretary-General for Management replied to the applicant’s request for a management evaluation and informed him that the Secretary-General had decided to uphold the contested decision.

12. On 15 March 2010, the applicant filed an appeal before the Tribunal.

13. On 16 March 2010, the Tribunal requested the respondent to submit its response to the application by 15 April 2010.

14. On 15 April 2010, the counsel for respondent submitted its reply.

15. On 26 April 2010, the Tribunal transmitted the respondent’s reply to the applicant for his observations and invited the parties to attend an oral hearing on 10 May 2010.

16. During the hearing, the applicant emphasized that he had been discriminated because some of his colleagues in comparable situations were initially placed on temporary appointments from UNIIC to UNAMI and ultimately recruited, while his contract had been not renewed. The Tribunal then issued its Order No. 58 (GVA/2010), dated 10 May 2010, whereby the applicant was instructed to submit general information regarding the colleagues who were allegedly in a similar situation. By the same order, the respondent was also requested to provide additional information about the contractual situation of those employees.

17. On 17 May 2010, the applicant provided a list of five colleagues. On 25 May 2010, the counsel for the respondent produced information about the contractual status of the staff members mentioned by the applicant. On 2 June 2010, the applicant submitted observations on the information provided by the respondent.

18. By letter dated 3 June 2010, the parties were informed of the Tribunal's intention to make a decision on the case without a further oral hearing and were requested to provide their comments thereon. On the same date, the counsel for respondent expressed his non-objection. The applicant did not reply.

Parties' contentions

19. The applicant's principal contentions are:

- a. He took up his assignment in UNAMI under a temporary duty assignment with the understanding that within three months, a post at the FS-5 level would be advertised and he would be interviewed for the post;
- b. The applicant was discriminated. His colleagues, who were also reassigned from UNIIC, were interviewed for vacant posts and offered appointments with UNAMI;
- c. Even if upon his assignment to UNAMI, he was encumbering a post of Administrative Assistant at the FS-5 level, it was his belief that the title of his post could be changed to "Language Assistant" as, to the best of his knowledge, UNAMI had had translators at the FS level in 2003;
- d. UNAMI should have recruited him for the following reasons: the translation office was understaffed and in need of his services, his supervisor made several attempts to recruit him, he had 24 years of experience in translation and interpretation and his performance was always positive;
- e. While UNAMI claimed that his post was abolished for financial constraints, a translator was hired at the P-3 level. Hence, if the

issue was related to budget, UNAMI could have abolished the P-3 post instead of his post, considering the need for his services and the harm caused to him. Moreover, he was not even considered for the P-3 post.

20. The respondent's principal contentions are:
- a. The applicant had no legal expectancy of renewal of his temporary appointment in accordance with staff rules 4.12 (c) and 9.4. His appointment clearly specified that it was of limited duration and limited to service with UNAMI;
 - b. The applicant's appointment was made on the basis of a clear and unambiguous understanding that it was temporary and that further appointment was conditional upon a recruitment and competitive selection process;
 - c. The decision was an appropriate and lawful exercise of the respondent's discretionary authority, for legitimate reasons, which are corroborated by the evidence on the record;
 - d. The post that the applicant was encumbering was on loan from the Humanitarian Coordination Unit in UNAMI and had been earmarked for abolition in 2010. Furthermore, there were no budgeted or approved posts for a Language Assistant or Interpreter at the applicant's level;
 - e. The evidence shows that the applicant's colleagues, to whom he referred, were not in a similar situation. Moreover, there is no record that the applicant applied for vacant positions at UNAMI or in another mission during his temporary duty assignment that would have entitled him to be recruited against available posts.

Considerations

21. Temporary assignments are governed by staff rule 4.12, which provides, *inter alia*, as follows:

(a) A temporary appointment shall be granted for a period of less than one year to meet seasonal or peak workloads and specific short-term requirements, having an expiration date specified in the letter of appointment...

(c) A temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment.

22. Staff rule 9.4 provides that:

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

23. It results from the foregoing provisions that a staff member who -like the applicant- is serving on a temporary contract does not have a right to renewal. Nevertheless, the Tribunal examines whether improper motives or countervailing circumstances existed in the decision not to renew his appointment, which may have tainted such decision with illegality. The Tribunal has stated in its jurisprudence that “even though the staff member does not have a right to the renewal of his or her contract, that decision may not be taken for improper motives. The Dispute Tribunal is therefore required to consider whether the motives for the decision were proper” (see Judgment No. UNDT/2010/005, *Azzouni*). According to the jurisprudence of the former United Nations Administrative Tribunal applicable to fixed-term appointments, which may be applicable *mutatis mutandis* to temporary appointments, countervailing circumstances may include:

(1) abuse of discretion in not extending the appointment, (2) an express promise by the administration that gives the staff member expectancy that his or her appointment will be extended. The Respondent’s exercise of his discretionary power in not extending a ... contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision (UNAT Judgement No. 885, *Handelsman* (1998)).

24. In the present case, no improper motives neither countervailing circumstances have been established.

25. First, it cannot be stated that the decision of non-renewal was an improper exercise of discretion. The evidence shows that the applicant’s temporary

appointment in UNAMI was not renewed because there were no budgeted or approved posts of Language Assistant, Interpreter or Translator at his level in UNAMI. In this regard, it is noted that although he was working as a Language Assistant in UNIIC, upon his assignment to UNAMI, he was hired as an Administrative Assistant due to the lack of an available post at the FS-5 level. Furthermore, according to the records, the post he was encumbering -Administrative Assistant- was on loan from the Humanitarian Coordination Unit and was abolished in 2010. The Tribunal notes that although the applicant's initial appointment in UNAMI was for a period of three months as of 1 May 2009, it was renewed until 31 December 2009, date on which the post he was encumbering was abolished. The Tribunal considers that by maintaining the applicant in a post for a period of eight months following the downsizing of UNIIC, and one additional month after the abolition of the post encumbered by him, i.e., until 3 February 2010, the Organization showed its good will to find a solution for the applicant.

26. Having said the above, the Tribunal recalls staff rule 9.6 (e) which is applicable to cases of termination for abolition and reduction of staff. It reads as follows:

Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of the service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments ;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments...

27. The Tribunal also noted the jurisprudence of the former United Nations Administrative Tribunal applicable to cases of abolishment of post to assess whether the Organization was obliged to find alternative employment for the applicant, as a staff member of a downsizing Organization before his

reassignment to UNAMI, and after that, as a staff member of UNAMI on temporary assignment whose post had been abolished.

28. The former United Nations Administrative Tribunal has consistently held that “a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose post are abolished” (see UNAT Judgement No. 910, *Soares* (1998), citing Judgement No. 447, *Abbas* (1989); Judgement No. 85, *Carson* (1962); Judgement No. 1128, *Banerjee* (2003)). The Tribunal has stated that such a duty is strictly speaking limited to staff members with permanent appointments and that to apply the same duty to staff members with fixed-term appointments appeared to fall out of the scope of application of the former staff rule 109.1. (see Judgment No. UNDT/2009/083, *Bye*). Even if the jurisprudence refers to former staff rule 109.1, the current staff rule 9.6 (e) cited above, embodies a similar rule in respect of the preference given to staff members in cases of abolishment of posts.

29. The applicant, who held a temporary appointment under the former staff rules in UNHCR before his assignment to UNAMI, and who held a temporary appointment in UNAMI under the staff rules in force as of 1st July 2009, appears to fall out of the scope of application of such duty. Nevertheless, the Tribunal considers that the Organization made a *bona fides* effort by assigning him to UNAMI for a total of nine months, period during which he had the chance to apply for vacant positions and be competitively selected. In this regard, the Tribunal takes note of the memorandum dated 28 August 2008 from the Officer-in-Charge, Field Personnel Division, Department of Field Support, to all Directors and Chiefs of Mission Support which provides as follows:

TDY assignments also may be used to temporarily place qualified staff members from liquidating/downsizing missions in another mission for a maximum three-month placement, during which period the staff member has the chance to apply and be competitively selected.

30. The applicant was fully aware of the approaching expiration of his contract and of difficulties that UNAMI was facing in maintaining him on board because there were no posts of Language Assistant, Interpreter or Translator at his level. He stated in the timeline of his case, attached to his application, that he was made aware of such situation in July and October 2009 by the Chief, HRS,

UNAMI. In this context, it is surprising, to say the least, that he did not apply for vacant posts at UNAMI or in another mission during his assignment. As the Tribunal stated in its jurisprudence “it is a well-established principle that equity aids the vigilant” (see judgment No. UNDT/2010/006, *Parma*, citing judgment No. UNDT/2009/074, *Luvai*). It appears from the evidence that the applicant did not avail himself of the opportunity to be recruited against an available post.

31. Furthermore, the Tribunal finds that the applicant did not have a solid ground to believe that the title of his post would be changed from Administrative Assistant to Language Assistant. Even if UNAMI had had translators at the FS level in 2003, the Organization is not obliged to create a specific post at a certain level for a given staff member.

32. Second, the Tribunal considers that the applicant did not have a legitimate expectancy of having his contract renewed. The former United Nations Administrative Tribunal has stated in its jurisprudence that:

[A] claim to renewal, to be valid, must be based not on mere verbal assertions unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case (UNAT Judgement No. 440, *Shankar*, (1989)).

33. The applicant claims that he took up his assignment in UNAMI with the understanding that within three months, a post at the FS-5 level would be advertised and he would be interviewed for the post. However, he failed to explain where this understanding came from. There is no expressed or even implied promise of the Administration with respect of such an understanding in the case file. The circumstances of the case do not reveal a firm commitment of the Organization to advertise a post at the FS-5 level. The applicant’s claim in this regard is no more than a speculation based on his belief that UNAMI had had translators at the FS level some years ago but it is not circumstantiated by reliable facts.

34. The applicant also claims that he should have been recruited because of his years of experience and his positive performance. He added in support of his claim, that the translation office was understaffed and in need of his services. In this regard, the Tribunal highlights that despite the positive qualifications of a potential candidate, the only way to be recruited by the Organization is to be

successful in a selection process for a vacant post. Furthermore, it has been the long-standing jurisprudence of the former United Nations Administrative Tribunal that a legal expectancy of renewal would not be created by efficient or even outstanding performance (see UNAT judgement No. 980, *Baldwin*, (2000)).

35. Third, the decision not to renew his temporary appointment was not tainted by discrimination or other extraneous factors. In the present case, no evidence for discrimination can be found. The applicant alleged that five of his colleagues, who were also reassigned from UNIIC were interviewed and offered appointments in UNAMI, while he was not interviewed for any post and his contract was indeed not renewed. In this respect, the evidence shows that the five staff members named by the applicant were competitively selected for posts of Security Officers and a post of Personal Assistant, while the applicant was willing to be placed in a post of Language Assistant or Interpreter/Translator. Hence, his claim is unfounded.

36. The applicant also claimed that he was not interviewed for the post of Translator at the P-3 level. However, he did not even apply for this post. Hence, his claim in this regard is also groundless.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 4th day of August 2010

Entered in the Register on this 4th day of August 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva