



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

OSMAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**  
Self-represented

**Counsel for respondent:**  
Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. By application dated 22 April 2010, the applicant contested before the United Nations Dispute Tribunal (UNDT) the decisions:
  - a. To reject, on 15 April 2009, the applicant's request for five days of annual leave;
  - b. Not to renew the applicant's fixed-term appointment beyond 18 August 2009.

## **Facts**

2. The applicant joined the Organization on 19 October 1991. He first served in the United Nations Iraq-Kuwait Observation Mission (UNIKOM) and later in various other missions. He started serving at the United Nations Assistance Mission for Iraq (UNAMI) on 19 February 2007, as a Fuel Supply Assistant at the FS-3 level under a fixed-term appointment. His contract, which initially covered a six-month period, was renewed on several occasions.
3. By memorandum dated 20 October 2008, the Chief, Mission Support, UNMIK, informed the applicant that his function was being abolished in the budget for 2009. He was furthermore informed that, in order to retain his services, he would be reassigned, together with his post, to the Movement Control Unit. It was stated that subsequent renewal of his contract was subject to satisfactory performance in his new duties.
4. In accordance with the rotation plan for April 2009 of the Baghdad International Airport (BIAP), where the applicant was discharging his duties, he was due to leave Iraq for rest and recreation on 20 April 2009 and to return on 30 April 2009.
5. On 14 April 2009, the applicant made a request, through the matrix system, for rest and recreation from 23 April to 30 April 2009 and annual leave from 1 to 4 May 2009. This request was approved by the applicant's direct supervisor, but refused, on 15 April 2009, by his second reporting officer, i.e., the Chief, Mission Support.

6. In response to an e-mail sent by the applicant, the Chief, Mission Support, reiterated, on 16 April 2009, that he would not approve the leave request as submitted, whereas he stated that the applicant would receive full cooperation if he wished to use some of the uncertified sick leave balance available for compassionate purposes, as provided for in staff rule 106.2 (c). He advised the applicant to consult with the Human Resources Section for this matter. The staff member instead took his leave as planned, returning to work on 5 May 2009.

7. The applicant was informed, by memorandum from the Chief, Mission Support, dated 9 June 2009, that his contract, which was to expire on 18 July 2009, would not be extended due to unsatisfactory performance. It was pointed out that efforts had been exerted to absorb the applicant after his initial post had been declared redundant, but he had not cooperated to perform satisfactorily.

8. The applicant was on annual leave and sick leave from 8 June to the beginning of July 2009.

9. By memorandum dated 17 June 2009, the applicant advised UNAMI that he wished to rebut his e-PAS for 2007/2008, as he had been rated “partially meets performance expectations”. He reiterated this request by e-mail of 23 July 2009 to the Chief, Mission Support. At the outcome of the rebuttal, his rating was upgraded to “fully satisfactory performance”.

10. On 13 July 2009, the applicant’s appointment was extended until 18 August 2009.

11. On 2 August 2009, the applicant requested management evaluation of the “final non-renewal of [his] contract beyond 18 August 2009”.

12. On 3 August 2009, the applicant submitted to the Dispute Tribunal a request for suspension of action during the pendency of management evaluation regarding the decision not to renew his contract, which was granted by order dated 13 August 2009 (UNDT/2009/008).

13. Following the Tribunal’s decision on the request for suspension of action, the applicant’s contract was extended for one month. It was extended again on 18 September 2009 for six months and a half, and on 27 April 2010 for three

further months, until 30 June 2010. On that date, the applicant's appointment was renewed once more for a one-year period.

14. On 17 August 2009, the applicant initiated the rebuttal of his e-PAS 2008/2009. The rating "partially meets performance expectations" was maintained.

15. By letter dated 5 October 2009, the applicant was notified of the result of the management evaluation, i.e., that his request had become moot in view of the successive renewals of his appointment.

16. On 22 April 2010, the applicant filed the present application with the Geneva Registry of the Dispute Tribunal.

17. The respondent submitted his reply on 28 May 2010.

18. By letter dated 2 June 2010, the parties were informed that the Tribunal intended to decide on the case by summary judgment and were invited to submit comments thereon within one week. On 9 June 2010, the applicant submitted additional comments on the merits of the case.

### **Parties' contentions**

19. The applicant's principal contentions are:

- a. However imperfect the request for management evaluation, it was clear from the explanatory statement that while the specific administrative decision contested was the non-renewal of his appointment, it was necessary to examine, to consider whether this decision was improperly motivated, a series of decisions and actions leading up to it, including the denial of the applicant's request for emergency annual leave. The denial of annual leave was clearly referenced in the request for management evaluation submitted in August 2009 as precipitating and influencing the subsequent treatment of the applicant's contractual status;
- b. Under article 7.5 of the Tribunal's rules of procedure, giving effect to article 8.3 of the statute, the Tribunal may decide to suspend or waive the 90-day deadline in exceptional circumstances. The

circumstances warranting such waiver in the present case are as follows: the applicant was on authorized home leave from 1 to 19 November 2009. He fell ill and was hospitalized on 12 November 2009 and remained on certified sick leave until 3 January 2010. In addition, the applicant's counsel had to be replaced twice during the same period. Moreover, as the applicant requested his second counsel to file an application, he was advised to consult the Ombudsman, which he did, to no avail since he obtained no reply;

- c. The applicant has consistently made good efforts to pursue his case. It would not serve the interest of justice to deny him a hearing of his claims;
- d. The applicant's second reporting officer engaged in a continuing pattern of harassment that intensified after he challenged the initial decision not to authorize his leave. This pattern culminated in efforts to remove the applicant from his post and functions and separate him from service;
- e. His supervisor did not follow the established procedures to evaluate his performance. Staff regulation 1.2 prohibits any form of discrimination or harassment. The former UN Administrative Tribunal (UNAT) held that prejudice can be inferred from a failure to follow procedural requirements (see Judgement No. 521, *Saeed* (1991)). Furthermore, both the former UNAT and the International Labour Organization Administrative Tribunal (ILOAT) found that an applicant is not required to provide any evidence of prejudice when the procedural requirements have not been observed (UNAT Judgement No.1134, *Gomes* (2003) and ILOAT Judgment No. 495, *Olivares Silva* (1982));
- f. The case has not been rendered moot by the subsequent renewals of the applicant's contract. Violations of due process are in and of themselves compensable, whether or not as a result of formal recourse the record is eventually set straight;

- g. The respondent argues that the denial of annual leave was based on the exigencies of service, without providing any evidence of how this would be consistent with the immediate supervisor's approval of the request. Given the urgent nature of the situation, the act appears on its face to be not only unreasonable and arbitrary, but indicative of a pattern of harassment.

20. The respondent's principal contentions are:

- a. The applicant has not requested management evaluation of the decision refusing annual leave. Accordingly, pursuant to article 8.1 (c) of the Tribunal's statute, the application concerning this decision is not receivable;
- b. Article 8.1 (d) (i) a) of the Tribunal's statute and article 7.1 of its rules of procedure prescribe a deadline of 90 days as of the date of the response on management evaluation to file an application before the Tribunal. The response to the applicant's request for management evaluation of the non-renewal decision was dated 5 October 2009. The applicant submitted his application more than three and a half months late. He has not presented reasons to justify this lateness;
- c. In any event, the non-renewal decision is of no effect as a result of the subsequent renewals of the applicant's appointment. Therefore, the application is moot in this respect;
- d. The applicant's contention that the denial of his annual leave request prevented him from attending to his mother's needs is unfounded for two reasons. First, he was informed as to how he might obtain authorization for uncertified sick leave through Human Resources, which he elected not to do. Second, the applicant did take leave during the relevant period, with his immediate supervisor's approval.

21. For the above reasons, the respondent requests the application to be dismissed summarily on the ground that it is not irreceivable, or alternatively, dismissed on the ground that it is without merit.

## Considerations

22. The present application is aimed against two distinct administrative decisions: the rejection of the applicant's request for five days of annual leave, dated 15 April 2009, on the one hand, and the non-renewal of the applicant's fixed-term appointment beyond 18 August 2009, dated 13 July 2009, on the other hand.

23. The application is irreceivable as far as it concerns the decision to reject the applicant's request for annual leave, for it was at no point submitted for management evaluation, as required by article 8.1 (c) of the Tribunal's statute (see (UNDT/2009/070, *Planas*; UNDT/2009/054, *Nwuke*; UNDT/2009/035, *Caldarone*)). The only request for management evaluation presented at the time by the applicant was dated 2 August 2009 and contested exclusively the decision not to renew his appointment. While reference was indeed made to the refusal by the applicant's second reporting officer to authorize the requested annual leave, it is patent that this episode was mentioned as factual background in order to substantiate the alleged unlawful character of the non-renewal decision, and was not singled out for review.

24. Even assuming that the above-mentioned request for management evaluation may be regarded as contesting the refusal to grant five days of annual leave as well, such request would have been time-barred. The decision in question was made on 15 April 2009, whereas the applicant's request for management evaluation was dated 2 August 2009. This is far beyond the sixty-day time limit set in provisional staff rule 11.2 (c) for that purpose.

25. As regards the decision not to renew the applicant's appointment beyond 18 August 2009, as notified to him by memorandum dated 9 June 2009, the application is irreceivable too. A number of successive renewals of the applicant's appointment took place subsequently up to today, which superseded the decision of 9 June 2009 and deprived same of effect. Its contestation thereby became moot.

26. In addition, the present application is time-barred inasmuch as it concerns the non-renewal of the applicant's appointment. While this decision, unlike that regarding the annual leave request, was duly submitted for management evaluation, the time limit prescribed by article 8.3 (a) of the statute for filing an

application before the Tribunal was not complied with in this case. As a matter of fact, the applicant received the response from the Management Evaluation Unit on 5 October 2009, from which date the applicant had 90 days to file his application before the Dispute Tribunal. However, he only did so on 22 April 2010. In other words, the relevant application was filed more than three months after the statutory deadline.

27. While conceding this delay, the applicant alleges that there were exceptional circumstances in his case justifying a waiver of the 90-day time limit, on the basis of article 8.3 of the Tribunal's statute, which reads:

The Dispute Tribunal may decide ... to suspend or waive the deadlines for a limited period of time and only in exceptional cases...

28. Yet, the Tribunal is not satisfied that any "exceptional circumstance" within the meaning of the above-cited provision existed in the case under review. The applicant explains that he was on sick leave from 12 November 2009 to 3 January 2010. Nonetheless, the fact of being on sick leave does not automatically justify an exception to the prescribed time limits in each and every occasion. As the United Nations Appeals Tribunal has affirmed in its Judgment 2010-UNAT-029, *El-Kathib*, following the longstanding jurisprudence of the former United Nations Administrative Tribunal, only events beyond the applicant's control and actually preventing him or her from pursuing legal action may be regarded as "exceptional circumstances" warranting such a waiver. In the case at hand, the applicant has failed to show how his health problems made it impossible for him to file an application in a timely fashion.

29. Moreover, it is noteworthy that, despite the applicant's certified sick leave having come to an end on 4 January 2010, he did not file his application until 22 April 2010. Hence, this delay of over three months could by no means be attributed to health reasons.

30. The applicant further submits that he had to replace his counsel twice during the relevant period. Be it as it may, the Tribunal has already stated that "lack of counsel is not an exceptional circumstance ... and no sufficient justification for the failure to observe the time limits set forth in the Tribunal's statute" (Judgment UNDT/2010/25, *Kita*).

31. In light of the above, the Tribunal must conclude that the application is irreceivable in its entirety. Concerning the first decision impugned, i.e., the rejection of the applicant's request for five days of annual leave, this decision was never submitted for management evaluation, and assuming it was, further to the applicant's request dated 2 August 2009, such request would have been time-barred. Concerning the second decision, i.e., the non-renewal of the applicant's appointment, the application is moot, as well as time-barred.

### **Conclusion**

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

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 1<sup>st</sup> day of September 2010

Entered in the Register on this 1<sup>st</sup> day of September 2010

*(Signed)*

Víctor Rodríguez, Registrar, UNDT, Geneva