



Introduction

1. The Applicant has challenged the Secretary-General's decision to terminate his employment on an appointment of limited duration with the United Nations Development Programme (UNDP) in March 2004. The termination was effected three months before the expiry of his contract on grounds of poor performance.

2. This case was transferred from the United Nations Administrative Tribunal (former UN Administrative Tribunal) to the United Nations Dispute Tribunal (UNDT) in Nairobi on 1 January 2010 pursuant to the provisions of ST/SGB/2009/11 on *Transitional Measures Related to the Introduction of the New System of Administration of Justice*.

3. The Applicant raised a number of issues about this termination. The essence of his case is that as his performance was not managed by the Respondent according to the established processes, the termination of his contract on grounds of poor performance cannot be deemed to have been lawful. In his appeal he alleged lack of proper management structure and performance evaluation, lack of due process and fraud and falsification of documents. He contends that he had a legitimate expectation that his contract would last for longer than the express contractual term of 1 year.

4. The Applicant also claims that the Joint Appeals Board (JAB) failed to conduct a fair and thorough appraisal of the facts and arguments produced to it. This is not a matter within the jurisdiction of the Tribunal. Pursuant to Article 2.1(a) of the UNDT Statute, the role of the Tribunal is to hear an appeal from an administrative decision that is alleged to be in non-compliance with the terms of employment or the contract of employment. This does not include the decisions of the JAB. This part of the Applicant's claim cannot be considered by the Tribunal as it has no power to review either the conduct or the recommendations of the JAB.

5. The Applicant seeks remedies for (i) loss of income for the remainder of the term of this contract and for the 2 years following for which he alleges he had an

level. DEPHA was an inter-agency project tasked to acquire, develop and disseminate information exchange resources for humanitarian and development planning in the Horn of Africa. The Project Manager was based at the United Nations Office at Nairobi (UNON), within the Division of Early Warning and Assessment (DEWA) of the United Nations Environment Programme (UNEP).

9. His letter of appointment stated that the appointment was non-career based in nature and did not carry any expectancy of renewal or conversion to any other type of appointment with UNDP.

10. An integral part of his terms of appointment were the DEPHA project's terms of reference. As well as describing the inter-agency nature of the project, these also provided a detailed description of the Applicant's responsibilities as Project Manager. These included:

- a. to expand DEPHA's client base and geographical coverage.
- b. to develop strong partnerships with governments and inter-governmental organizations in the region.
- c. to provide technical and institutional leadership to the DEPHA project.
- d. to meet reporting requirements and
- e. to administer and manage the DEPHA project on a day-to-day basis.

11. Mr. Bowen was required to report to a small management team representing stake holders and to the DEPHA Project Steering Committee (PSC) which represented donors, NGOs and the UN community. Mr. Philip Dobie chaired the PSC.

12. The Drylands Development Centre (DDC) provided administrative support for the DEPHA project. Mr. Dobie was the Director of DDC at the time. He told the Tribunal that DEPHA was an unusual project in that it provided services for several

different agencies both inside and outside the United Nations. He described himself as the “senior officer responsible for the Project but not the technical supervisor.”

13. Ms. Fikerte Assefa, a P3, was the Special Assistant to the Director of the DDC and the Management Specialist on the DEPHA Project. In the latter capacity, Ms. Assefa oversaw the administrative management of the Project and therefore worked most closely with Mr. Bowen.

14. The day-to-day supervision of the DEPHA Project Manager was left to the UNEP/DEWA. Mr. Dobie frankly accepted that because of this unusual structure, certain responsibilities towards the Project and the Programme Manager fell between the cracks.

15. The Respondent’s witnesses told the Tribunal that there were growing concerns about Mr. Bowen’s lack of performance. Ms. Assefa said that Mr. Bowen also had many concerns about the composition and membership of the PSC, the administration of the project and the procedure for managing the project. The Project Document itself appeared to exist only in draft form and the methodology for the project needed clarification. Mr. Bowen maintained that he was recruited to manage a project, not design one, and the drafting of a Project Document was therefore not within his competence. Subsequently, a consultant was engaged to do this.

16. Ms. Assefa said that all her discussions with Mr. Bowen were friendly and professional but she could not comment on the quality of his work because he did not produce much.

17. She complained to Mr. Dobie about the amount of her time that was being consumed by what she considered to be very long fruitless discussions with Mr. Bowen. Mr. Dobie met with Mr. Bowen but described the meeting as unsatisfactory. Mr. Bowen had challenged the authority of the PSC and elements of the administration and in Mr. Dobie’s words “it was hard to get down to brass tacks.”

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opportunity to get the matters that Mr. Bowen had been troubling her about sorted out.

22. On the evening of Friday, 6 February 2004, Mr. Bowen received an email from Ms. Assefa inviting him to make a presentation at a meeting of the DEPHA Steering Committee at 11am on Monday, 9 February 2004. The presentation was to cover the progress of the Project, future plans as well as challenges he may have encountered in his efforts to implement the Project. Apologising for the short notice, the email read “I am sure you’re on top of it, as you have been preparing presentation[s] for all UN visitors.”

23. On the morning of 9 February 2004, less than an hour before the meeting was scheduled to take place, Ms. Assefa wrote to Mr. Bowen referring to a preceding telephone conversation.

27. Directly after the meeting Mr. Bowen sent an email to the same people questioning how the committee operated. He also expressed his dissatisfaction with how the meeting had been planned and attended. He asked for information on how DEPHA staff salaries were calculated so that he could do an audit of the existing salaries and scales because he had concerns that DEPHA staff were not receiving a fair wage. He also repeated a request he had made a week or so before for a signed copy of the DEPHA Project document and to meet Mr. Dobie to discuss these and other unresolved issues. The record is silent as to whether this email was responded to, or if the issues raised in it were dealt with.

28. Mr. Dobie wrote a letter to Mr. Bowen on 12 March 2004 in which he enclosed the minutes of the 18 February meeting, and drew the Applicant's attention to the "findings of the Steering Committee and th

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Bowen sought a stay of the decision to terminate his contract. In response on 8 April 2004, the Resident Representative of UNDP sent him a letter refusing his request. He referred to Mr. Bowen's "apparent lack of resolve over 9 months; frustration with the lack of results achieved by the project so far; his failure to convince the Committee of his side of the story; failure to respond to the minutes of the 18 February 2004 meeting; and his inability to secure a single agreement after nine months.

36. Following administrative review of his case, Mr. Bowen took his appeal to the Nairobi JAB. The process at the JAB took from August 2004 to October 2006 before a recommendation was made to the Secretary-General to deny the appeal. Its decision was that there had been no evidence of extraneous factors in the decision to terminate but the JAB would have expected to see more documentation over the course of his

39. Staff rule 304.4 provided that:

All appointments under these Rules are temporary appointments for a fixed term, the period of which is specified in the letter of appointment. Appointments granted under these Rules may be terminated prior to their expiration dates in accordance with the provisions of rule 309.1. Appointments under these Rules carry no expectancy of renewal or of conversion to any other type of appointment.

40. Section 309.2(b) referred to termination of appointments. It provided:

The appointment of a staff member appointed under these Rules may be terminated at any time if, in the Secretary-General's opinion, such action would be in the interests of the United Nations.

41. Rule 301.4 concerned performance of staff. It required that staff members be:

[E]valuated for their efficiency, competence, and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Rules for the purpose of accountability.

42. UNDP's performance management system at the relevant time was contained in the *UNDP Results and Competency Assessment 2003-2004 Guidelines (RCA)*.

43. The RCA covered staff members up to and including D2 level who held contracts continuously for more than six months. The performance cycle for the purpose of the RCA was from 1 February to 31 January of the following year. It had an annual cycle of 4 steps: a) the development of annual work plans, b) individual performance planning, c) mid-year review (August September) and d) year-end review in February, March of the following year.

44. The progress of staff was measured by the staff member's supervisor in a results score card and learning plan. These were discussed at the

engaged in people management, employing a suitable array of informal and formal approaches to assure a staff member's performance and learning plans were on track

45. Overall assessments were done by a Career Review Group (CRG) which had responsibility to make a final recommendation and assign a rating to the overall performance of the staff member. The review had to take into account consideration of circumstances beyond the staff member's control and the staff member's feedback.

46. The staff member had the right to rebut the rating or comments of the supervisor or CRG.

The Applicant's Contract

47. A contract of limited duration is essentially

54. The answer to this question lies in the rationale for those regulations, rules and administrative instructions.

55. In the first place, performance appraisals for staff members are mandatory. Staff rule 301.4(a) states:

- (a) The performance of staff members shall be evaluated to assess their efficiency, competence and integrity and to ensure their compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

Administration wishes to rely on its assessment as a basis for the termination or non-renewal of a contract.

Discussion

Did the Respondent's management structure enable it to meet its responsibilities concerning performance evaluation of staff members employed at DEPHA?

61. The Respondent submitted that the management structure required Mr. Bowen to report to the management team, and that he was also supervised on a day-to-day basis by UNEP/DEWA. The Respondent contends that the DEPHA's lack of progress was solely and exclusively attributable to the Applicant's acts and/or omissions.

62. I find that in spite of the theoretical management structure in practice, Mr. Bowen was left to get on with managing the Project with the administrative support of Ms. Assefa. Although UNEP was cited as the supervisor there was no evidence that it assumed this role which is hardly surprising given that Mr. Bowen was actually employed by UNDP.

63. The responsibilities of the management team were largely undefined except for Mr. Dobie whose role did not include being involved in the day-to-day management of the Project. He was the only one who took any responsibility but only intervened when problems arose.

64. The programme had serious structural defects which meant that any failings by its manager were not promptly or appropriately addressed.

Conclusion

65. The management structure for DEPHA was not sufficiently defined to enable it to fulfil its legal obligations in relation to the evaluation of a staff member's performance as envisaged by the RCA.

66. In reaching this conclusion the Tribunal is mindful of the special and unusual nature of the DEPHA project. It was a project that deserved to succeed and the disappointment felt by Mr. Dobie at the way matters transpired is appreciated.

does not support this submission. The Respondent relied on a document authored by a staff member junior to the Applicant and which the Applicant had no notice of until his termination became the subject of a dispute within the internal justice system. This is a breach of due process.

76. One example of the consequence of the failure of due process is the allegation that his management style led to high staff turnover. Although those allegations had been noted by other staff members, the first time Mr. Bowen had an opportunity to explain the circumstances under which two of his staff members left was during the hearing by the Tribunal. From his evidence it is possible that what appeared to the Respondent to be high staff turnover caused by his behaviour had a more innocent explanation. Mr. Bowen explained to the Tribunal that two staff members left to pursue studies and both expressed a desire to return. Too much time has passed to verify this one way or the other. But as this was one of the reasons given for the early termination of his contract he should have had a fair opportunity to explain his side before a conclusion was reached. Mr. Bowen also pointed out that the basis of the evaluation as revealed to him subsequently was very limited as it relied on only a few of the performance indicators in his terms of reference.

Conclusion

77. The early termination of his contract was not based on a proper or lawful evaluation of the Applicant's performance. The reasons given for the termination are no longer capable of objective verification. In the absence of a comprehensive and fair performance evaluation

78. This is not a question of improper motivation. There is no evidence that the Respondent was motivated by anything other than a desire to have the project functioning efficiently. The Respondent's failure was in not treating the Applicant in a fair and lawful manner in accordance with the Staff Rules and UNDP procedure.

Did the Applicant have a legitimate expectation of employment beyond the expiry of the one year contract?

79. In his written appeal Mr. Bowen alleged that he had a legitimate expectation that his contract would in fact last at least three years and seeks compensation for two extra year's income. Although he did not pursue this at the hearing it is canvassed for completeness.

80. His submission is that his contract gave him a legal expectation of a renewal of his contract for a further 2 years. He bases this on the wording of the terms of reference of the DEPHA project that stated that the appointment may be renewed subject to the availability of funds and performance appraisal. He submitted that because there had been no performance appraisal (one of the preconditions for the renewal) and there were funds available there was no reason not to expect renewal.

81. This submission falls well short of the test for expectancy of renewal of a contract. I accept the Respondent's submission on this point. The terms of reference of the project stated that it "may" be renewed subject to the availability of funds and performance appraisal. Although there was no performance appraisal this failure does not give rise to a firm commitment of renewal.

82. The terms of his contract were explicit and clear and there is no evidence that Mr. Bowen was given any assurances or promises that there was even a possibility of an extension of his contract as opposed to the continuation of the project.

Conclusion

94. The Tribunal ORDERS:

- i. The Respondent's decision to terminate the Applicant's contract on 23 March 2004 is rescinded.
- ii. Payment to the Applicant of the salary and other entitlements he would have received until the end of his contract on 24 June 2004 less the payments in lieu of notice.
- iii. Payment of two years' net-base salary at the rate which applied at the time of the termination of his contract.
- iv. Interest on the sums in orders ii and iii at the applicable US Prime Rate, accruing from 24 March 2004 to the date of this Judgment.
- v. The payments shall be made within 60 days of this Judgment becoming v.