



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/099/
JAB/2009/044

Judgment No.: UNDT/2011/032

Date: 10 February 2011

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

OBDEIJN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. The Applicant contests the decision not to renew his fixed-term contract with the United Nations Population Fund (“UNFPA”) beyond its expiration date of 2 April 2009. He alleges, *inter alia*, that the decision was improper because it was motivated by extraneous factors. The Respondent refused to disclose the reasons for the contested decision to the Applicant and refused to disclose them to the United Nations Dispute Tribunal, asserting that the Administration is not required to provide reasons for a decision not to renew an appointment.
2. The Applicant requests compensation in the amount of two years’ net base salary and retroactive reinstatement to the United Nations Joint Staff Pension Fund. The Applicant also requests compensation in the amount of three months’ net base salary for emotional injury and distress caused by the “abrupt and unlawful termination of his career” with the Organization and by UNFPA’s failure to respond to his repeated attempts to obtain the reasons for the contested decision.
3. The main legal issue in this case is whether the decision not to renew the Applicant’s fixed-term contract was lawful.
4. After issuing several case management orders, the Tribunal held hearings on 13 August and 1 October 2009 and on 16 February 2010, following which further submissions were filed. The statements of appeal, the Respondent’s reply, and subsequent submissions constitute the pleadings and the record in this case.

Facts and procedural history

5. The Applicant joined UNFPA on 3 October 2005 on a fixed-term two-year appointment as UNFPA Representative in New York (P-5 grade, step 11). His letter of appointment was “subject to the provisions of the Staff Regulations and Staff Rules applicable to the United Nations Population Fund” and stated, *inter alia*:

Th[is] Fixed-Term Appointment ~~do~~ not carry any expectancy of renewal or of conversion to any ot

wish you every success in your future endeavours. My colleagues will be in contact with you in due course regarding separation formalities.

9. On 15 February 2009 the Applicant sent a letter to the Director of the Division for Human Resources, requesting the reasons for the non-renewal of his contract. The Applicant stated in his letter *inter alia*:

I am surprised at your letter of 13 February 2009 and fail to understand this decision after a period of almost 3.5 years of hard and dedicated work in a UNFPA priority country with a complex and security compromised setting, where I have done my very best and with no issues that I was made aware of, as was recorded in my yearly performance reports, as well as the 2008 mid-year performance discussions with my immediate supervisor on 23 September 2008.

...

Director of Division [for] Human Resources, advising me of the decision that my fixed-term contract would not be renewed beyond the six-month expiry date of 2 April 2009.

11. On 12 March 2009 the Officer-in-Charge of the Division for Human Resources replied to the Applicant's letter dated 15 February 2009, stating *inter alia*:

I would like to explain that in accordance with Staff Rule (104.12(b)(ii)), a fixed-term appointment does not carry any expectancy of renewal of the appointment. Rather, the appointment expires automatically and without prior notice on the expiration date specified in the letter of appointment (Staff Rule 109.7(a)).

12. On 27 March 2009 the Executive Director of UNFPA replied to the Applicant's request for administrative review, stating that UNFPA was not required to disclose the reasons for the contested administrative decision. The Executive Director's letter stated *inter alia* (emphasis omitted):

My review of the administrative decision in question entailed a review [of] whether it was taken in accordance with the United Nations Staff Regulations, Rules, and applicable UNFPA policy [i.e., UNFPA Policies and Procedures Manual hereinafter referred to as the "UNFPA Manual"].

...

Given that you have been serving with UNFPA for a period of less than five years (i.e., three years and six months), the Administration of UNFPA was permitted, in accordance with section 5.2 of the policy and the established jurisprudence of the [UN Administrative] Tribunal, not to renew your appointment, without having to justify that administrative decision.

13. The Applicant's appointment expired on 2 April 2009 and he was separated from the Organisation. Due to within-grade increments throughout the duration of his contract, at the time of separation the Applicant was at the P-5 grade, step VI.

14. On 4 May 2009 the Applicant filed an incomplete statement of appeal with the Joint Appeals Board, which was followed by a complete statement of appeal on 29 May 2009. On 1 July 2009 the case was referred to the Dispute Tribunal. On

13 July 2009 the Respondent filed his reply to the application, stating *inter alia*: that the appeal was without merit; that the Applicant had no expectancy of renewal; that the Respondent was under no obligation to provide reasons for the contested decision; and that the Applicant failed to offer any evidence in support of his allegations of prejudice and extraneous factors.

15. On 27 January 2010 the Dispute Tribunal issued Order No. 8 (NY/2010), directing the Respondent to provide the reasons for the non-renewal of the Applicant's contract. In a submission dated 8 February 2010, filed in response to the Order, the Respondent reiterated his position that the Administration was "not required to disclose the reason(s) for its decision not to renew a fixed-term appointment". The Respondent based his argument on the wording of the Applicant's contract and the jurisprudence of the United Nations Administrative Tribunal. Accordingly, no reasons for the contested decision were provided to the Dispute Tribunal.

16. On 10 February 2010 the Applicant filed a submission entitled "Motion for Summary Judgment", stating that "whereas [the] Respondent has failed to provide evidence that could serve to refute [the] Applicant's case—in defiance of Order No. 8[—the] Applicant respectfully requests that the Tribunal pursuant to Article 9 of the Rules of Procedure issue a summary judgement rescinding the Impugned Decision".

17. On 12 February 2010 the Respondent filed a submission requesting the Tribunal to issue an order "to the effect that the Respondent is not required, as a condition of the execution

No. 8 (NY/2010), until a purported appeal against the Order would be considered by the United Nations Appeals Tribunal.

In view of the importance of the legal issue

further hearing on 16 February 2010. At that hearing, following the Tribunal's explanation that Order No. 6 (NY/2010) was not a final judgment in the matter, the Applicant withdrew his motion for summary judgment. No appeal was subsequently filed by the Respondent. The parties were ordered to make further submissions as to whether the Respondent was required to provide the reasons for the non-renewal of the Applicant's appointment. In his final submission, as in all submissions, the

(emphasis omitted). As affirmed by the United Nations Administrative Tribunal, the Respondent is under obligation to provide reasons for the decision not to renew (see, e.g., UN Administrative Tribunal Judgment No. 1191, *Aertgeerts* (2004)).

b. The Respondent denied the Applicant's assertions of fact as to what was said by the relevant Directorate, stating that although the possibility of a mission had been discussed, it was far from a promise or commitment to [the Applicant] to undertake this mission. Further, such a mission, had it materialised, would have had multiple programmatic objectives which may or may not have included a discussion concerning further extensions of the Applicant's appointment. Even if the Applicant's account of what was said by the Director were accepted, these facts were far from constituting countervailing circumstances, such as an express promise on the part of the Administration. A claim to renewal must be based not on a mere verbal assertion unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case. The Applicant failed to meet his burden of proof and thus his claim with regard to expectancy of renewal must fail.

c. The decision not to renew the Applicant's contract was not vitiated by prejudice or extraneous factors. Paragraph 25 of the UNFPA Manual does not create any expectation of renewal because it deals only with situations in which the Administration decides to renew the appointment, which was not the Applicant's case. Further, the decision to renew the Applicant's appointment for a limited period of six months in October 2008 does not prove prejudice against the Applicant.

21. Following the hearing of 16 February 2010, the Respondent made a further submission on the legal issues pertaining to the instant matter. The Respondent submitted, *inter alia*, that the jurisprudence of the United Nations Administrative

Tribunal established that there were three exceptions to the rule that no justification was required for non-renewal: (i) where there is an expectation of renewal; (ii) where a staff member has to be afforded ever

administrative decision. The contested decision in such a case would not be the initial decision to set a certain expiration date at the time of the entry into contract, but the later decision not to extend the applicant's appointment beyond its original expiration date.

26. It is clear from the Applicant's employment history, contemporaneous records, and the parties' submissions, that the subject matter of this application is not the Respondent's refusal to enter into a new, separate, and unrelated contract of employment with the Applicant, but the Respondent's decision, notified to the Applicant by letter of 13 February 2009, not to extend his appointment any further. Therefore, this application is properly before the Tribunal.

Scope of the contested decision

27. The Tribunal finds that the scope of this case relates only to the decision not to extend the Applicant's contract beyond April 2009, which was notified to him on 13 February 2009, and not the earlier decision to extend his contract for six months, communicated to him on 9 October 2008. Although in his request for administrative review, dated 15 February 2009, the Applicant sought "to know on what basis both decisions (six-month contract and [non-renewal] hereafter) were taken", his request for review was timeous only with respect to the decision not to renew his contract, notified to him by letter dated 13 February 2009. The decision to extend the Applicant's contract for six months was communicated to him on 9 October 2008, and therefore his request for administrative review, dated 15 February 2009, was submitted more than two months after the expiration of the deadline for filing of a request with respect to that decision (former staff rule 111.2). As the Appeals Tribunal held in *Costa* 2010-UNAT-036 (approving *Costa* UNDT/2009/051), the Dispute Tribunal does not have the power to waive or spend the time limits for requests for administrative review or management evaluation (see also *Bernadel* UNDT/2010/210, para. 32, and *Schell* UNDT/2011/023, para. 31).

Was the contested decision lawful?

28. When considering the propriety of a contested administrative decision, the Tribunal will consider, *inter alia*, the lawfulness of any reasons given for the contested decision, including whether it was based on improper motives (see *Saka* UNDT/2010/007 and *Abdalla* UNDT/2010/140).

29. The Applicant contends that the Respondent's failure to give a reason for the non-renewal of his fixed-term contract renders the decision unlawful. The Respondent's view is that, under principles of the law of contract, fixed-term contracts expire automatically and without notice and that the Staff Regulations of the United Nations do not contemplate any requirement on the part of the Respondent to disclose reasons for the non-renewal of a fixed-term appointment. The Respondent submits, *inter alia*, that he was "not required to disclose reasons for the decision not to renew a fixed-term appointment" and maintains that he is not obligated—and, accordingly, will not—provide the reasons for the contested decision to the Tribunal, just as he refused to disclose them to the Applicant.

30. Generally at common law and under the law of contract, a fixed-term contract, unlike one for an indefinite period, expires automatically by operation of law at the end of the agreed period, by effluxion of time, without requirement of notice or reason. Fixed-term contracts may be a useful and efficacious arrangement for both parties in respect of many occupations and activities and are entered into for a specific period or for a specific project. However, it is recognized that this type of contract may be misused to avoid conferment of rights otherwise granted to permanent workers, or to enable the creation of an employment relationship without good reasons and without following fair procedures. Therefore, in many jurisdictions, including Member States of the International Labour Organization ("ILO") (pursuant to ILO Convention No. 158 of 1982) and Member States of the European Union (pursuant to the Council of the European Union Directive 1999/70/EC of 28 June 1999), appropriate legislative protections are provided to prevent abuse of employees

on fixed-term contracts. Examples of such

34. The Respondent relies on the UNFPA Manual in support of his contention that no reasons are required to be provided for a decision not to renew an appointment. The UNFPA Manual states *inter alia* (emphasis omitted):

5.2 In accordance with past practice, upon expiration of the fixed-term appointment of a staff member who has served with UNFPA for less than five years, the Administration of UNFPA may choose not to renew the appointment. In such case the Administration will not offer reasons for non-renewal of appointment to a staff member who is appointed for a fixed term has been serving with UNFPA for five years or more and without break in service, UNFPA shall accord the UNFPA staff member every reasonable consideration for further employment.

5.3 While it rests primarily within the authority of the substantive manager to decide that an appointment should not be renewed under the preceding paragraph, any non-renewal of appointment shall require the concurrence of the Director [Division for Human Resources].

5.4 In the interest of good human resources administration, if a fixed-term appointment is not to be renewed under these provisions, the Division for Human Resources or an appropriate officer in the field should inform the staff member concerned accordingly, in writing, at least one month in advance of the non-renewal.

...

25. Fixed-term appointments: staff members require a reasonable amount of job security. Fixed-term appointments of staff members appointed under the 100 or 200 series of the Staff Rules should normally be renewed for two years at a time. [The footnote to this paragraph stated *inter alia*, that "[t]his only applies if UNFPA has taken a decision that an appointment should be renewed at all".]

26. The Director, [Division for Human Resources], or the manager at the UNFPA field duty station, as applicable, may determine that an appointment should be renewed for a shorter period of time if:

- this is in the interest of UNFPA;
- the funding arrangements or the budget underlying the post so requires (appointments should never be renewed beyond any period of time for which funding has been secured);
- departures from the standards of performance or conduct have occurred.

35. The Tribunal finds that the UNFPA Manual is of little assistance in the present matter. It is at best an internal instruction developed by UNFPA and, if its provisions conflict with the provisions of the contract of employment or the terms of appointment, it will not have the effect of unilaterally amending the terms thereof. If sec. 5.2 of the UNFPA Manual is to be interpreted such that the reasons for non-renewal shall never be disclosed, such interpretation would, in effect, mean that certain types of administrative decisions are exempt from any kind of review—either by the Administration itself or by the Dispute Tribunal.

36. The UNFPA Manual cannot have the effect of absolving the Respondent from the obligation to disclose the reasons for the contested decision, thus rendering the decision not reviewable and ousting the jurisdiction of the Tribunal. I note, in this respect, the following pronouncement of the ILOAT in Judgments No. 17, *In re Duberg* (1955); No. 18, *In re Leff* (1955); No. 19, *In re Wilcox* (1955); and No. 21, *In re Bernstein* (1955)—the four judgments cited and declared valid by the ICJ in its 1956 Advisory Opinion (quoted at para. 23 above):

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Accordingly, the complainant cannot claim any right to have his appointment renewed, and, so as not to impair the Director-General's authority, the Tribunal's power of review is limited.

Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, in regular form, whether the correct procedure has been followed, as regards its legality under the Organisation's own rules, whether the Administration's decision

will still be working after the expiry date or discussing the availability of the post. As the Dispute Tribunal stated in *Immed* UNDT/2010/161, an expectancy of renewal may also be created by countervailing circumstances, such as violation of due process, arbitrariness or other extraneous motivation on the part of the Administration (see also *Hepworth* UNDT/2010/193, as well as UN Administrative Tribunal Judgment No. 1192 *Mbarushimana* (2004)).

41.

decisions. Reasons must generally be disclosed at the time of the notification of the decision, and they also most certainly must be disclosed when requested by the staff member.

47. Further, reasons must be made available at the management evaluation stage (or, in the former system of justice administrative review stage). The purpose of administrative review and management evaluation is to “allow management the opportunity to rectify an erroneous, arbitrary or unfair decision” and to “give management a chance to correct an impr

III of UN Administrative Tribunal Judgment No. 1008, *Shasha'a* (2001), stating that “[t]he Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision”, in which case “the contract terminates automatically and without prior notice”, but “when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts”.) The Respondent submitted that the Dispute Tribunal should not disturb this long-standing and settled jurisprudence of the United Nations Administrative Tribunal.

51. Indeed, the United Nations Administrative Tribunal did not require reasons to be automatically given when a decision to renew a staff member’s contract was

may for good reason interfere with the exercise of administrative discretion.

52. The right of a staff member to know the reasons for a decision not to renew her or his appointment has been part of ILOAT's long-standing jurisprudence. The ILOAT, which was established in 1946 and exercises jurisdiction over disputes arising out of more than 50 international organisations, has described the right to know the reasons for a decision not to renew a staff member's appointment as "a general principle of international civil service". See ILOAT Judgment No. 675, *In re Pérez del Castillo* (1985) (stating at paras. 8 and 9 that "[t]here must be a good reason [for a decision not to renew] and the reason must be given" and that "[t]he failure to give a reason will in many cases lead to the conclusion either that the Director-General mistakenly thought that he had an arbitrary power to do as he liked or that his decision was in fact arbitrary or wrongly motivated"); Judgment No. 1154, *In re Bluske* (1992) (stating at para. 4 that "it is a general principle of international civil service that there must be a valid reason for any decision not to renew a fixed-term appointment and that the reason must be given to the staff member"); Judgment No. 1911, *In re Ansoorge (No. 3)* (2000); and Judgment No. 2499 (2006) (stating at para. 6 that "there must be a valid reason for any decision not to renew a fixed-term contract [which] must be given to the staff member, who must be told the true grounds for non-renewal"). I note the persuasive value of these pronouncements of the ILOAT.

53. The area of employment relations and the law pertaining thereto is dynamic and not static. Whilst it is recognised that fixed-term contracts can serve a useful purpose in many instances, and that management must have the prerogative to make certain decisions, the rule of law and due process must be followed. Labour is not a commodity and the Organisation is continuously working to effect transparency and accountability in the workplace. This was further affirmed by the General Assembly in its resolution 63/253, quoted above.

54. Finally, it is the duty of the Organisation to act in good faith and to respect the dignity of staff members. This duty requires that reasons be given particularly so that staff members may exercise their right to appeal and take whatever action may be necessary. A decision not to renew a contract is subject to the requirements of good faith and fair dealing, which are accepted as part of the contract of employment between the Organisation and its staff (see, e.g., *Jones* UNDT/2009/025, *Castelli* UNDT/2009/075, *Utkina* UNDT/2009/096, *Allen* UNDT/2010/009, *D'Hooge* UNDT/2010/044, *Sina* UNDT/2010/060, *Gaskins* UNDT/2010/119). These requirements imply that both parties will be placed on equal footing when it comes to appeals against decisions affecting their legitimate rights and that staff members will have a certain level of access to information necessary to protect their rights. Not disclosing the reasons for an administrative decision, including a decision not to renew a fixed-term contract, particularly when the affected staff member requests them, is an act in violation of the requirements of good faith and fair dealing. The Organisation must ensure that staff members have reasonable and effective means to contest administrative decisions.

55. Therefore, for the reasons stated above, the Tribunal finds that the Administration breached its obligation to

57. In light of the Tribunal's comments regarding the UNFPA Manual and in the circumstances of this case, the Tribunal finds that it does not follow with a sufficient degree of certainty that, were not for the unlawful decision, the Applicant's contract would have been renewed for two years. Both his previous extensions were less than "for two years at a time". The first extension received by the Applicant was for one year only and there is no evidence that he sought to contest it. The second extension, for six months, was given to the Applicant after his discussions with the Director of the Arab States Regional Office of UNFPA in July 2008 about whether his next extension would be for one or two years (see para. 7 above). Therefore, even in July 2008, the option of a further renewal for a period shorter than two years was being considered and the Applicant was aware of it. Nevertheless, as discussed at para. 27 above, the Applicant failed to make a timely request for administrative review with respect to the six-month extension. The Tribunal is persuaded, based on the circumstances of this case, including the past practice of extensions given to the Applicant, that the next renewal would have been for less than two years. The Tribunal notes that a further extension of six months beyond 2 April 2009 would have brought the total duration of contract extensions since its original expiration date of 2 October 2007 to exactly two years, and to one year from October 2008 (one of the two options apparently considered in July 2008). Therefore, the Tribunal considers that the appropriate remedy for the violation of the Applicant's rights and for any economic loss suffered as a result of the unlawful decision is compensation in the amount equivalent to six months' net basic salary and entitlements, if any (see also *Sehgal*, para. XI). The Applicant shall be paid interest on these payments in accordance with *Warren* 2010-UNAT-059, from the date that they became due (see *Iannelli* 2010-UNAT-093, para. 18, *Fayek* UNDT/2010/194, para. 22, and *Auddin* UNDT/2010/200, para. 39).

58. The Applicant has requested compensation for the emotional distress and injury suffered by him as a result of the Respondent's failure to disclose the reasons

61. To compensate the Applicant for the emotional distress suffered, the Respondent shall pay him USD8,000. This sum ~~to be~~ is paid within 60 days from the date the Judgment becomes executable, ~~and~~ which period interest at the US Prime Rate applicable as at that date shall ~~apply~~ if the 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 Ebrahim-Carstens

Dated this 10th day of February 2011

Entered in the Register on this 10th day of February 2011

(Signed)

Santiago Villalpando, Registrar, New York