
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/022

Judgment No.: UNDT/2012/068

Date: 10 May 2012

Original: English

Nairobi

Registrar: Jean-Pelé Fomété

PIRNEA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Seth Levine OSLA

Counsel for Respondent:
Thomas Elftmann, UNDP

beyond its expiry date of 26 February 2011. UNDSS did not disclose a reason for this decision as it held the view that there was no legal obligation under the terms of the contract to provide a reason for the nonrenewal of the contract.

23. Further, the Applicant points to Judgment No. UNDT/2011/059 regarding the Applicant's Suspension of Action application in which the Tribunal found that the decision of UNDSS not to disclose the reasons for the contested decision was not unlawful.

24. Finally, the Respondent submits that the Applicant's claim for DSA is not receivable as the Applicant did not request a management evaluation thereof.

Consideration

25. In determining this Application, the main issues for examination are:

- a. Whether the Respondent should have given the Applicant reasons for the nonrenewal of his contract
- b. Whether the nonrenewal of the Applicant's fixed-term contract was based on extraneous factors
- c. Whether the Applicant's claims for DSA is receivable.

Whether the Respondent should have given the Applicant reasons for the nonrenewal of his contract

26. The Respondent's contention is that as stipulated in staff rule 4.13(c), fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of length of service. The Respondent therefore states that no explanation is needed for the nonrenewal of said appointments.

Administration itself, and, ultimately, the Tribunal, would be precluded from or, at the very least, seriously hampered in trying to examine and verify the propriety of the decision, made in response to the staff member's request, not to extend his or her contract beyond its expiration date."³

28. Obdeijn was an applicant who contested the decision not to extend his fixed-term contract beyond its expiration date, alleging *inter alia*, that the decision was improper because it was made by extraneous factors.⁴ The respondent in Obdeijn refused to disclose the reasons for the contested decision to 1 T ttes9(not)-18-37(r)

terminated reasons must be given to the concerned staff member so that he or she is in a position to take any actions as he or she deems fit.”⁷

31. In this case, the reasons given by the Administration for the nonrenewal of the Applicant’s contract is that he could no longer perform his professional duties at his former duty station in Hargeisa, Somalia. This reasoning was based on the alleged sexual assault incident, which, according to the Administration, put the Applicant’s safety in high risk and thus he had to be evacuated to Nairobi. Therefore, according to the Administration, the Applicant could not carry out his duties from another duty station, as he was needed to be physically present in Hargeisa, Somalia. The Respondent goes on to state that the UNDSS Office had only 10 FSCOs operating at different duty stations in Somalia when the Applicant’s contract expired, instead of 11 FSCOs as reflected in the UNDSS Staffing Table.⁹

32. It is clear to the Tribunal that the main reason given by the Respondent for the nonrenewal of the Applicant’s fixed-term appointment is the risk the Applicant would have been exposed to if he had remained in Somalia in view of the alleged sexual assault.

33. In the course of his testimony the Applicant stated that he was having a shower with his room unlocked when two females walked in and left. He

35. The charge of sexual assault triggered

investigation was closed, leading him to think, rightly so, that the renewal of his contract was based on these allegations.

40. The Respondent on the other hand states that it exercised its discretion in the Applicant's case and the allegations did not influence the contested decision. In his closing submission, the Respondent proffers that since the Applicant did not introduce this assertion in his request for management evaluation, but only in his Application, the Applicant's contention that there was a connection between the alleged misconduct and the non-renewal of his contract lacks credibility and is inadmissible in the context of these proceedings.¹¹

41. At the time of requesting the management evaluation, on 16 February 2011, the Applicant had not been informed whether the investigation in Ivory Coast was concluded. During the court hearing, the Applicant stated that he was told by the Administration in 2010 that the investigation would take longer than anticipated. Notwithstanding, the Respondent did confirm that indeed, the investigation was actually closed in 2009. In fact in October 2010, the Applicant's contract was extended to February 2011, but he was not notified that the investigation into the racial and improper behaviour allegations had been closed.

42. The court heard the issue of the alleged racist and improper behaviour. Both parties agreed that there was insufficient evidence to substantiate these allegations, and the matter was closed. The issue then becomes whether the Administration's failure to tell the Applicant that the investigation was closed in a timely manner leads to bias, which resulted in the non-renewal of his fixed term contract.

43. The Applicant proffered at the court hearing that there was tension between him and the CSA. The Applicant stated that he encountered numerous operation difficulties while serving as a FSCO in Ivory Coast leading to a lot of conflict between him and the CSA whenever he requested proper support. The Respondent did not refute this. Further, when the Applicant was posted to

¹¹ Respondent's Closing Submission, para. 33.

used, the Tribunal considers that legitimately the entitlements to which the Applicant claims were due to him also encompass the DSA entitlements.

Conclusion

52. The Tribunal finds ~~therefo~~ that the Applicant's contract was not renewed and no valid reason was proffered for this action mainly because ~~substantiated~~ reason existed insofar as the Somalia incident is concerned. Even if the Respondent falls back on the principle that a ~~fixed~~ contract that reaches expiry lapses automatically, he must fail because in such a case reasons need to be given.

53. The Tribunal also finds that ~~the~~ decision to transfer the Applicant in a rather hurried way from Ivory Coast to Somalia was motivated ~~by~~ allegations of racist and improper behaviour on his part. These allegations were never proven.

54. In the light of the above, the Tribunal awards the Applicant two years' net base salary for the ~~non~~renewal of his contract ~~and~~ for the treatment meted ~~out~~ to him following the allegations of racist behaviour.

55. The Tribunal finds it strange ~~and~~ fails to understand why no action was taken following the email that the CSA, Mr. Innocent Dassanou, sent ~~to~~ a number of colleagues in Ivory Coast where he writes that ~~the~~ Applicant left Ivory Coast like a thief and that he ~~did~~ not even deem it fit to say goodbye ~~to~~ him except for a terse

IT IS ORDERED THAT:

56. The Applicant is awarded two years' net base salary. Pursuant to article 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total 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.

57. The Applicant is entitled to his DSA entitlement for the period he was posted in Nairobi, Kenya when his duty station was in Hargeisa, Somalia.

58. In Kamunyi UNDT/2010/214 regarding unlawful, careless or negligent actions of UN officials, Shaw J. stated that it is clear that the actions of several UN officials were unlawful, careless or negligent. It is for the Secretary-General to take any disciplinary or other steps in the light of the finding in this judgment and in the interests of the maintenance of the Rule of Law in the UN.¹⁶ The learned Judge then ruled that it was for the Secretary-General to take any disciplinary or other steps in the interest of the maintenance of the Rule of Law in the UN. The Tribunal will follow that ruling and leave it to the Secretary-General pursuant to article 10.8 of the Statute of the Tribunal, to take any