



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/067

Judgment No.: UNDT/2013/102

Date: 12 August 2013

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

GALBRAITH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Lyndon Barnes, Osler, Hoskin & Harcourt LLP

Brian Gorlick, OSLA

Anita Saran, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Deputy Special Representative of the Secretary-General (“DSRSG”) for the United Nations Assistance Mission in Afghanistan (“UNAMA”) employed at the Assistant Secretary-General (“ASG”) level, contests the administrative decision to terminate his fixed-term contract in “the interest of the Organization” before its expiry.

Procedural history

2. On 24 April 2010, the Applicant filed the application. On 26 April 2010, the Registry acknowledged its receipt and served it on the Respondent, who was given until 24 May 2010 to provide his reply. The Respondent requested a time extension, and after some correspondence, filed and served his reply on 28 June 2010.

3. Following a case management hearing held on 5 October 2010 by the Judge assigned to the case at the time (Judge Kaman), the Tribunal recorded in Order No. 270 (NY/2010) of 8 October 2010 the parties agreement that the contested decision before the Tribunal is

[t]he 12 October 2009 decision of the Secretary-General to terminate the applicant’s appointment as Assistant Secretary-General (ASG) pursuant to a termination clause in the applicant’s appointment letter stating that the “appointment is ... subject to termination in the interest of the Organization, as determined by the Secretary-General”.

4. Order No. 270 recorded the par

5. The respondent's contentions:

a. Pursuant to the letter of appointment, the Secretary-General was empowered to act on behalf of the Organization in terminating the applicant's contract of employment;

b. The Secretary-General properly exercised his discretion in making the decision to terminate the applicant's appointment;

c. The Secretary-General did not delegate any authority

11. Two different letters of appointment were adduced in evidence by the parties, one dated 28 April 2009 and the other 20 July 2009. However, in their jointly signed response to Order No. 156 (NY/2012), the parties agreed that the version dated 20 July 2009 is the letter of appointment that regulated the Applicant's employment as DSRSG for UNAMA and that this letter of appointment was regulated by the Staff Regulations and Rules that came into effect on 1 July 2009. Explicitly from this letter of appointment follows that:

- a. The Applicant's appointment was a fixed-term appointment su[0-lt on0cn.15;Allows thati(

of polling centers again. And, in what the Applicant felt was unprofessional behaviour, the SRSG criticized him behind his back to Afghan Ministers and

...

... On his return from Istanbul, the Applicant went to see the SRSG to report on [the Speci

bring a shared sense of purpose, greater focus, and renewed vigor to the political work of this mission, all of which would be to the benefit of our mission in Afghanistan, the United Nations, and [the SRSG's] standing as head of mission. These accusations are not just personally offensive but also impede the important work we have ahead of us.

14. The event's described by the Applicant's continues as follow:

... The Applicant felt it was his job to give the SRSG his candid assessment and to provide advice that reflected his best judgment as well as that of the PAD. PAD spent weeks debating the situation and the views the Applicant presented to the SRSG were PAD's unanimous judgment and recommen

falsely asserting that the SRSG had ordered the Applicant out of Afghanistan because the Applicant wanted to do something about electoral fraud. [The article stated;

The relationship between [the SRSG] and [the Applicant] has completely broken down,” said a diplomat in Kabul. “[The Applicant] has left the country. The official line is that he’s on a three-week mission to New York. But [the SRSG] just turned round to [the Applicant] and said, ‘I want you out’.

[The SRSG] and [the Applicant] insist that they are old friends from serving in the Balkans. Indeed, [the SRSG] introduced [the Applicant] to the Norwegian anthropologist who became his wife. But [the SRSG] is said to have lobbied behind

“One reason I was so concerned about the fraud in this election is that it inevitably raised a concer

17. In a private letter dated 28 September 2009 from the Applicant to the Secretary-General, the Applicant stated, *inter alia*:

It is incredible to [the Applicant] that the United Nations would dismiss a senior official for having taken seriously the issue of electoral fraud in a United Nations-supported and funded election, but this is precisely what [the Secretary-General's] senior advisors are recommending [him] to do in Afghanistan.

As [the Secretary-General knows], [the SRSG] and [the Applicant] have had prolonged disagreement as to whether UNAMA should take action to prevent or mitigate fraud in the Afghanistan elections. Given our mandate to support "free, fair, and transparent" elections, [the Applicant] felt UNAMA could not overlook the fraud without compromising our neutrality and becoming complicit in a cover-up. For a long time after the elections, [the SRSG] denied that significant fraud had taken place, even going to the extreme of ordering [United Nations] staff not to discuss the matter. And, at critical stages in the process, he blocked [the Applicant] and other UNAMA professional staff from taking effective action that might have limited the fraud or enabled the Afghan electoral institutions to address it more effectively.

[The SRSG's] approach has compromised UNAMA's reputation for neutrality, at least with the Afghan opposition.

[The SRSG] has many strengths as SRSG. He is articulate, effective in his relations with the international community and enjoys warm relations with the top level of the Afghan Government (but not the opposition). He has an admirable humanitarian streak as evidenced by his persistence in the case of which you are aware. He is, however, a terrible manager as he himself admits.

[The SRSG] is secretive, deeply mistrustful of the staff, arbitrary in his decision-making and rarely follows through. Aside from his special assistants (and on some occasions [the Applicant]), almost no one in the mission knows what he is doing. The staff, who include professionals with many years experience in Afghanistan, do not feel involved on key issues and often have no idea what constitutes [the SRSG's] policy line.

[The Applicant] thank[s] [the Secretary-General] for the trust [he] placed in [him] by choosing [him] as [his] Deputy Special Representative in Afghanistan. [The Applicant] would like to continue the important work that [he] ha[s] begun there but [he] fully

respect [the Secretary-General's] responsibility to make decisions that [he] feel[s] are in the best interests of the United Nations.

18. In the press statement of 30 September 2009, the Secretary-General's spokesperson stated that:

The Secretary-General has decided to recall [the Applicant] from Afghanistan and to end his appointment as the Deputy Special Representative of the Secretary-General for the United Nations Assistance Mission in Afghanistan (UNAMA).

He expresses his thanks to [the Applicant] for his hard work and professional dedication. The Secretary-General recognizes [the Applicant's] important contributions to the work of the mission and throughout his distinguished career as an international civil servant. The Secretary-General has made this decision in the best interest of the mission.

He reaffirms his full support for his Special Representative, [the SRSG].

19. The Respondent's separate account of the same events is set out below.

... On or around 28 August 2009, the Applicant and the SRSG had a meeting during which the SRSG raised issues concerning divisions and disputes with the mission, disparaging remarks that the Applicant had allegedly made about the SRSG and the problem of confidential information being leaked to the press. The SRSG also objected to the Applicant's raising of the issue of constitutional change (that is, the replacement of the Afghan president ...) with ... [his] main rival in the National Elections). A *New York Times* article later cited Western diplomats as confirming that the Applicant had also raised the issue of [the incumbent President's] removal with the American Embassy in Kabul. On 30 August 2009, the Applicant sent the SRSG a letter responding to the issues raised at the meeting.

... On or around 2 September 2009, the Applicant met with the Chief Electoral Officer of [the IEC]. Remarks he made to the IEC were not well received. Following this meeting, [the incumbent President] Government complained that UNAMA, and the Applicant personally, had interfered in the Afghanistan election process. Further, the Afghanistan Permanent Representative threatened to have the Applicant expelled from the country.

... On 8 October 2009, UNAMA issued a statement refuting the Applicant's accusations against the mission. On 11 October 2009, the SRSG, accompanied by members of the diplomatic community, held a press conference during which he rebutted the Applicant's accusations against UNAMA.

... In a letter dated 12 October 2009, the Assistant Secretary General for Human Resources Management notified the Applicant that the Secretary-General had decided to terminate the Applicant's appointment in accordance with the terms of his appointment.

Considerations

Receivability

20. In accordance with O'Neill UNDT/2010/203 the Tribunal must verify *ex officio* the receivability of an application.

21. Articles 2 and 3 and 8 of the Dispute Tribunal's Statute establish the conditions that an application has to meet to be considered receivable by the Tribunal.

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

22. In the present case, the Applicant, a former staff member, is appealing the administrative decision to terminate his fixed-term contract in “the interest of the Organization”.

23. On 12 October 2009, the Applicant received a letter from the ASG/OHRM which confirmed the Secretary’s General decision of 30 September 2009 to terminate his fixed-term contract in the interest of the Organization as of the close of business on 12 October 2009. The Applicant was also informed that the Secretary-General had authorized, in lieu of the notice period, payment of compensation equivalent to three months’ salary, including the applicable post-adjustment and allowances.

24. The Applicant requested a management evaluation of this decision on 10 December 2009. On 3 February 2010, the Management Evaluation Unit (“MEU”) informed the Applicant, via email, that “any recourse that he may wish to pursue may be addressed to the United Nations Dispute Tribunal in accordance with provisional Staff Rule 11.4”.

25. The present application was filed on 23 April 2010, within 90 calendar days of the date on which the MEU response, even though none was provided, was due.

26. The application meets all of the requirements of art. 8 of the Dispute Tribunal’s Statute and is receivable.

Issues

27. In accordance with the parties’ submissions, the issues that the Tribunal has to determine are:

a.

appointment is also subject to termination in the interest of the Organization, as determined by the Secretary-General, in which case will be given three months' written notice".

38. In the present case, the Applicant, by signing his letter of appointment, agreed that his appointment could, in addition to the reasons for termination specifically identified by staff regulation 9.3,

- c. retirement (staff regulation 9.2 and staff rules 9.1(iv) and 9.5).

II) Separation by parties' agreement prior to the expiration of the contract (staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi))

42. According with the general principle of legal symmetry—*mutuusconsensus*, ~~mutuus disensus~~the labor contract, which is a consensual contract, can be terminated by agreement between the parties.

43. All types of appointments (temporary, fixed-term or continuing) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that this action is not contested by the staff member.

44. A termination based on this reason can only take place if the action is not contested by the staff member. In other words such an action can only be legally implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally the offer then is an agreed termination and the parties can come to an agreement orally or in writing.

45. In *Jemiai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.

III) Separation initiated by the staff member

46. There are two types of separation which may be initiated by a staff member:

- a. Resignation (staff regulation 9.1 and staff rule 9.2); and
- b. Abandonment of the post (staff rule 9.3).

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Demotion with deferment, for a specified period, of eligibility for consider

(b) A termination without the consent of the staff member;

(c) A direct result of the Secretary-General's unilateral opinion that the termination is in the interest of the good administration of the Organization; the Secretary-General's authority to determine the interest of good administration of the Organization and his discretionary power to terminate a staff member's contract are provided for by the Staff Regulations and Staff Rules.

d. This termination is to be interpreted principally as a change or termination of a mandate.

e. The written notice is three months.

48. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c) respectively when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text this reason itself can be interpreted in two ways change of the mandate or termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the UN mandate and/or the availability of funds.

49. The Tribunal notes that the Applicant's contract mentions staff regulation 9.3, but this reason was not applicable *ab initio* because his contract was a fixed-term appointment, and this clause refers only to continuing appointments. In the Applicant's letter of appointment a contractual clause similar to this reason was

56. The relation of trust and cooperation between the SRSG and the DSRSG for political affairs began to become disruptive because the SRSG assumed that the Applicant was the source of an article published in *The Guardian* on 24 August 2009 about electoral fraud in Afghanistan and that he had also criticized the SRSG at a meeting with the IEC. The Applicant sent a letter to the SRSG on 30 August 2009 concerning accusations of disloyalty and he later proposed, and the SRSG agreed, that it would be better if he left Kabul for a week or two.

57. The Applicant was asked to join the SRSG's meetings in New York and Washington scheduled for the end of September and he left Kabul on 12 September 2009. Three days later, *The Times of London* published an article regarding the Applicant's removal in "Afghanistan Poll Crash". On 20 September 2009 the Applicant provided statements to *Burlington Free Press* in regard to his disagreement with the SRSG.

58. From the parties' submissions it results that the Applicant was informed orally on 24 September 2009 by the USG that he was being recalled from his position as DSRSG and the explanation provided was that the mission must only have one policy line. The Applicant agreed following which, on a telephone call on 26 September 2009, the USG proposed that the Applicant's recall be explained publicly "as a disagreement on how to handle electoral fraud", which was already made public on 15 and 20 September 2009.

59. A recall is defined (*Webster's New World Law Dictionary*) as the removal of a public official from the office to prematurely end his or her term of service. Consequently, as can be seen from the content of the first paragraph of his letter to the Secretary-General dated 28 September 2009, the Applicant understood exactly that in light of the recall his contract was being terminated.

60. After expressing his agreement, but before the termination decision based on the same reason as the recall—in the interest of the mission—was officially

announced and implemented, the Applicant stated that he realized that the United

70. The Secretary-General acted in respect of this principle and his intervention was necessary in order to avoid any negative impact of the disagreement between the SRSG and the Applicant upon UNAMA's mandate at a very important time and consequently upon the relations between the mission, the Afghani government and the international community, so he did not abuse his discretionary power.

71. In the 30 September 2009 statement it was mentioned that the Secretary-General "expresse[s] his thanks to [the Applicant] for his hard work and professional dedication and recognize[d] his important contributions to the work of the mission and through his distinguished career as an international civil servant".

72. It results from this statement that the Secretary-General declared that the Applicant, who has a distinguished international career, acted with professionalism, dedication and his contributions to UNAMA were important, so the Applicant's career and reputation were not affected by the decision.

73. In his 29 June 2010 reply, the Respondent reaffirmed that the reason to terminate the Applicant's contract was the one cited in the 12 October 2009 letter, namely that it was "in the interest of the Organization as determined by the Secretary-General" and this decision was not disciplinary in nature.

74. There was no mention in the public statement issued by the spokesperson for Secretary-General, and there is no evidence from which the Tribunal can conclude, that the Applicant's service was considered unsatisfactory or that his conduct was considered as being against the highest standards of integrity required by art. 101 of the Charter of the United Nations. The Applicant acted in compliance with his duties under the Charter of United Nations and Staff Regulations and Staff Rules as DSRSG for political affairs. He informed the SRSG and the Secretary-General about his conclusions related to the 2009 elections in Afghanistan and his important contributions to the work of the mission were recognized by the Secretary-General, so the termination was not a dismissal.

75. In order to respect the fundamental human rights proclaimed by arts. 3–28 of the Universal Declaration of Human Rights, arts. 6–28 of the International Covenant on Civil and Political Rights, arts. 6–12 and 15.1 of the International Covenant on Economic, Social and Cultural Rights, and arts. 2–18 of the European Convention of Human Rights, the Tribunal observes that an appointment cannot be terminated for reasons related to an employee’s sex, sexual orientation, genetic characteristics, nationality, age, race, color, ethnicity, religion, pregnancy, political opinion, social origin, disability, family situation or responsibility, or union activity or membership. These rights can be subject only to the limitations established by art. 29 of the Universal Declaration of Human Rights. Article 5 of the Termination of Employment Convention 158 (1982) additionally states that “filing a complaint or the participation in proceedings against an employer involving alleged violation of law and regulations or recourse to competent administrative authorities, pregnancy and absence from work during maternity leave” shall not constitute valid reasons for termination.

76. As determined previously, the termination was not based on any reason other than the one mentioned in the decision “in the interest of the Organization” or on reasons such as an employee’s gender, sexual orientation, genetic characteristics, nationality, age, race, color, ethnicity, religion, political opinion, social origin, disability, family situation or responsibility, union activity or membership, filing a complaint or participating in proceedings against an employer involving alleged violation of law and regulations or recourse to competent administrative authorities.

Were the Applicant’s ~~due~~ process rights respected?

77. The preamble of the Charter of the United Nations states that the United Nations was created to “establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained”.

UNAMA must have one policy line. The Applicant also agreed with the proposed public explanation—his disagreement with the SRSG on how to handle alleged electoral fraud, which was already public from 15 and 20 September 2009. The Tribunal considers that the Secretary-General informed, in a clear and sufficient manner, the Applicant of the reason and the explanation to recall and end his contract in the interest of the mission and he respected the requirement of art 4 from ILO Convention 158 and staff regulations and rules applicable in the present case.

84. As it was established in the Tribunal's jurisprudence, if the reason for terminating the contract was not initially presented to the staff member and/or not included in the termination decision—which is an administrative decision—and he/she contests the decision, the Respondent must provide it to the Tribunal and to the Applicant.

85. In *Pirnea* UNDT/2011/059, the Tribunal held that “the main purpose of giving reasons is to enable a staff member to take any action he/she deems appropriate. If no reasons are initially available but are subsequently brought to the knowledge of the staff member either in pleading or an order of the Tribunal or any other form of communications, both the Applicant and the Respondent are in presence of the reasons”.

86. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal stated that an administrative decision can not be deemed unlawful on the sole ground that the decision itself did not articulate any reasons for it but, like any other administrative decisions, it can be challenged as the Administration has the duty to act fairly, justly and transparently in dealing with its staff members. When a request for reasons is formulated as part of the formal review process, a failure of the Administration to respond to this request would seriously hamper or preclude the staff member from taking the most appropriate actions. The obligation for the Secretary-General to state the reasons behind an administrative decision do not stem from any staff regulation or staff rule, but are inherent to the Tribunal's power

to review the validity of such a decision as part of the functioning of the system of administration of justice.

87. Nevertheless, in *Shook* UNDT/2011/083, where the contested decision was

