



Introduction

1. The Applicant is a former staff member of the United Nations Children's Fund (UNICEF) where he served as a Procurement Manager at the P3 level. He later joined the United Nations Development Programme (UNDP) on secondment from UNICEF, on 1 July 2009, as Operations Manager (OM) at the P4 level in Khartoum, Sudan.

2. He worked with UNDP until 30 June 2012 when he was separated from service as a result of the non-extension of his secondment. On 28 August 2012, the Applicant filed an Application contesting the non-extension on the grounds that:

- a. The decision taken and conveyed to him by Mr. Ali Al-Za'tari, the UNDP Resident Representative (RR) in Khartoum, on

12. On 2 March 2012, Mr. Ali A Za'tari took up duties as the new Resident Representative (RR) for UNDP Sudan.

13. On 23 March 2012, Mr. Al-Za'tari went to the Applicant's office accompanied by four other officials. He handed the Applicant a letter placing him on administrative leave with immediate effect to pave way for investigations into allegations of misconduct. The Applicant was ordered out of the office by the RR and was escorted out by a Security Officer who had accompanied the RR.

14. On 25 March 2012, Mr. Ehab Burawi, who was then the Operation Manager for the UNDP Demobilization, Demilitarization and Reintegration (DDR) programme in Khartoum was asked to assume duties as ~~the~~ the UNDP CO in Khartoum on a temporary basis to fill the position that had been vacated by the Applicant who was then on administrative leave.

15. On 26 April 2012, Mr. Al Za'tari addressed ~~a~~ letter to the Applicant

17. Mr. Al-Za'tari wrote back to the Applicant on 2 May 2012 and reiterated his decision to extend the Applicant's contract by three months for purposes of the ongoing investigation and not one year. He stated:

At a time when UNDP finds itself with staff members who need placement or legitimately look at their career progression, I am not in a position to consider the extension of your secondment for one further year. This would result in the organization taking on yet additional liability.

18. On 3 and 4 May 2012 an exchange of emails ensued between the Applicant and Mr. Al-Za'tari. The Applicant insisted that he could not accept a three month extension of his secondment.

19. The Applicant requested management review of the decision of the RR on 14 May 2012 by writing to Ms. Helen Clark, Administrator of UNDP in New York.

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c. He knew about the aide memoire of 5 April 2012 prepared by Mr. Ghulam and confirmed that paragraphs 1, 2 and 6 ~~indicated~~ that Mr. Al-Zatari had

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leave and escorted out of the office by the Security Office on the instructions of the RR.

36. The timing of Mr. Al-Za'tari's decision suggests that it was heavily influenced by the commencement of the investigation for which he was placed on administrative leave. Should his placement on administrative leave pending investigation of the complaints against him be the real reason behind the decision against the renewal of his appointment, this would be illegal as it predetermines the outcome of the investigation and violates his rights to due process.

37. When his former post at UNDP was advertised, Arabic was included as a requirement yet no other position in the CO required Arabic and all the international staff members are Arabic speakers. This was specifically calculated

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54. The InterOrganization Agreement makes no mention of a duty to notify the releasing Organization six months in advance of expiration of secondment and UNDP is unaware of such a requirement by UNICEF.

55. The Respondent prayed the Tribunal reject the Application in its entirety.

Issues

56. The Tribunal has framed the legal issues arising out of this case as follows:

- a. Did the Applicant have a legitimate expectation of a ~~year~~ extension of his secondment contract?
- b. Is there a United Nations/UNDP rule or policy that stipulates that secondments automatically expire upon completion of the third year?
- c. Was there an official UNDP policy that staff on secondment to the agency would be removed in order to accommodate displaced UNDP staff or those needing career progression? Was the Applicant's post required to absorb displaced UNDP staff members?
- d. Was the Applicant treated with fairness, good faith and dignity by the new RR and UNDP? Was there discrimination or other improper motives on the part of the said RR? Is managerial discretion a ~~basis~~ for overturning a valid administrative decision?
- e. The role of management evaluation: is it that of advocate for the manager?

Considerations

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contract extensions. Thereafter, there was a temporary halt to the extensions because the new RR did not want the extension of a number of staff mainly of Asian origin. Eventually, all contracts were extended except that of the Applicant.

62. It was Mr. Ghulam's testimony also that the records of the 29 February 2012 meeting were shared with him and other attendees and kept in the electronic folder in the office for retrieval if necessary. In answer to a question by the Tribunal, the witness said that no subsequent management meeting took place to reverse the decisions taken on 29 February 2012.

63. When cross-examined, the witness said that the CO CMG meeting decided that all staff on extrabudgetary posts would be extended because the funding was stable and also that the Applicant was affected by that decision since he was on an extrabudgetary post. He said that an aide memoire, Annex 16 was made by him.

64. While making out the Respondent's case, the first witness for the Respondent, one Abusabeeb El Sadiq of the UNDP Sudan Office, said that at the times material to this Application he served in that office as head of the MSU. He told the Tribunal that he was in attendance and took notes at the meeting of the CO CMG held on 29 February 2012 at which the subject of contracts extension was discussed among other agenda items.

65. He said that a list of all the staff at the CO including international positions was provided by the HR and examined at the meeting. He took notes on action points to be followed up later. His notes or minutes of the said meeting was titled "Key Action Points Summary of Management Meeting, Wednesday 29 February 2012" and was tendered before the Tribunal in the Applicant's bundle as Annex 5. The Applicant and another staff member present at that meeting were among those affected by the decision to extend the contracts of staff of the CO.

66. Mr. Sayed Aqa was the UNDP Country Director at the times material to this case. He was called by the Tribunal. He testified that on 29 February 2012, the regular CMG meeting of the CO was held and chaired by him. There, staff contracts were reviewed and a decision taken that for positions where funds were available, they were all to be renewed for one year but for project staff whose

posts were dependent on funding, they would be dealt with case by case based on the availability of funding. Since the Applicant was part of the CO staff, it was decided that his contract would be extended ~~only~~ like the others

67. When ~~cross~~ examined by the Respondent Counsel, the witness said that staff members all over the country were worried at the time about their contracts and so the office tried to inform them in good time about their ~~contract~~ status. He said also that the process of ~~decision~~ making with regard to the early extension of staff contracts had started months before the decision was taken on 29 February 2012 to extend them. The CO CMG meeting decided that all international staff would be extended for one year and the Applicant knew of the decision.

Was the country office management group meeting of 29 February 2012 irregular? Did the said management group meeting lack the authority to take decisions on its agenda items?

68. Mr. Al-Za'tari told the Tribunal that he took the decision that the Applicant's contract would not be renewed. He testified that before his arrival, a meeting was held on 29 February 2012 which he learnt about later. When he saw the minutes, he found that they were ~~not~~ conclusive and that they were not professional in dealing with personnel issues. The witness said there were no specific decisions on specific individuals made in the 29 February meeting. He had reviewed the staffing table to ensure clarity. In ~~answer~~ question in cross examination, Mr. Al-Za'tari said he could not tell if the CO CMG ~~later~~ reversed any of its former decisions.

69. All the witnesses who were called by both parties and the Tribunal ~~excepting~~ Mr. Al-Za'tari, testified that they were ~~present~~ at the said CO CMG meeting when a decision was taken to extend the contracts of all the international staff members in the country office for one year including that of the Applicant. The four witnesses further corroborated each other when they ~~each~~ told the Tribunal that the Applicant was present at that meeting and knew of the decision to extend his contract and that of others. The decision was not conveyed to the Applicant personally.

70. Although Mr. Al-Za'tari said he queried the ~~CD~~ who had been the interim RR before he was appointed, as to why a CMG meeting would be held a day before he arrived in Sudan; it was not the Respondent's case that the CMG in taking decisions at its meeting of 29 February 2012 had acted wrongfully or irregularly. There is no suggestion on the part of the Respondent that ~~the~~ CMG had acted ultra vires or outside its powers in considering personnel issues and taking decisions on the extension of staff contracts. In fact, there is evidence before the Tribunal that all the ~~staff~~ contracts that the ~~said~~ CMG meeting of 29 February 2012 had decided to extend ~~were~~ eventually extended except that of the Applicant.

71. The Applicant's supervisor Mr. Ghulam, who at the times material to this

74. He also submitted that the fact that the Applicant was a participant at the meeting and was mentioned in the notes of other senior staff members present at the said meeting cannot constitute official notification or a promise to him that his secondment would be extended.

75. In other words, the Respondent's case on this issue is that although a decision was taken to extend the Applicant's secondment at the CMG meeting of 29 February 2012, that decision did not constitute a "official" or "firm commitment" to the Applicant with regards to his contract extension.

76. Counsel for the Respondent cited the decisions Ahmed, 2011-UNAT-153; and Abdallah, 2011-UNAT-138 in support of his argument that the Applicant had no expectancy of renewal. In both cases, the Appeals Tribunal held that

unless the Administration has made an 'express promise' ...that gives a staff member an expectancy that his or her appointment will be extended, or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the renewal of a staff member's appointment is not n,1 119.04 484.8 Tm [(h)9(a)17(d)-32()-5(n)9(o)-11(h)927(c)17.88 389.28 Tm [(i)22(s)

documents. Even those staff members who were not at the meeting could have access to the minutes if they so desired.

80. This Tribunal finds that the decision taken at a regular and proper CO CMG meeting to extend the contract of a staff member, which decision is embodied in open recorded minutes and accessible to staff members, carry far greater weight than any express promise that can be made to the said staff member about extending his contract. Kasmani UNDT/2012/049, the Tribunal referred with approval to the view of the Secretary General in a management evaluation review, that the promise made by Mr. Kasmani's supervisor created an expectancy of renewal of the Applicant's contract.

81. In the said Kasmani case, the Applicant's supervisor or FRO had issued him that his three month temporary contract was likely to be renewed since a regular VA had not yet been issued for the post. In the instant case, it was not just the case of promise by an FRO, but a decision taken by the Country Office's Core Management Group which only remained to be implemented. In fact, there

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93. Still in cross-examination, the witness who had earlier testified that UNDP Sudan lost donors and resources and had to scale down the DDR project; told the Tribunal that he could not remember how many DDR staff members he had absorbed into other positions in UNDP Sudan.

94. Clearly, no official policy exists in the United Nations or UNDP that favours any category of staff members over others. There is evidence that the Applicant had competed for the position of Operations Manager at the UNDP Sudan CO in 2009 and was selected. He opted to be seconded to UNDP since he was at the time a staff of UNICEF.

95. For the lawful duration of that secondment, the Applicant was not a "second class" staff member of the UNDP who could be shown the door whenever other staff of UNDP were displaced or needed career progression. The Tribunal agrees with the Applicant's argument that Mr. Al-Za'tari's position that a seconded staff member did not have the right of extension of his contract offended the stated policy of the United Nations to encourage mobility.

96. It is also not in any doubt in this case that at the time that the new WRR Al-Za'tari, unilaterally overturned the lawful decision of the CO CMG of the Sudan CO to extend the Applicant's secondment by one year, no staff of UNDP Sudan was displaced and needed placement.

97. The Tribunal finds it difficult to appreciate how a staff member, who has not attained the pensionable age, can refuse a renewal of his employment contract because another staff member needs career progression. Nowhere in the Organization's rules or practices does such a bizarre reason exist for the extension of a contract.

103. In considering the issue as to whether the Applicant was unfairly treated by the new RR, and by extension UNDP, it is clear that the question relates to the actions and decisions and a pattern of conduct towards the Applicant in the UNDP Sudan CO following the assumption of duty of the new RR, Mr Zattari, on 2 March 2012. At paragraph 32 of the Applicant's pleadings, it is stated that since the arrival of the new RR, there was a pattern of unfair treatment meted out to him. The Tribunal will examine these questions under four headings.

a. The Applicant's physical removal from the UNDP Country Office in Sudan

104. On 23 March 2012, exactly three weeks after the assumption of duty of the new RR, the Applicant was placed on administrative leave on the recommendation of the said RR as a result of a string of complaints made against the Applicant by some female staff members alleging sexual harassment in previous years. It is necessary at this juncture to note that neither the merits of the said administrative leave nor the merits of the investigation are the subject matter of this Application.

105. The Applicant gave testimony, however, as to the manner in which he was informed of the decision to place him on administrative leave and the treatment received thereafter. According to the Applicant, on 23 March 2012, Mr Zattari entered his office while he was in a meeting with colleagues from the Copenhagen office. The RR was accompanied by a number of officials which included an investigator, a security officer, the country director and another senior staff member.

106. The RR proceeded to order the staff members from the Copenhagen office to leave the Applicant's office and then asked the investigator that he brought with him to read the allegations made against the Applicant to him. The Applicant was immediately given a list of allegations and a letter placing him on administrative leave. After that, the RR asked the security officer to escort the Applicant out of the office, ordering that he must not be allowed to talk to anyone.

the action of making the Applicant a public spectacle by the unwarranted display conducted and supervised by Mr. Al-Za'tari breached the duty of confidentiality in investigations as the treatment of the Applicant in the circumstances was no better than being placed in handcuffs in public view. It did not speak well either for the humanitarian image of UNDP.

b. Unduly protracted investigation of the Applicant

112. The Applicant pleaded at paragraph 32 of his Application that in spite of being removed from his post and being placed on administrative leave for three months, the investigation against him was never finalized. The Respondent at paragraph 36 of his Reply stated that the refusal of the Applicant to accept a three month offer of the extension of his secondment with UNDP pending investigations prevented the process from being brought to completion. He did not explain how he came about that position.

113. However, Annex 9 of the Application shows emails between the Applicant and the investigator dated 19 May 2012 in which the Applicant gave information that he was travelling to his home country for a certain period and gave details as to how he could be reached and also stating that if he was needed earlier by the

115. Whereas the UNDP Legal Framework provides that to the extent possible, an investigation should be concluded within six months, this provision has not been complied with.

116. It is somehow

upon applying for the post, he was not even ~~int~~sted. He testified that in the three years he had worked as OM in the UNDP Sudan CO, he was ~~as~~ stating "exceeded performance expectations".

122. The RR in his testimony stated that he discussed the inclusion of Arabic in the VA with the then Country ~~Director~~ Mr. Aqa and the Deputy Country Director/Director of Operations Mr. Ghulam who was also ~~Applicant's~~ FRO. He said that Arabic is not required for the post of Director of Operations because according to him, a sizeable part of the ~~Operational~~ Manager's functions involved dealing with the Foreign Affairs office in Sudan ~~by~~ adding Arabic in letters to the Government, there was greater clarity instead of general statements.

123. Mr. Aqa stated that he was never consulted by the RR in making Arabic a requirement for the post of Operations Manager in the new VA that was published. He said he opposed the VA and expressed the view that many candidates would be excluded especially female candidates. He said he also objected because Arabic was not required ~~in any~~ other position in the ~~CO~~.

124. Mr. Aqa continued that ~~because~~ of the inclusion of Arabic language as a requirement, the ~~CO~~ had to seek a waiver as there were no female candidates. He also stated that he took no part in the recruitment of the new ~~Operational~~ Manager Mr. Burawi, as the RR made it clear that all international posts would be filled by him alone.

125. Mr. Ghulam for his part also denied Mr. ~~Za'tari's~~ claim that he had consulted him when he changed the job description for the post of OM ~~to~~ include knowledge of Arabic. The witness told the Tribunal that in his view, fluency in Arabic was not a requirement for the job as the office had existed for a long time and Arabic had never been a requirement. He said he sent his objections on the issue to ~~the~~ RR but was overruled.

126. The entire recruitment, he said, was handled by the RR and HR at the CO. According to him, the RR had made it clear that he did not want any consultation and that he would do things in his own way. The RR also said he was mandated

by top management to change things and so he took decisions alone. The RR, the witness said, marginalized supervisors and dealt with staff directly.

127.

was formerly encumbered by the Applicant, was done in bad faith and targeted at preventing the Applicant from competing for the said post.

132. Mr. Al-Za'tari had testified that he took the decision not to extend the Applicant's secondment and that the said Applicant was "not a UNDP staff member per se." The CDMr Aqa, also told the Tribunal that Mr. Al-Za'tari had told him that he did not want the Applicant in the CO irrespective of the outcome of the investigation against him.

133. Mr. Aqa also confirmed that the contents of Mr. Ghulam's aide memoire indeed reflected what Mr. Al-Za'tari told him. The said aide memoire material contents in spite of being shared with the Respondent ahead of the Tribunal's hearing of this case, may remain unrebutted.

134. The Respondent's Counsel had submitted that Mr. Al-Za'tari's decision to overturn the earlier decision of the CO CMC deny the Applicant an extension of his secondment for one year was a valid exercise of managerial discretion and that UNDP is at liberty to decide whether or not a secondment should continue.

The place of managerial discretion

135. On the issue of managerial discretion, it was held in Kasmari² that "unfettered discretion is inimical to the rule of law." Also in the case of Contreras³, this Tribunal while examining the meaning and limits of managerial discretion had this to say:

Discretion while being the power or right to act according to one's judgment, by its nature involves the ability to decide responsibly. It is about being wise and careful in exercising a power. In public administration, both power and discretion must be used judiciously. The administrator does not exercise power for its sake or other extraneous reasons but only in furtherance of the institution's interest.

136. The prime questions here are (a) whether the RR had discretion to unilaterally overturn an administrative decision already taken by a competent

² UNDT/2009/017, at para. 9.5.2.2.

³ UNDT/2010/154, at para. 74.

146. Gauging from this paragraph alone, it becomes evident to the Tribunal, that the management evaluation was conducted with a total lack of independence, undue partiality and a bias towards justifying the contested actions of the concerned manager Mr. Al-Za'tari.

147. It is apparent that the management evaluation did simply reproduce the untrue reasons given by Mr. Al-Za'tari for his decision and argued a case for him. The DDR project has not ended even as this judgment is issued but was scaled down by 2013. Mr. Burawi, who was brought in to replace the Applicant, was not a displaced staff member, his position had not been abolished at the material time and Mr. Al-Za'tari even testified to this.

148. The Tribunal's jurisprudence is very clear that the reasons given for non renewal of a contract must be accurate. At the time that the Applicant was first told by the RR in a letter of 26 April 2012 that his secondment would not be extended, the reason given him was that UNDP "unregular circumstances" would not extend his secondment for a fourth year.

149. Following the Applicant's response that the CO CMG had decided earlier that his secondment be extended, the RR wrote to him that he could not be extended because UNDP had staff members in need of placement and career progression. The management evaluation did not objectively examine the issue of different reasons given by the RR on different occasions.

150. The UNDP management evaluation again ignored the earlier decision of the CO CMG to extend the Applicant's contract which was unilaterally overruled by the new RR and the implications of such an action. Rather, a defence of how reasonable it was for the RR to want to review sta

be no efforts made at ascertaining the truth of the happenings in ~~the~~ Khartoum office.

152. Interestingly, the arguments, explanations and conclusions employed by the management were copied almost in their entirety and pasted to become the Respondent's Reply to the Application.

153. It needs to be emphasized that those officers within the United Nations, who are tasked with con

Findings/Conclusions

155. The summary of the Tribunal's findings are as follows:

- a. The Country Office's Core Management Group meeting of 29 February 2012 decided that all international staff including the Applicant, would be extended for one year and the Applicant knew of the decision. The Applicant therefore, had a legitimate expectation of a ~~year~~ extension of his secondment contract.
- b. The decision taken at a regular and proper Country Office's Core Management Group meeting to extend the contract of a staff member, which decision is embodied in open recorded minutes and accessible to staff members, carries far greater weight than any 'express promise' that can be made to the said staff member about extending his contract.
- c. There is no automatic expiry of a secondment after this year within the United Nations Common System if the parties to the secondment are agreed an extension.
- d. At the time that Mr. AZa'tari unilaterally overturned the lawful decision of the Country Office's Core Management Group to extend the Applicant's secondment by one year, no staff of UNDP Sudan was displaced and needed placement. Nowhere in the Organization's rules or practices does such a bizarre reason exist to deny the extension of a contract.
- e. Placement on administrative leave is not a disciplinary action by itself nor does it constitute a finding of guilt. Every staff member is entitled to the basic human right to dignity especially in the work place. No manager, however highly placed, should breach a staff member's right to dignity in the workplace, especially when the staff member in question does not become unruly, noisy or constitute a nuisance by ordering a security officer in the full view of others to march him out of the work premises.

- f. The UNDP Legal Framework does not stipulate or imply in any way that staff to be placed on administrative leave be humiliated in public. The action of making the Applicant a public spectacle in the unwarranted display conducted and supervised by Mr. Al-Za'tari breached the duty of confidentiality in investigations as the treatment of the Applicant in the circumstances was no better than being placed in handcuffs in public view. It did not speak well either for the humanitarian image of the UNDP.
- g. The UNDP Legal Framework provides that to the extent possible, an investigation should be concluded within six months. This provision has not been complied with.
- h. Harm was done to the Applicant by placing him under unending investigations for allegations that amount to criminal conduct.
- i. The new requirement of knowledge of the Arabic language inserted by Mr. Al-Za'tari into the VA for the post of OM, which post was formerly encumbered by the Applicant, was done in bad faith and targeted at preventing the Applicant from competing for the said post.
- j. Mr. Al-Za'tari discriminated blatantly against the Applicant, sent him out of the workplace with unnecessary force and drama while unilaterally overruling the CMG's decision to extend his contract.
- k. The Applicant was not afforded the basic duty of fair treatment, good faith and the right to dignity in the workplace which every staff member is entitled.
- l. The management evaluation was conducted with a total lack of independence, undue partiality and a bias towards justifying the contested actions of Mr. Al-Za'tari. The management evaluation simply reproduced the untrue reasons given by Mr. Al-Za'tari for his evaluation.

m. Mr. Al-Za'tari displayed a lack of integrity in the process leading up to the non-renewal of the Applicant's appointment.

Judgment

156. In view of the foregoing, the Tribunal grants the following reliefs

a. The Applicant is entitled to nine months basic pay for the period from separation from service as a result of the unilateral decision of Mr. Al-Za'tari to overrule the earlier decision of the CO CMG to extend his secondment by one year

b. The Applicant is entitled to USD 6,000 as compensation for moral

(Signed)

Judge Nkemdilim Izako

Dated this 17th day of February 2014

Entered in the Register on this 17th day of February 2014

(Signed)

Abena KwakyeBerko, Acting Registrar, Nairobi