Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

JEAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former Administrative Assistant at the G-4 level in the Office of the Special Advisor on Africa .

shared with [the Applicant]

s not necessarily the same thing as a staff member receiving notification of a decision.

[24] We hold that

Procedural background

7. On 16 December 2014, the Applicant filed an application with the Dispute Tribunal. By Judgment No. UNDT/2016/044 dated 26 April 2016, the Tribunal dismissed the application as not recW*n4ivabl*n4

c. On separate occasions, the USG/OSAA told the Applicant that he did not intend to renew her fixed-term contract, but he did not explain why. The USG/OSAA also verbally informed the Applicant that, if she completed her performance evaluation under his supervision, he would give her a negative rating;

d. The Applicant was under such strain that she consulted the offices of the Office of the United Nations Ombudsman and Mediation Services and the staff counsellor seeking their advice and intervention. *Inter alia*, she asked the ombudsman to assist her to find a new position in DESA or elsewhere in the Secretariat in order to move her away from her supervisor;

e. Despite
environment, she completed her tasks and duties responsibly and to the best of her ability. She sought, and hoped to find, another position within the Organization before she was separated;
srisicity

f. On Monday, 25 August 2014, the Applicant met with the Director of OSAA, and enquired as to the decision regarding her contract. Her contract was due for renewal at the end of that month and the Applicant was concerned that that renewal would go smoothly. The Director of OSAA replied that everything was going well, that the DESA Executive Office had found the Applicant a post in DESA and that he would confirm with her the following day. That same day the Applicant called a senior Human Resources Adviser in the DESA

Adviser in the DESA Executive Office had ostensible authority, such that it was reasonable for the Applicant to rely upon them. The Applicant was conducting herself at all times in good faith. It was (and is) incumbent upon those persons, and the Administration, to do likewise;

v. In addition, the Dispute Tribunal found in *Kasmani* UNDT/2009/017 that temporary appointment were raised when his First Reporting Officer promised him that his contract was likely to be renewed. It was held in that case that the promise created a legitimate expectation of renewal;

w. The Appeals Tribunal found in *Ahmed* 2011-UNAT-153, unless the Administration has made an non-renewal -term appointment is not unlawful *A contrario*, non-renewal of a staff -term appointment is unlawful in the case where the Administration has made an appointment will be extended;

x. In the present case, it is undisputed that the Applicant joined the United Nations in September 2007 and that she was subsequently reassigned to OSAA in February 2008. It is also undisputed that the Applicant systematically renewed, last contract being a two-year fixed-term appointment from 1 September 2012 to 31 August 2014;

y. It is undisputed that the Applicant attended a number of meetings on 11, 12, 19, and 25 June 2014 concerning her employment in OSAA. During these meetings, the Applicant was systematically reassured that OSAA and DESA would assist her in applying for alternative employment in other departments at the G-4 or G-5 level (see para. 7 of *Jean* 2017-UNAT-743);

z. It is also undisputed, as found by the Appeals Tribunal, that the meetings held in June 2014 did not have the aim of notification of the

non-renewal of the Applicant intended to reas

reassign the Applicant

The Applicant has no right to placement outside of the competitive process

g. The Applicant has no right to placement outside of the competitive process. Section 4.3 of ST/AI/1998/9 (System for the classification of posts) only provides that staff members whose posts are classified above their

. The established procedures in ST/AI/2010/3 (Staff selection system)

30. The Respondent, on the other hand, submits that the decision not to renew the -term appointment was a lawful exercise of discretion in assessing the operational needs of the Organization, and to organize and restructure the work of the Organization accordingly. post was reclassified to fund a new position of Senior Staff Assistant at the G-6 level due to operational needs of the Organization. As former position no longer exists, it was not possible to renew her fixed-term appointment. The post was reclassified to the G-6 level with effect from 28 August 2013. The new G-6 level position of Senior Staff Assistant was advertised in Inspira [the online United Nations jobsite] in January 2014. Because of the -term appointment. Her former position at the G-4 level no longer existed.

31. As way of background, the Respondent explained that t was expanded to include the role of convener of the Inter-Departmental Task Force on African Affairs and the United Nations Secretariat monitoring mechanism to review . mandate led to an increase in the number of staff in the Office and increased high-level activity for the USG/OSAA. The Organization therefore identified a need to recruit a Senior Staff Assistant at the G-6 level to strengthen the front office of the USG/OSAA.

32. Although the record demonstrates that the Applicant was aware of the reclassification process, and that her position or post would be , the Applicant states that she was not given rational reasons for the non-renewal of her contract

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 [the Administrative Tribunal of the International Labour Organization 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

the official must be informed of that reason explicitly in a decision against which she or he can appeal. This principle also applies to the non-renewal of a fixed-term appointment which, under the staff regulations or by agreement between the parties, ends

37. The Applicant maintains the notice

(a)

the USG/OSAA had threatened to write negative comments in her performance evaluation, that he had threatened to adversely

-4 level to the G-6 level.

45. Any decision to reclassify and/or abolish a post must be based on objective grounds and its purpose should never be the removal of a staff member. Having reviewed the outcome of the investigation as presented in the letter of the ASG/OHRM, which does not appear to have been contested by the Applicant, it is clear that the USG/OSAA was reasonably perceived as an intimidating and abusive manager, with a harsh communication style that affected multiple staff members. Whilst it is the AA was abusive and threatening to multiple staff members, there is, however, no clear indication on the record that the Applicant was singled out, her post reclassified, and her contract not renewed due to the alleged actions of the USG/OSAA. nding regarding the moving of cubicles and that the reaction of the USG/OSAA was disproportionate, lacked moderation and was insensitive to the point of being hostile towards the Applicant, a staff member with known health concerns, is worrisome. The Tribunal is encouraged that the Secretary-General decided to take administrative action in relation to the USG/OSAA

The a manager would have been challenging and stressful, in the resultant hostile work environment, as evident from the assault at her desk in April 2014 from a colleague who apparently received a reprimand.

46. In light of the findings of the panel and the information before the Tribunal, there is insufficient evidence to establish a link between the USG/OSAA abusive management style and the decision to -4 level to the G-6 level. The Tribunal is therefore satisfied that the Applicant has not met her burden of proving that the contested decision was biased or was motivated by other improper purposes.

47. As an observation, the Tribunal notes that the outcome complaint against the USG/OSAA pursuant to ST/SGB/2008/5 dated 6 April 2016 was not disclosed to the Tribunal, until the Tribunal, following perusal of the previous filings prior to the remand from Appeals Tribunal, the transcription of proceedings before another Judge, and previous submissions, requested the said document pursuant to Order No. 246 (NY/2018) dated 13 December 2018.

48. It is difficult to understand why neither party disclosed this highly relevant evidence, especially in light of their duties of disclosure. It remained for the Tribunal to wade through the previous filings, the copious transcription of proceedings consisting of over 200 pages, and all the submissions on file, to properly identify the claims and arguments, with the corresponding evidence and then to pronounce on pertinent evidence such as the investigation report. Submissions filed by legal counsel should be well articulated, disclosing proper causes of action, clearly and concisely stating all material facts relied upon relating to the contested issue and identifying up-to-date evidence, with submissions on the said evidence. Lack of full and up-to-date disclosure delays the disposal of cases. However, the Tribunal is also appreciative of the complex and lengthy procedural history of this case, the lengthy transcription of two days of proceedings, and the fact that there have been several Counsel engaged in the conduct of this matter, particularly on behalf of the Applicant, who appears to have had no fewer than four different Counsel, one of whom was an external private Counsel who was abroad and unavailable for 6 months.

Whether the Applicant had a legitimate expectancy of renewal

49. The Applicant submits that she had a legitimate expectation of renewal of her

promise was made to renew her fixed-term appointment. On the contrary, the Applicant was repeatedly informed that her fixed-term appointment would not be renewed unless she was selected for another position.

51. Legitimate expectation may result in the creation of an enforceable legal right, although the application of the doctrine is subject to a number of qualifications (*Candusso* UNDT/2013/090). A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way, by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation, and the other party does so (*Checa-Meedan* UNDT/2012/009). Where a staff member claims that she had a legitimate expectation arising from a promise made by the Administration, such expectation must not be based on mere verbal assertions, but on a firm and express commitment made individually to the staff member by a competent authority of the Administration (*Abdalla* 2011-UNAT-138; *Ahmed* 2011-UNAT-153; *Igbinedion* 2014-UNAT-411; *Samuel Thambiah* UNDT/2012/185).

52. The Respondent contends that the 26 July 2012 clearly stated that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment in the Secretariat (see also staff rule 14.3(c)). The letter of appointment stated that the .

53. However, in the matter of *Obdeijn* UNDT/2011/032 (as affirmed in *Obdeijn* 2012-UNAT-201, with variation to compensation), at para. 40, the Tribunal stated:

> The practice of inserting disclaimers into fixed-term contracts to the effect that an employee has no expectation of renewal is not conclusive proof that the employee could not reasonably have expected his or her contract to be renewed [ ] What constitutes a reasonable expectation will be a question of fact in each particular case.

54. As the Dispute Tribunal stated in *Ahmed* UNDT/2010/161 (affirmed in *Ahmed* 2011-UNAT-153), an expectancy of renewal may also be created by countervailing

56. The Applicant submits that these reassignment promises were provided by senior-level United Nations officials whom she could not compel to document such assurances in writing. For the Tribunal to find otherwise, she contends, would be to accept the denials of the Executive Office and DESA without testing that evidence. In this regard, the Tribunal notes that the Applicant waived her right to a hearing as the parties agreed to a determination of this matter on the papers, and the Applicant filed no further documents or submissions following the receipt of the transcriptions of the previous proceedings.

57. Although the Tribunal finds that the sudden short notice given to the Applicant by way of the separation memo of 24 August 2014 may have created the expectation that she will be renewed as she had not heard to the contrary even a week before, the Tribunal finds that there is insufficient evidence that the Administration made a firm commitment or express promise to renew the Appl -term appointment such that a legitimate expectation was created in all the circumstances.

Whether the Administration made good faith efforts to find the Applicant an alternative suitable position and place her outside of the competitive selection process following the reclassification of the post

fixed-term or continuing appointment in accordance with the terms of the appointment on the grounds of abolition of posts or reduction of staff see staff rule 9.6(c)(ii).

60. The Respondent that t due to operational needs and was no longer existing, means, in effect, that post was abolished. Prior to and following the reclassification and eventual abolition of her G-4 position, the Respondent submits that the Applicant was provided with assistance in identifying and competing for other positions. That she was encouraged to apply and follow-up meetings were held with the Applicant in efforts to place her elsewhere. The Executive Officer of DESA also possibility of an agreed termination.

61. programmatic situation which led to the abolition of the G-4 level post to accommodate a G-6 position. Whilst the so-called memorandum of separation makes no reference to any reasons, , following which the possibility of an agreed termination was raised.

reiterates that even where the Administration may be under an obligation to make proper reasonable and good faith efforts to find alternative posts for displaced staff members, the latter are expected to apply for suitable available positions and obliged to fully cooperate and make good faith efforts in order for their applications to succeed. Even where a staff member shall be retained in preference, the latter must show readiness and interest by timely and completely applying for positions before any determination regarding suitability can be made (see *Fasanella* 2017-UNAT-765).

63. As regards the as a General Service staff member she did not receive consideration for suitable posts available within the parent organization duty station in terms of staff rule 9.6(f), the Applicant did not request the disclosure or discovery of any relevant information upon which any finding could be made if warranted.

64. In any event, the Tribunal notes that the Applicant eventually succeeded in securing a series of temporary appointments at the G-4 and G-5 level since her appointment with OSAA ended on 7 October 2014, and even secured a G-5 level appointment for some months up to December 2015. In the joint submission dated 9 February 2018, it is agreed that subsequent thereto the Applicant applied for and was reappointed to other positions within the Organization.

Was the Applicant given reasonable notice of non-renewal?

65. The Applicant states that she was not given reasonable notice of non-renewal. She submits received a notice of non-renewal on 26 August 2014, only five calendar days prior to the expiration of her contract. Furthermore, the issued guidelines on separation from service provide that it is best practice in the case of fixed-term appointments that staff members are provided 30-day notice. In this case, this best practice was not followed.

66. The Respondent asserts that the Secretary-General is not obliged to give notice of non-renewal of a fixed-term appointment, and that in any case, the Applicant