



Case No.: UNDT/NY/2009/046/  
JAB/2008/089

Judgment No.: UNDT/2010/107

Date: 9 June 2010

## **Introduction**

1. Following a competitive selection process, the applicant was employed by the UN on a six month 100-series contract of limited duration as a Procurement Supervisor at the G-7 level with the Procurement Unit of the Economic Commission for Latin America and the Caribbean (ECLAC). He had formerly undertaken similar functions in his employment in private enterprise but, it is fair to infer, had been using significantly different formal procedures. It is not, in substance, disputed that he was informed by the Chief of Section (CoS) during the selection process that he could expect that his contract would be renewed if his performance were adequate. He commenced work on 8 October 2007 but, on 8 March 2008, was informed that his contract would not be renewed. On 17 March, the CoS completed a short-term evaluation which noted the applicant's performance as inadequate. The applicant was informed of this evaluation on 26 March and challenged the appraisal. A rebuttal panel was convened to consider the performance evaluation and the applicant's contract was extended by one month to 10 May to enable the rebuttal process to be completed. On 6 May the rebuttal panel confirmed the overall evaluation (with some criticisms, however, about the management of the applicant's integration into the work of the Unit) and, on 10 May 2008, the applicant's contract was terminated.

2. The applicant does not seek to contest the performance evaluation per se but, in substance, submits that an appropriate evaluation proces



however, that he had not had time to do so. (Of course, he could not be and was not criticised for this.) The CoS emphasised that it was important that the applicant's understand and apply the manual. According to the CoS (and not disputed by the applicant) the applicant was also informed of the goals of the Unit in quite specific terms. These were stated in evidence but the details are immaterial; the applicant did not dispute that this information was provided to him. In substance, the goals required a change of focus from low value purchases to larger contracts and dealing with a number of non-compliant contracts. He was required to prepare a procurement plan with these goals in mind. This plan had already been basically drafted since the Unit had been working on the goals. Amongst other things, he was also required to supervise the six or so staff of the Unit and produce a weekly agenda in accordance with a draft which he was given. He was given a printed Powerpoint presentation which described the procedures and mandates of procurement and was taken quickly through it, referred to the procurement website (which also contained the procurement manual) and another website with examples of requests for proposals and bids. On the following day he was scheduled to be trained in the use of the integrated management system and other training was arranged for other databases, the details of which do not presently matter.

6. The CoS explained that there was not any formal training process available and she relied on former employees with supervision experience who had returned to the Unit following retirement and who were familiar with the procurement procedures and



knowing the manual was necessary to enable him to perform a number of other tasks but pointed out that his staff were also informing him of the procedures.

9. The CoS testified that in mid-February 2008, at which time she returned from annual leave to find the applicant had taken annual leave without leaving the Unit properly instructed, she started to form an opinion that the applicant's contract would not be renewed in April 2008, based on his poor work performance. She stated that her decision not to renew him was, however, not taken until 8 March 2008, when she wrote to the Office of Human Resources Management (OHRM) on the subject, and that the decision was based on "his unwillingness to learn, a lack of mastery of the subject matter, his failure to follow rules and a lack of managerial capacity". On 17 March 2007 the CoS, at the behest of OHRM completed the "Report on Short Term Staff", which dealt with a number of specific performance parameters. In respect of technical and professional competence, quality of work, quantity of work, initiative and responsibility, she gave the applicant a score of one out of a possible five; and, in respect of punctuality in attendance and personal relations with others, scores of three out five. His overall rating was the lowest of the available terms, namely "inadequate". Additional assessments were that he was unsuitable for supervisory work and, also, was not suitable for other work. She added the comment that the applicant was unwilling to learn, had not mastered the subject matter and not followed the UN rules and regulations. The rebuttal panel suggested that the assessment that he was not suitable for other work and the comments should be reviewed in light of their discussion of the difficulties faced by the applicant in his being integrated into the work

started with as a way of getting to understand the process and the electronic systems), his continuing inability to cope with the databases, failure to ensure that staff were informed of his work when he was absent and complaints by staff about his low output compared to theirs, implying that they were carrying an unfair burden of the work of the Unit. The procurement 0.031ey we4urevide-0.0003 Tc 0.028214 Td8.03 03Td(U)he tafhTJ0td8ee

that it was a significant factor in the delay. On his own account, he held a responsible position in a major private enterprise before his appointment to the UN and it is reasonable to infer that his eyesight had at that time not been a significant handicap for him, with no suggestion that it worsened. In the absence of any other explanation, the conclusion is virtually inevitable that the applicant simply did not organise his work or his affairs to enable him to complete this task in a timely way. The new edition had, I am persuaded, only relatively few changes but, even accepting that it had to be read in full, a familiarity with the previous edition should have made this task much easier. To take a month to read it reinforces my conclusion about the applicant's inability or disinclination to master the processes necessary to enable him to perform his functions. This gives some real support, as a matter of common sense, to the evidence of the former supervisor that she found him difficult to train and, at the end of several months, still needed support and is consistent with the opinion of the CoS that he was performing at a level significantly below that which was necessary for his responsibilities, an opinion based upon the extent to which the level of work achieved fell far short of what would usually be expected.

13. If the applicant's evidence were true, this would involve at least the reasonable likelihood that the CoS and the former supervisor were, for some unexplained reason, either sharing a similar and significant failure of recollection or had fabricated their evidence. Both of these possibilities seem to me to be very unlikely, especially given the existence of contemporary documents critical of the applicant's performance. It was submitted by counsel for the applicant that the CoS' evidence should be evaluated bearing in mind that she had had an interest in justifying her decisions and the former supervisor may have been under her influence. This, of course, is true but, on the other hand, the applicant also has an interest in the outcome of the case which may have influenced the accuracy of his evidence. Overall, such considerations are rarely useful. I prefer to rely on my own commonsense judgment of the witnesses, the objective facts, and the logic of events. The more likely explanation is that the applicant has reconstructed the events to explain what otherwise would seem to be an inexplicable failure to perform his job, a reconstruction that strikes me as inherently unconvincing.



I find it very hard to accept that he was indeed so inadequate as to need the extent of training which he claims was necessary, especially when it is apparent that several courses of self-help were so obviously avai

shortcomings, it was appropriate not to renew the applicant's contract. If this decision was reasonably open on the material available to her and was not affected by any significant extraneous or irrelevant matter, including bias, or the omission of a significantly relevant consideration, the making of any significant error of fact or law and, in the absence of patent error, was not such that no reasonable decision-maker would have made it, then it cannot be held to be made in breach of the contractual obligations of the Organization, even if the Tribunal would have made a different decision. It is not for the Tribunal to substitute its judgment for the reasonably open judgment of the responsible official or officials that has complied with the proprieties of decision-making. Aside from strictly legal considerations, it will almost inevitably be the case that the Tribunal will lack the expertise to enable it to be confident that its judgment is the superior. I accept that the CoS conscientiously believed, at least, that the training and support offered to the applicant were adequate to enable him to perform to a sufficient – if not necessarily ideal level – and that her opinion that that his performance failings were such as not to justify the renewal of his contract was not so plainly unreasonable or manifestly unjust as to render that decision a breach of the applicant's entitlements.

15. Given that the CoS' judgment was that the applicant's performance was significantly short of that which was required, the question arises whether she should have done more to bring the extent of his shortcomings to his attention and instituted some training that may have improved the situation. The CoS had informed the applicant about particular issues, such as those concerning his not reading the manual, the insufficient number of contracts finalised, the inadequacy of the draft procurement plan and ignorance of current status of the contracts in the Unit. He was being assisted by the former supervisor, who was plainly competent to do so. The applicant's general complaints about the lack of direction or help are unpersuasive. I believe that he was well aware that his performance was a great deal less than optimal but was unable to take any effective action, for whatever reason, to remedy the situation. In the context of a busy Unit and the overall responsibilities of the CoS, I am satisfied that sufficient

was done both to bring the situation to the applicant's attention and to attempt to help him to correct it.

16. Since it must follow that it was reasonable for the CoS to have concluded that the applicant's contract should not be renewed, it is strictly unnecessary to deal with the issue of formal evaluation. However, having regard to the evidence led by both parties on this issue, it seems to me that I should deal with it in fairness to them.

### **The evaluation of the applicant's performance**

17. A formal, comprehensive performance evaluation scheme is promulgated in ST/AI/2002/3. Sec 1 applies its requirements compulsorily to staff employed for terms of one year or more (with irrelevant exceptions) and as a matter of discretion to staff on contracts for lesser terms, such as the applicant, "where appropriate, taking into consideration the nature and duration of the functions and the supervisory structure in place in the work unit". The CoS testified to the effect that, at or around his commencement, when (as I have mentioned) the applicant was informed of the nature of the work he would be required to do, and his goals, he was also told that renewal of his contract would depend on a satisfactory performance appraisal. I infer, from the initial assurances about extension, that the CoS anticipated effective performance and consequential renewal of the applicant's contract, with the result that, in due course, the scheme provided in ST/AI/2002/3 would be initiated to appraise his work. The actual trigger for doing so appears to be the opinion of the CoS, by November 2007, that the applicant needed help to put together the instructions and information about criteria and goals about which he had been told; she testified that she thought the ePAS process would facilitate this process, although strictly speaking it was only *required* to be undertaken by staff with contracts for one year or more. Accordingly, she requested him to initiate the procedure and explained that he needed to approach the human resources section for the necessary information and that the former supervisor would help him to prepare the necessary documents. When she asked him about it in December, he said he had not taken the matter up because human resources had not

provided him with any training. She explained that training was unnecessary and that the former supervisor would help him. She requested the former supervisor to provide the applicant with sample documents in order that he could develop an individual work plan. On 28 December 2007 the former supervisor sent the applicant an email attaching a note which included a description of the required goals and competencies that he would need to issue his ePAS. The email stated that the note reflected the work required of a senior procurement officer, which was in large part the same as that of a procurement supervisor. The three-page note contained a comprehensive description of the work, competencies and goals of a senior procurement officer together with a summary of the relevant supervision work requirements. The applicant does not appear to have raised any queries in respect of this email or the note. He testified, however, that he thought it was merely background information and that a subsequent meeting would be called by the CoS to discuss the content of the email, in order for a detailed work plan to be developed. He said that the job description provided to him was very different to what he expected to receive directly from his CoS to allow him to complete his work plan, which was a complete work plan with a set of goals and results that had to be achieved by him and which he would be appraised on. He said that what he had been given was inadequate but took no action himself to seek a meeting for this purpose. The CoS and former supervisor testified that the work plan for the Unit, also necessary for completing the ePAS work plan, was on a chalkboard in the CoS' office. This was not challenged by the applicant.

18. Of course, I do not have the expertise to form an independent judgment about the adequacy of the note and the information on the chalkboard but it is clear that the former supervisor thought it should have sufficed and my own consideration of its contents supports this view. The note seems to me to be a carefully ordered, detailed and comprehensive account of the fundamental responsibilities of procurement and the duties of supervision which should have permitted the applicant at the very least to make a very substantial start in a draft work plan which might, of course, have required further refinement in due course. I think that the applicant's attitude to the note and the preparation of his work plan is all of a piece with his apparent inability to take the



“discretionary”, this discretion is not to be exercised arbitrarily but in accordance with proper principles of managerial decision-making. If it is “appropriate” to undertake such an appraisal, then it must be undertaken, as sec 1 itself states. It would no doubt be useful to provide some guidelines to management as to when it will or might well be appropriate but, in the meantime, common sense and good judgment must be the guide. Here, it cannot be seriously argued that it was not entirely appropriate to

responsible officers in the human resources section also had the (simplistic) understanding that, as a staff member on a six month fixed-term contract, there was no need for the applicant to complete an ePAS and the applicant was apparently so informed when, following the direction of the CoS, he sought information from them.

24. A combination of these factors and the applicant's own delays in preparing his work plan meant that the appraisal that would in the normal course have followed from the initiation of the ePAS process was not completed before the decision was made not to renew his contract. There will be times when there is no alternative but to proceed in this way, where the staff member for example, simply refuses to participate, but that was not the case here. It follows that the contention of counsel for the applicant that the decision as to non-renewal was premature is well taken. Nor was there a midpoint review in accordance with sec 8 of the administrative instruction. Although this provision is clearly drafted upon the assumption that the employment period is one year or more and thus is not, in terms, applicable to a six-month term, an explicit, if not necessarily formal, process of review is obviously an important part of the evaluation of a staff member's performance and should be undertaken where (as here) it is appropriate within the meaning of sec 1 to undertake the ePAS process for a short-term staff member. Here, as I have explained, there was an informal and continuing process of review by way of setting specific tasks and critiquing outcomes, with the CoS hoping that the ePAS procedure would assist the applicant to clarify his responsibilities and assess his performance against them.

25. The principles of both law and justice require a focus on substance rather than form, unless the form, fairly interpreted, is in terms that forbid it. Here, there was a departure from form but, I am satisfied, not from substance. I should state, however, that had the CoS acted pursuant to a deliberate scheme to avoid the form of ST/AI/2002/3, the outcome of this case would have been different. However, as is clear from the above discussion, I believe that she acted in accordance with a genuine

in finalizing the non-renewal of his contract until it was completed, the applicant suffered no actual detriment.

### **Other matters**

26. The applicant gave evidence about what he claimed to be unnecessarily humiliating language used by the CoS concerning his performance in the presence of other staff members and to him alone. I accept that his feelings may well have been hurt but not that the language as described by him amounted to harassment or other wrongful conduct. Certainly, the criticisms may have been tactlessly expressed but this falls far short of any impropriety. Indeed, there are times when direct language is necessary. It is, in the nature of things, impossible to recapture the circumstances and, in these matters, context is everything. Even accepting the applicant's evidence at its highest, I do not consider that the CoS acted improperly.

27. The applicant also resented steps taken by the CoS to deal with the management of the Unit whilst she went on leave in January 2008. The CoS has explained the position in evidence. It is enough to say that I am persuaded that her decision as to this matter was well within her managerial responsibilities and, although I am not unsympathetic to the applicant's difficulties with it, there is nothing to suggest that the decision was unreasonable.

28. The applicant's complaints about the CoS concerning his allegations of harassment were considered by a panel whose report was tendered by the respondent. Counsel for the applicant objected to its admission. In the result I have decided the application without reference to the report.

### **Conclusion**

29. The application is dismissed in its entirety.



**Note about applicant's counsel**

30. Counsel for the applicant, a qualified legal practitioner, appeared for him pro bono. The case required consideration of a large number of documents and hearings took a number of days.

31. The Tribunal wishes to express its thanks for the great assistance counsel for the applicant provided in dealing with a difficult and somewhat complex matter, without at any point failing in her duty to press her client's case in respect of every consideration which could be argued in his favour. In so acting, counsel adhered to the highest and best traditions of the independent bar, without the assistance of which no tribunal, whether this or any other, charged with the administration of justice would be able undertake its responsibilities.

*(Signed)*

Judge Michael Adams

Dated this 9