



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

ASSALE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Stephan Grieb, UNICEF
Tamara Shockley, UNICEF

Introduction

1. The Applicant is a former staff member of the United Nations Children's Fund (UNICEF). He filed the current application with the Registry of the United Nations Dispute Tribunal (the Tribunal) in Nairobi on 5 December 2011 to contest the administrative decision not to renew his fixed-term appointment beyond 31 January 2011.

Procedural history

2. The Respondent filed a Reply to the Application on 5 January 2012.

3. By Order No. 025 (NBI/2012), dated 8 February 2012, the Tribunal sought the views of the parties on the need for a hearing and other matters.

4. On 14 February 2012, the Parties informed the Tribunal that they would not submit any further evidence/supplementary documents and that they did not consider a hearing to be necessary. The Applicant, however, sought leave to file additional submissions in response to the Respondent's Reply. The Respondent objected to the Applicant's motion but requested leave to respond to the Applicant's rejoinder in the event that the Tribunal acceded to the Applicant's request.

5. By Order No. 185 (NBI/2013), dated 21 August 2013, the Tribunal granted the Applicant leave to file a rejoinder and informed the parties that the matter would be adjudicated based on the documentary evidence in the record.

6. The Applicant complied with Order No. 185 on 3 September 2013.

UNICEF suspend his separation until the management evaluation was completed. On 21 January 2011, the Applicant's appointment was extended for one month so that the investigation into his harassment complaint could be completed.

14. In a memorandum dated 28 February 2011, Mr. Martin Mogwanja, the Deputy Executive Director of UNICEF, informed the Applicant that even though his request for management evaluation was still pending, it was not considered "in the best interest of the Organization to further renew [his] contract".

15. The Applicant was separated from service on 28 February 2011. His e-PAS was finalized on 31 March 2011.

16. On 12 July 2011, the Office of Audit and Investigations (OAI) issued its report on the Applicant's complaint of harassment and abuse of authority. OAI concluded that his claims were not substantiated but that Mr. Babilie exercised poor judgment in the way he communicated his dissatisfaction with the Applicant's performance.

17. On 6 September 2011, the Applicant received the final decision on his request for management evaluation from the Deputy Executive Director. Mr. Mogwanja informed him that Mr. Babilie properly exercised his discretionary authority in deciding not to renew his contract. Mr. Mogwanja further informed him that since his performance did not fully meet their expectations, it was "in the best interest of the Organization" not to renew his contract.

Preliminary matters

Requests for rejoinders

18. On the issue of the Applicant's request for a rejoinder, the Tribunal took note of the Respondent's submissions that: (a) the General Assembly created the new system of internal justice with a view to expediting the resolution of cases in a fair, professional and efficient manner and for this reason, the General Assembly

eliminated the practice of filing rejoinders to the Respondent's Reply and then comments on the Applicant's rejoinder; and (b) there is no need to continue arguing "ad nauseam" at the expense of the expeditious management of the proceedings.

19. The Tribunal wholeheartedly accepted these submissions and found that there was no need for the Respondent to also comment on the Applicant's rejoinder. Consequently, the Respondent's request to submit comments on the Applicant's rejoinder was rejected.

The Investigation Report of OAI

20. By Order No. 016 (NBI/2014), the Tribunal requested that the Respondent communicate to the Registry a copy of the findings of OAI on a confidential basis. In regard to confidential documents, parties may request that the Tribunal impose measures to preserve the confidentiality of evidence on account of security measures or other exceptional circumstances as provided for by art. 18.4 of the UNDT Rules of Procedure. In reviewing the request and making a determination on it the Tribunal's duty is to consider all the facts and the circumstances. A request to impose measures in the interest of security or otherwise is not granted for the mere asking. The Rules are silent on whether the Tribunal can on its own volition impose confidentiality

Issues

22.

25. Further, the recommendation not to renew his appointment and the approval thereof were made prior to the completion of his e-PAS and prior to the completion of the reporting period.

Respondent's submissions

26. The Respondent submits that the Applicant's performance was evaluated in accordance with the established procedures. His performance shortcomings were identified early by his supervisor and noted in writing on 27 October 2010. However, these shortcomings were not strong enough to warrant a termination of the contract prior to its expiration. Instead, his supervisor recommended non-renewal considering that several competencies had to be reinforced if the Applicant were to maintain the same level of responsibility.

27. The Contested Decision was in the best interest of the Organization. This was a discretionary decision that was carefully considered, thoroughly reviewed and legitimately made.

Considerations

28. Section 5.1 of CF/AI/2011-001, which was promulgated on 17 January 2011 and is therefore applicable to this matter, sets out the guiding principles on performance and evaluation of UNICEF staff members and the measures that need to be taken to address any failings in performance. It reads as follows:

During the performance cycle, the supervisor should continuously evaluate performance. When a performance shortcoming is identified during the performance cycle, the supervisor should, to the extent possible, assist the staff member to remedy his/her performance shortcomings. Such measures may include counseling, assignment of more suitable tasks, additional training and/or the institution of a time-bound improvement plan, which should include clear targets for performance improvement, provision for coaching, and supervision in conjunction with regular performance discussions.

staff office, including heads of sections, and ask what is new, and if there were any problems they would discuss them and try to find a solution. He also took advantage of the weekly programme meetings held on Fridays to discuss any problem that may have arisen”⁶.

38. The Tribunal also refers to the account

2011 due to poor performance. Mr. Babilie endorsed the non-renewal

the belief that it could escape scot free from scrutiny for not having complied with the Organization's rules on performance appraisal.

43. The Respondent's Reply to the Application on the issue of termination vis-à-vis non-renewal is very confusing to say the least. Firstly, the Respondent submits that the "Applicant's performance was not as unsatisfactory as to warrant the termination of his appointment however it was not considered satisfactory enough to be renewed"⁹. Secondly, the Respondent submits that a distinction must be made between separation upon expiration of an appointment and a termination. The Respondent avers that: a "separation upon expiration of appointment is not regarded as a termination" under section 5.1, Part 1 of CF/AI/2010-001¹⁰. The Applicant was therefore not terminated but separated from service at the expiry of his fixed-term appointment.

44. The distinction relied on by the Respondent is not justifiable. Section 2 of CF/AI/2010-001 defines a separation from service as including a termination of employment as defined in sections 8 to 13 under Part II of the CF/AI2010/001. And a termination for non-performance is explained in detail in section 10 of CF/AI/2010-001. So when a staff member is terminated for non-performance, this is a separation from service and, depending on the circumstances of the case, that staff member may or may not be entitled to compensation.

45. Section 5.1 of CF/AI/2010-001 reads: "Separation upon expiration of an appointment is not regarded as a termination of appointment". That may be so but a staff member is not without any remedy in such a situation. The non-renewal decision must still be based on cogent reasons.

46. When a fixed-term appointment comes to an end, though the staff member expects it to be renewed, that renewal depends on a number of factors, namely the availability of the position, whether funds are available, whether the staff has

⁹ Para 23 of Respondent's Reply, 5 January 2011.

¹⁰ Para. 9 of Respondents' Reply, 5 January 2011.

Though OAI did not find harassment, the Tribunal is concerned that it merely brushed aside the evidence of the Applicant, Ms. JL, and Mr. DM. What is more disturbing is the fact that OAI did not consider the admissions of Mr. Babilie that he was either aggressive or using a loud tone of voice thus humiliating the Applicant.

55. Instead of Mr. Babilie engaging with the Applicant in compliance with the rules of the Organization, he chose to use a shouting crusade against the Applicant. This is evidence of how Mr. Babilie was trying to humiliate and demean the Applicant not only as an individual but as a staff member in front of his colleagues.

56. In this context the Tribunal will refer to paragraph 15 of ST/SGB/2002/13, which provides that:

Managers and supervisors are in a position of leadership and it is their responsibility to ensure

59. In view of the foregoing, the Tribunal concludes that the decision not to renew the Applicant's appointment beyond 31 Ja

62. Admittedly there was no rebuttal process but when a staff member files a complaint against a manager who is the person who plays an active role in his/her performance evaluation, common sense and reason require that the Administration stalls any final decision in the case of that staff member. The Tribunal therefore holds that by rushing to judgment on the decision to separate the Applicant before being in presence of the OAI findings, the Respondent flouted the basic fundamental rights of the Applicant and abused his discretionary authority.

Referral to the Secretary-General

63. The Tribunal concludes that Messrs. Ndikumana and Babilie openly, consciously and deliberately flouted the basic rules of the Organization in regard to: (a) the evaluation of the performance of a staff member; and (b) the prohibition against creating a hostile work environment; and (c) abuse of authority.

64. In light of the foregoing, the Tribunal finds it necessary to refer both of these senior managers to the Executive Director of UNICEF, in accordance with art. 10.8 of the UNDT Statute, for action to enforce accountability.

65. The Tribunal would respectfully request that the Executive Director inform the Tribunal in confidence of the outcome of the process on accountability. The Tribunal is fully conscious that there is no provision in the UNDT Statute for the Secretary-General or the executive head of a separately administered United Nations fund or programme to inform the Tribunal. However, since it is the Tribunal that initiates the accountability process it is only fair and logical that the Tribunal be apprised of the outcome of the accountability process.

Decision

66. Just as the Tribunal concluded in *Said* UNDT/2013/150, all elementary rules of fairness in regard to performance and a conducive work environment were simply ignored by the Respondent in the present case, which resulted in the Applicant being separated from service unlawfully. Consequently, the overall impression that is

garnered is that the only aim of the senior managers of UNICEF Chad was to hurriedly bundle up the Applicant and banish him into redundancy without having to comply with any rules.

67. Pursuant to art. 10 of its Statute, the Tribunal may rescind a contested administrative decision and order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) provides for an order of compensation which, in exceptional cases, may exceed the equivalent of two years net base salary.

68. Based on the findings above and in view of the fact that the Applicant was initially granted a one year appointment, the Respondent is ordered to pay the Applicant the equivalent of one year's net base salary, at the level he was entitled to before he was separated from service.

69.

Entered in the Register on this 25th day of March 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi