UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/051/ JAB/2008/098
Judgment No.: UNDT/2010/060
Date: 9 April 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

SINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
George Irving

Counsel for respondent:
Peri Johnson, UNDP

Notice: This judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The applicant contests the non-renewal of his fixed-term contract and the manner in which he was ultimately separated. Some months before the expiry of his contract, he was seriously injured in an explosion accidentally caused by a mortar shell that had been brought to his residence. Investigation suggested that the applicant had brought the mortar and may have been to blame for the explosion. Before the report of this investigation was formally issued, the applicant was informed that his contract would not be renewed. A further report concluded that the initial faulty examination of the scene could not be corrected and the origin of the explosion could not be ascertained in the sense of whether it occurred under the bed, not whether it occurred in the room. UNDP, based on this report, decided that no conclusion could be drawn that the applicant was responsible. The applicant was placed on sick leave, which was extended a number of times, following medical assessments and awaiting recommendations on compensation from the UN Advisory Board on Compensation Claims (ABCC). The UN Medical Services Division (MSD) had some time previously concluded that he was fit for work, though he was not informed of this decision. He was informed of the recommendations of the ABCC over two weeks after they were made, on the day upon which he was separated, without notice, from the Organization.

2. The applicant argued that he had a legitimate expectation of renewal and that the adverse findings of the earlier investigation wrongly influenced the decision not to renew his contract. He also contended that he was entitled to be told of the conclusion that he was fit for work and the lack of notice of his separation was unfair and a breach of due process.

3. Some of the facts were reviewed in an earlier decision of the Tribunal dealing with and rejecting an application for summary judgment on 30 September 2009 (UNDT/2009/027).

Facts

4. The applicant was employed under a 300 series Appointment of Limited Duration (ALD) contract as a Disbanding, Disarming and Reintegration (DDR) Officer with the United Nations Development Programme/Afghanistan New Beginning Programme (ANBP/UNDP) in Kabul. He commenced work on 23 August 2005 and his contract had been initially extended for two periods of six months until 28 February 2007. The applicant worked at first with the Ammunition Survey Team (AST) 4. He was then transferred to AST 9 as team leader. When the ammunition work was handed over to the Afghan government in November 2006 it was proposed that AST 9 would be disintegrated. The applicant, as well as other team members, had occasionally replaced the Operations Manager of ANBP/UNDP when he was away from his duty station. The Operations Manager does not recall having made any statement assuring the applicant of any future work prospects in the event of his being assigned to another position. The programme was long-term and continued past the expiry of the applicant's fixed-term contract.

5. On 12 October 2006 an explosion occurred in the applicant's room at his place of residence, causing him severe injuries. There is little doubt that the explosion was caused by a mortar shell. The applicant was first treated in local medical facilities and then, on 14 October 2006, was evacuated to India for further treatment. On 26 October 2006 the UN Office of Internal Oversight Services (OIOS) commenced its investigation into the circumstances of the explosion.

6. The applicant maintained from the time he was first spoken to at the hospital about the matter that he had not brought the shell to the residence and suggested that one of his co-workers had done so. The first report by UN authorities was made on 26 October 2006 by the Special Investigation Unit of the Department of Safety and Security which, in substance, exonerated the applicant but implicated his co-worker. As I mentioned in UNDT/2009/027, the investigative methods used and the examination at the scene were problematic in a number of significant respects, although it did not follow that reasonable conclusions could not be drawn as to the

cause of the explosion. The investigation was taken over on the following day by the UNDP Office of Audit and Performance Review (OAPR). I characterised this report in my earlier decision as thorough, objective and careful. Nothing since said has led me to change this conclusion. On 14 November 2006, before the investigation was completed, the Assistant Administrator and Director of the Bureau of Management (AAD/BOM) of UNDP, advised the co-worker initially implicated that the OAPR investigators "did not find evidence corroborating [his] implication in this explosion" and that the suspension from service he had been under pending further investigation was lifted.

7. In the meantime, as I have mentioned, a decision had been made to hand the Khairabad ammunition depot was to the local authorities so that AST 9's tasks at the depot would be completed by 30 November 2006. It was the view of the Chief of Staff and the Programme Director of ANBP/UNDP that the applicant's position had therefore become redundant, with the consequence that his contract should not be renewed. In a statement tendered to the Tribunal, the Programme Director, whose decision it was, categorically denied that the decision had anything to do with the circumstances of the explosion or the investigation, the report of which he did not have to hand until January and the contents of which he had not been earlier informed.

8. On 19 December 2006 the applicant emailed the Chief Protection Officer, ANBP/UNDP, to ask for any report on the explosion that might have been prepared so that he could pass it to his lawyers to consider. The Officer forwarded this message to the Programme Director and the Country Director with the suggestion that the applicant be informed that an internal investigation was being carried out, which has not been released and the content of which was unknown and that UNDP was unaware of any other reports. The Programme Director and the Country Director agreed. There is no reason to suppose that this information was other than correct.

9. On 21 December 2006 the Programme Director informed the applicant that his contract due to expire on 28 February 2007 would not be renewed. In a statement

of 3 November 2009 tendered to the Tribunal by the respondent, he averred that the Programme Director was not influenced by the continuing investigations into the circumstances surrounding the explosion. (It may be worth noting that it is evident from contemporaneous documents that the Programme Director was most sympathetic to the applicant and, I rather think, thought he was innocent of wrongdoing.) This is corroborated by the tendered statement of 23 October 2009 of the former Chief of Staff of ANBP.

10. As it happened, various extensions of the contract were later given to the applicant. However, it is clear that those extensions simply delayed implementation of the decision of 21 December 2006 not to extend it. A crucial question in the case is whether the Programme Director was aware of the conclusions of the investigators when he decided not to renew the applicant's contract. On 14 January 2007 the applicant wrote to the Programme Director referring to the letter of 21 December and commented –

> I would prefer to be honest with you and my self telling you that I had no intention to come back to Afghanistan even if my contract would have been extended … But I had always thought that ANBP would offer an extension of my contract at least until I would feel fully recovered and until doctors would certify that.
>
> …
>
> In this condition, as I had an accident while being under contract with ANBP, I would like to ask you to support me by considering two alternatives:
>
> 1. Extension of my contract at least for additional three months if doctors would recommend additional period of sick leave after Feb 2007.
>
> 2. Requesting UNDP/ANBP for a financial support (in form of compensation) which would cover my health expenses for certain period of time until I would be capable physically and physiologically [*semble* psychologically] to do other work.

11. On 23 February 2007 the AAD/BOM of UNDP extended the applicant's appointment for three months pending the ongoing investigation and the applicant's ongoing medical treatment, stating –

> Notwithstanding the absence of legal expectancy for renewal, I realize that exceptional circumstances may require that we consider the extension of your appointment. Indeed, I understand that you are still under medical treatment for the injuries your suffered from the explosion that took place … I am also aware than an investigation is still pending to try to understand the reasons why such an explosion occurred and, as the case may be, to determine where the responsibilities for this explosion lie.
>
> Under these circumstances, I have decided to put aside the decision of 21 December 2006 and to extend your ALD for three months by which time I expect the Organization will have clarity regarding the circumstances of the explosion. This three-month extension will allow the continuation of your medical insurance coverage for the same period.
>
> This extension is exceptionally granted given the circumstances, and in no case does it entail a commitment from the Organization to renew your contract beyond 31 May 2007.

12. The OAPR provided its report in January 2007 (the actual date of its completion is unknown). The investigators accepted, in substance, that the applicant's co-worker was not involved. To oversimplify somewhat, that left the applicant as the likely culprit. The report concluded, *inter alia*, that –

> The evidence supports the conclusion that Mr. Sina had taken ammunition including a mortar shell into his room and that this had accidentally detonated – probably by falling off his bed.

On 17 January 2007 the report was sent by the Senior Legal Officer of the Office of Legal and Procurement Support (the precursor to LSO), UNDP, to the applicant for comment. He was informed that, although there was no "disciplinary case" against him, "failure to provide reasonable explanations [sic] to the findings of the investigation may lead to the initiation of disciplinary proceedings with charges of misconduct". On 15 February 2007 the applicant provided an extensive commentary, reiterating his innocence.

13. On 24 April 2007 a second OAPR investigation report was submitted to the applicant for comments. Further enquiries had been made in response to the applicant's criticisms, which were to my mind convincingly answered. This second report concluded (for good reason, in my opinion), *inter alia*, that –

> [T]he evidence strongly suggests that this was an unfortunate accident, caused by the partial detonation of a mortar contained in Mr. Sina's black bag that he had brought into his room.

14. The applicant again commented extensively on this report, again denying any responsibility for the explosion. It was decided to request OIOS to comment on the available evidence in order to permit, if possible, a conclusive determination as to the matter. On 17 July 2007, following a review of the material to hand, OIOS informed the AAD/BOM of UNDP that –

> …in the absence of first hand and critical evidence, which could have been obtained from the scene of the explosion, that is, if proper investigative steps were undertaken from the outset, OIOS cannot ascertain the origin of this explosion.

15. By letter dated 30 October 2007 the respondent extended the applicant's contract until 30 November 2007 because there was no final determination on his outstanding medical claim with the UN Claims Board, also informing the applicant –

> OIOS could not ascertain the origin of this explosion … We then carefully reviewed all the material available, i.e. the two OAPR reports, your comments thereon and the OIOS position, and we conclude that absent definitive evidence as to the origin of the explosion, no one can be held liable for it.

In the same letter, the respondent urged the applicant to follow up on the status of his claim and to provide an update of his medical condition, with supporting certificates, so that MSD could make a proper determination of his medical and administrative status, in particular, with respect to certified sick leave.

16. By letter dated 6 December 2007, in response to a request from the applicant to suspend the decision not to extend his appointment beyond 30 November 2007, the Deputy Secretary-General suspended the decision until 31 January 2008, stating –

> [The] Secretary-General believes that, on an exceptional basis, you should be given one final opportunity to fulfil your obligation to submit the information necessary for a determination of your administrative and medical status. He has therefore decided to suspend action on the decision not to renew your contract until 31 January 2008. This suspension, however, is subject to the UN Medical Service in New York receiving from you, *no later than 4 January 2008*, all necessary documentation that would allow it to determine your medical status, in particular with regard to your sick leave after 6 March 2007 …
>
> … For the avoidance of any doubt, I would like to stress that the responsibility for submitting, within the stipulated timeframe, all records required to establish your medical status since March 2007, rests exclusively with you. Should you fail to ensure that all documentation as stated in this letter is *received* by 4 January 2008, this suspension of action will lapse and your appointment will automatically expire on that day.

17. On 18 December 2007 MSD emailed the applicant acknowledging receipt of his medical records and seeking further information from his doctors as to the extent of scarring, the present condition of his skin, limitations of movement, and a list of medications. This information was required for submission to the Advisory Board on Compensation Claims (ABCC). Although there is no direct evidence that this material was sent, I am inclined to think that it was, having regard to the email of 18 April 2008, summarised below.

18. By email of 29 January 2008 from the Coordinator of the Panel of Counsel (the precursor to the Office of Staff Legal Assistance) to the Director, LSO, the Coordinator stated –

> [M]any thanks for your voice mail informing us of the extension of Mr. Sina's contract. We understand that UNDP will extend his contract through the end of February 2008 and that may be extended again depending on the work and/or results of the ABCC.

19. On 4 March 2008 applicant's former counsel wrote to the Director of the Legal Support Office (LSO), UNDP passing on information that he had apparently received from the applicant. Amongst other things, the applicant was said to have been anxious to learn how the findings of the ABCC "might relate to the possibility of his applying for a disability discharge". It was also stated that the applicant "has been able to determine that his sick leave was exhausted about a year ago, and he was told at that time that the possibility of his being granted additional sick leave depended on the official medical evaluation of his condition". The applicant, who claimed that he was unaware of his sick leave entitlements, has contradicted this part of the email in his evidence, but I prefer to rely on the near contemporaneous note of his own counsel at that time, who had no axe to grind and plainly had an interest in being accurate. That is not to say that there was no possibility of misunderstanding but, even allowing for that possibility, the email should be accepted as at least probably reliable. Counsel commented that the applicant "has also provided full information on the extent of his current disabilities, as you know". The Director, LSO, confirmed by reply on the same day that the applicant had, indeed, shared his medical information with MSD.

20. It seems that there was a further communication from the Director, LSO, to the applicant shortly thereafter because on 10 March 2008 he emailed her, in effect thanking her for extending his contract until the end of March.

21. By email of 17 March 2008 to the applicant's former counsel, the Director, LSO, stated –

> I received a memo today from the ABCC, they need more information. Anything that would help them determine whether the injury is service incurred. Can you discuss with your client, whether he has any information that would be relevant? We are also consulting with the CO [Country Office] and will see what else we can provide. Obviously, we will have to extend his contract again through April. I will notify the Office to take the necessary measures.

22. By e-mail of 31 March 2008 MSD notified the respondent that, based on the medical reports forwarded and reviewed by MSD, it had approved sick-leave for the

applicant from 12 October 2006 until 5 December 2007 and that there was "no medical reason to extend the sick-leave further". This information was not conveyed to the applicant. On 8 April 2008, MSD confirmed that the medical documents reviewed indicated that the applicant did not qualify for disability benefits and that he was fit for work, though they would not recommend he return to Afghanistan. This information was not passed on to the applicant.

23. On 15 April 2008 the applicant's former counsel informed him that the ABCC was still uncertain about whether his injuries were job-incurred and that his case would be returned to the Board on 23 April 2008, although the volume of cases to be considered might require a further meeting to consider his case. He had requested a further one month's extension of the applicant's contract. The applicant forwarded this email on 17 April 2008 to the Director, LSO, with a tirade of complaints about his treatment and added –

> I am not much interested in getting another extension of my contract as much as I am to have the ABCC making a decision and then I could be separated from UNDP asp [*semble*, as soon as possible]. So, I would be grateful if you would be able to push the ABCC in making a decision on my case.

The letter concluded with a request for advice.

24. On 18 April 2008 the Director, LSO, replied, informing the applicant that UNDP was extending his contract "through end May, as the ABCC is meeting end April to review your claim", expressing the "hope that there will be a final decision at the meeting, taking into account the additional information you submitted and also that we submitted at ABCC's request". She reiterated the point that UNDP had "continued to extend your contract during this period whilst ABCC was reviewing [whether the injuries were job-incurred]".

25. On 22 April 2008 the applicant emailed the Director, LSO, thanking her for the information. He repeated his complaint about the delay in getting a final decision from ABCC and added –

> It is time that I really would like to know and have the final decision from ABCC and in meantime get separated from UNDP in order to be a free person and pursue my matters in the best possible way I can.
>
> So, I would appreciate very much anything you could do to push ABCC making the final decision on my case.

26. On 12 May 2008 the ABCC recommended that the applicant's injuries and illness should be recognised as attributable to the performance of his official duties. This was approved on behalf of the Secretary-General on 17 May 2008. It appears that UNDP was not aware of the recommendation and the approval until 27 May 2008.

27. On 30 May 2008 the respondent wrote to the applicant to inform him of the recommendation of the ABCC and notified the applicant that –

> The final extension [of your contract] lapses 30 May 2008 and UNDP is proceeding with the administrative formalities to separate you from service thereafter.

This letter (which, despite the ending clause, effected the separation) also explained that the applicant's contract had been continued since its first expiry date in order to keep his medical insurance rights on foot.

Issues

28. The main issues can be summarised as follows –

(a) whether there existed any legitimate expectation of renewal;

(b) whether the investigation unfairly influenced the decision not to renew the contract; and

(c) whether the respondent's obligations towards the applicant were complied with in respect of notification of the applicant's medical status and notice of separation.

Applicant's case

29. On expectancy of renewal, the applicant submitted –

(a) Former staff regulation 4.4 required preference to be given when filling vacancies to those already in the service of the Organization, such as the applicant.

(b) The applicant was hired as a DDR officer and not for any particular team. There was no reason why, when the ammunition work was handed over to the government in November 2007 or if AST 9 was disintegrated, his contract could not have been renewed and/or he could not have been absorbed into another team or project.

(c) The applicant had replaced the Operations Manager when he was away from his duty station and there were various conversations between him and the Operations Manger which created an expectation that the applicant would replace him when he left.

(d) The applicant expected that his contract would be extended as he had a particular expertise and had only served three of the four years to which an ALD appointment is limited. When he went to AST 9, he was told that he would return to another team or other work. There was still a need for the applicant's expertise. (The applicant referred to the UNDP Afghanistan Disbandment of Illegal Armed Groups (DIAG) Quarterly Project Report that reported four international field officers were hired by Afghanistan regional offices as evidence of this need.)

30. On whether the decision-maker had taken inappropriate matters into consideration on deciding not to renew the contract, the applicant submitted –

(a) A reasonable inference can be drawn as to the probability that the investigation had an impact on the contested decision, as occurred in *Al-Khatib* (2000) UNAT 951 and *Mbarushimana* (2004) UNAT 1192.

(b) The applicant being named as the "subject" of the ensuing investigation showed that he was believed to be the culprit. The inference should be drawn that the decision was motivated by the suspicion that he was responsible for the explosion.

31. On the issue of whether the applicant was afforded due process and fair dealing with regard to notification of medical status and notice of separation, the applicant submitted –

(a) It was unfair and procedurally improper for the applicant not to receive notification of his status with regard to sick leave, namely that his entitlements had ended and that he was medically fit to return to service. With such information, the applicant could have returned to work with potentially further benefits, including enabling him to get a new job. It would have also given him the opportunity to challenge any findings. There was a general obligation of fairness for the administration to have informed him of his status before they relied upon the expiry of his last extension.

(b) There is an established practice not to separate any staff member while they are on sick leave and the contract must be continued as it affects a staff member's rights to social security benefits (unemployment, disability, etc).

(c) The applicant did not know his sick leave entitlements had expired until after he was separated. MSD did not remind him that further documents were required.

Respondent's case

32. On whether there existed a legitimate expectancy of renewal, the respondent submitted –

(a) The applicant would have had to apply for an actual post or be a longer-term staff member for staff regulation 4.4 to be applicable ie, the applicant is not treated as an internal candidate.

(b) The Operations Manager does not recall having made any statement assuring the applicant of any future work prospects and was not, at all events, authorised to do so. Even on the applicant's evidence, what was said went no further than a prediction of likelihood.

(c) In a number of statements the applicant either asserted that he did not intend to continue his employment or that he was expecting separation at the end of the contract extensions, when the ABCC made its recommendations. Accordingly, he at least had no expectation of renewal after that point.

33. On whether the decision-maker had taken inappropriate matters into consideration when deciding not to renew the contract, the respondent submitted that the decision to end AST 9's work by 30 November was a *bona fide* operational decision having nothing to do with the applicant. There was no obligation to renew his contract, except for special reasons connected with the investigation and his sick leave. The statements of the then Programme Director and Chief of Staff to this effect should be accepted. They are supported by the statement of the relevant investigator to the effect that the investigators did not keep UNDP management informed of the course of the investigation: except for informing them of the exoneration of the first suspect, they never discussed the substance of the investigation.

34. On the issue of whether the applicant had been afforded due process with regard to notification of his medical status and notice of separation, the respondent submitted –

(a) The decisions to extend and the grounds for so doing were known to the applicant who indicated both that he understood and accepted them.

(b) There was no legal obligation to give notice.

The legitimate expectation of renewal

35. 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 that the other party does so.

36. There was no expectation of renewal based on the applicant's contract alone. The applicant's evidence of his conversations with the Operations Manager is too general to justify the inference beyond a speculative, though not unreasonable, prediction. The expectation that the project would extend past his initial contract expiration date together with the continuing need for his services was not such as to carry legal consequences: it also was a speculative prediction. One of the uncertainties about this evidence is whether the Operations Manager spoke in the knowledge of the impending closure of the depot and the term of the applicant's contract.

37. The only reasonable inference from the email exchange set out in detail above is that the applicant himself had at no time an actual expectation of renewal, since it is inevitable that he would have made such a claim as a first response to the letter notifying him of the non-renewal his contract. No hint of the making of representations by the Operations Manager was made until long after one would have expected. Nor is there any other cogent evidence that he was induced by anything said or done on behalf of the respondent to believe that there was a legitimate

expectation of renewal, as distinct from speculation that his contract might be renewed.

38. Furthermore, the applicant made it perfectly clear from the very beginning that he did not wish to extend his contract past the expiration of his sick leave and the determination of his compensation claim by the ABCC. It is scarcely to the point that there might have been some position available in which he could have been placed, even assuming that this were so.

The decision not to renew

39. As I have previously explained (eg see UNDT/2010/001 *Abboud* and UNDT/2009/039 *Beaudry*), the decision not to renew a contract is an administrative decision which does not, in any significant respect, differ in its legal character from any other administrative decision made under the contract of employment. The requirements of good faith and fair dealing that are invariably implied in such contracts must be complied with. They are not complicated. For present purposes the decision was required to be made by a person authorised to do so, for the purpose of which the authority is conferred, who has taken into account all significant relevant matters, disregarded all significant irrelevant matters, made no significant mistake of fact or law and whose decision, objectively considered, is not so unreasonable that no reasonable decision-maker would make it. These prerequisites for validity would also be implied simply by the implicit condition of the contract that decisions must be rational but it is both conventional and useful to set them out.

40. The respondent maintains that the investigation did not in *any* way influence the decision not to renew the applicant's contract and that the decision was based on the fact that there was no longer a need for the applicant as the temporary project on which he was working had been transferred to the government. The statements of the Programme Director and Chief of Staff as to the reasons for non-renewal of the applicant's contract are, to my mind, credible, nor were they sought to be cross-examined to suggest otherwise. Undoubtedly these officials were aware of the

exoneration of the applicant's co-worker before the decision not to renew was made. It is obvious, in the circumstances as well known to them, that if he had not brought the mortar shell to the applicant's room, it was very likely that the applicant had done so. However, it does not follow that this suspicion influenced the decision, particularly in light of the completely legitimate reasons deriving from the close of the project upon which the applicant was working which strongly militated in favour of, if they did not actually require, non-renewal.

41. In my opinion, the preponderance of evidence strongly supports the conclusion that the non-renewal was not influenced by suspicions that the applicant had been culpably involved in the explosion. However, I should at the same time express my firm opinion that it would have been entirely proper in the circumstances to take that suspicion into account. It is obvious from the investigation reports that it was only by a fluke that the applicant was not himself more seriously injured and even killed and that other persons might also have suffered this fate. To bring ammunition into a residence is plainly dangerous folly, whether it was also in breach of any regulation or not (and one must assume that it would be). No objective assessment of the investigation report could have failed to raise the strong suspicion at least that the applicant had done so, even if no definitive finding could be made to this effect. In this respect the OIOS response was quite inadequate, indeed, tendentious. But accepting it at face value, as I am satisfied the responsible officials did, it meant no more than that there was not a proper basis for disciplinary proceedings. Having regard to the applicant's field of operations, a fair suspicion (in the sense that he had been given a chance to comment on the findings and those comments had been thoroughly examined) based upon reasonable grounds that he had brought the mortar shell to his residence was so serious a matter as to entitle the decision-maker to decline to take the risk of re-employing the applicant in that work. One only has to contemplate the consequences of another such accident occurring and the response to the decision-maker's explanation that there was no actual *proof* that the applicant had been responsible for an earlier explosive incident to demonstrate this point. Moreover, there was an ample basis for any decision-maker to conclude

that there was more than a mere reasonable suspicion of the applicant's responsibility. In light of the material as a whole, it seems to me that it cannot be sensibly maintained that the respondent had a positive legal obligation to renew the applicant's contract. Whether such a suspicion would be sufficient to terminate a current contract or refuse to renew where there was otherwise a legal obligation to do so is a different question upon which it is not necessary to presently decide.

42. The test of responsibility for problematic conduct in disciplinary proceedings is very different from the test that is applicable in considering whether to renew a contract. In the latter case, the decision-maker is entitled, indeed bound, to take into account all relevant matters providing they are not merely speculative but founded on a reasonable apprehension of the material facts, in order to make the decision in question. In such a case, an appreciable *risk* that a significant problem, say of serious carelessness, misjudgment or lack of integrity, is present in relation to a matter that directly affects the work to be performed is not to be dismissed simply because the fact itself might not be established to the level of probability. There can be no bright line, of course, given the manifold potentially applicable circumstances but, providing the decision-maker acts reasonably and rationally, having regard to the question in issue, there will be no error of law.

43. Here, it is not too much to say that life and limb were at stake and I have no hesitation in concluding that, if my finding that the Programme Manager was not influenced by a suspicion that the applicant was responsible for the explosion be mistaken, the outcome of this part of the case would have been the same: in short, he would have been both entitled and bound to take that suspicion into account and, doing so, the decision not to renew would have been justified.

44. Counsel for the applicant referred to *Al-Khatib*, a case in which an appellant was accused of rape but on trial was found to be innocent. It appeared that a payment of compensation had been made under Jordanian custom by the appellant's family to the complainant's family, which the appellant said was done without his knowledge or consent and was, at all events, repaid following his acquittal. The applicant's

contract was terminated "in the interest of the Agency", the decision-maker (mistakenly and irrationally as the Administrative Tribunal found) concluding that the payment amounted to an admission by the appellant of his guilt. It will be seen that this decision concerns circumstances very far from those in the instant case. First, there was no material which showed anything more than that the appellant had been the subject of an unproved allegation. In the instant case, the Organization has itself undertaken an investigation from which it is reasonable to draw adverse findings, at least to the level of appreciable risk directly related to the danger of the applicant's work, in respect of which it gave the applicant a right to comment. Second, the appellant's contract was terminated rather than not renewed. There is no requirement that non-renewal must be "in the interest of the Organization".

45. *Mbarushimana* is also a case very different from the present. The appellant had been accused of genocide and other appalling crimes. It was held by a court considering extradition that there was insufficient evidence even to demonstrate a reasonable suspicion of guilt. Furthermore, the Prosecutor of the International Criminal Tribunal for Rwanda dismissed the case against the appellant, which had been brought to that Tribunal, for lack of evidence. This meant, of course, that the appellant would not get any opportunity to clear his name. The respondent declined to renew the applicant's contract, although there was a legal expectancy of renewal, on the grounds of the interests of the Organization without itself examining any of the evidence. Thus the decision not to renew (there being a legal obligation to do so) rested solely upon mere allegations and the possibility of a trial. With respect, the decision of the Administrative Tribunal that the decision not to renew was fatally flawed was undoubtedly correct but, equally undoubtedly, does not inform the issue here.

The significance of the extensions of contract

46. It will have been noted that the applicant's contract was first extended pending the completion of the investigation. It appears that extension of fixed-term contracts for this purpose is conventionally done within the UN and it is reasonable to

infer that it is so common that it has become an implied condition of the contract or, at least, has given rise to a legitimate expectation that a staff member's contract will be renewed (circumstances justifying summary dismissal aside) until investigations of possible misconduct have been completed. However, such an entitlement, if it exists, should not be left to implication. If, on the other hand, contracts are extended where there is no legal obligation to do so, it is difficult to see how this can be justified if the staff member is not actually performing any duties. The cost of extension in such a case can be considerable and one naturally asks how payments can be justified where there is no legal obligation to make them and no legal entitlement of the employee to them since he or she is not performing any work to receive them. This is not to say that there will be no exceptional circumstances in which these contracts should not be extended. But, to my mind, the circumstances must be truly exceptional or otherwise can be shown to be in the interests of the Organization, such as the desirability of retaining the services of a staff member where, for example, apart from the allegation required to be investigated, the contract would have in all likelihood been renewed or, if the investigation showed that there was no misconduct, renewal would be otherwise justifiable. In this case, the additional element was the injury suffered by the applicant in the explosion from which, at the relevant time, he had not recovered.

47. As time went by, the reason justifying the extension was stated to be the unfinished process being undertaken by the ABCC. The legal basis for these extensions is far from clear although, having regard to the almost pathological and universal reluctance of any decision-maker to create a precedent, it seems safe to suppose that this complied with accepted practice. (But as A P Herbert observed in *Misleading Cases in the Common Law*, nothing is a precedent until it has been done for the first time, quoting, I think, Lord Mildew.) Again, however, it is undesirable to rely merely on past practice when substantial sums are paid without a clear and explicit legal basis for doing so.

48. In this respect, I note that the first letter from the respondent of 23 February 2007 granting the extension to 31 May 2007 relied on both the pending investigation and the continuing incapacity of the applicant due to his injuries. The letter also, as it happened, explicitly denied that the Organization was legally obliged to extend the contract and thus, implied that the extension was *ex gratia*. Although what I have already said about this question raises doubts about the legal basis for making such an *ex gratia* provision, the case was argued throughout on the basis that such a provision was appropriate and I therefore say no more about it. This qualification was not repeated in later extensions.

49. I simply wish to bring the Organization's attention the desirability, if not (as it appears) the necessity, for providing explicitly in some appropriate instrument its obligations to staff members in these or cognate circumstances together with the considerations that might justify, in any particular case, the making of *ex gratia* payments. If it is not already clear, I should emphasise that extending a contract in circumstances where the staff member is still working does not involve an *ex gratia* element. I should also mention that this discussion does not concern the placing of a staff member on leave with pay in the circumstances already envisaged by the staff rules.

Fitness for work

50. It is conceded by counsel for the respondent that the applicant was not informed of the conclusion by the MSD that the applicant was fit for work. The question is whether the applicant was legally entitled to be so informed. Where some entitlement of a staff member depends upon a particular finding by or decision of an official, the staff member must be informed of the finding or the decision in question. The Organization is not entitled to keep to itself information that is crucial to the staff member's knowledge of his or her rights and the ability to enforce them. I would have no difficulty in implying such an obligation of disclosure as deriving directly from the existence of the entitlement and the necessity for a finding or decision. An alternative legal basis is that disclosure in these circumstances is an essential

requirement of good faith, necessarily inconsistent with a consequential concealment of entitlements which the Organization is obliged to provide.

51. It is not an answer in the present case to say that the applicant should have been aware whether he was fit for work or not. His awareness is not a determinant of any entitlement. However, a real difficulty facing the applicant in this regard is that the *entitlement* to which the finding of fitness for work was relevant is not articulated, though it is contended that certain *procedural* rights were lost. (I note, by the way, that the applicant's then counsel informed the Director that the applicant had been aware for a considerable time that his sick leave had expired.) That he was fit or not was not relevant, in the particular circumstances here, to any issue since the decision not to renew his contract had already been taken for reasons having nothing to do with his health and the extensions also were not dependent on his being unfit. Moreover, there is no evidence that he was not (relevantly) fit for work, thus suggesting that the decision was mistaken. (This also focuses attention on a cognate issue, namely, what work was it that MDS found him fit for? On the face of it, it would seem to be somewhat unlikely that he would have been permitted to handle ammunition again. However, since the applicant was not separated for want of fitness, this does not need to be determined.) It was no part of the applicant's case that he should not ultimately have been separated because he was, in fact, not fit for work. It is said that, had he known that he was regarded as fit for work, he could have turned up for work. But, if he was in fact fit, he could have done so at all events. And for what work? This use of the information was anyway not related to an entitlement.

52. At the end of the day, the applicant has failed to prove how, in any practical sense, the omission to inform him that the respondent regarded him as fit to work had any impact on him or on his circumstances or entitlements. I would readily accept that the obligations of courtesy, which are not without importance, should have led to his being so informed but courtesy does not give rise to legal rights.

The separation

53. It is clear that the applicant was aware that his contract was on foot to 31 May 2008 unless extended and that it would not be extended if the ABCC made its recommendation in the meantime. He was also aware that it was hoped, if not exactly expected, that the ABCC would make its recommendation in April 2008. He might have inferred from the fact that he was not informed of any proposal to further extend his contract that, at last, no further extension would be made but, since it is known that an extension would have been made had the ABCC in fact not handed down its recommendations by the end of April, it is scarcely fair to attribute to the applicant knowledge that he could not have possessed.

54. I am prepared to accept that the Director, LSO, was unaware before 27 May 2008 of the recommendations of the ABCC and the decision of the Secretary-General. That delay was unfortunate because it led to the applicant being advised of the outcome of the process and his separation on the same day. I can understand the reasoning that led to the conclusion that, in the circumstances, it was unnecessary to grant the applicant any further extension, despite the shortness of notice. But I do not accept its fairness or its correctness. It is true that fixed-term contracts may expire without notice and that the applicant's contract had already been extended several times but it is not only the almost universal practice in the UN to provide notice of non-renewal, in this case he was always given timely notice of the extension. In the particular circumstances here, there was undoubtedly a legitimate expectation of renewal whilst the ABCC consideration was outstanding, a fact which the applicant could not know until he was informed of it. Hence, this is not a case where he could have expected separation as at 31 May 2008 when he had heard nothing until that very day, since the effect of the agreement about the ABCC process was that the date was provisional only: it was only final if the ABCC process had ended earlier. In my view, it was completely unreasonable to separate him on the very day on which he was notified of the outcome of the ABCC process.

55. Looked at in another way, the decision of the ABCC was made on 12 May 2008. Having regard to the agreement between the applicant and the respondent as to

the effect of the making of that decision, it should immediately have been notified to the applicant, since he was entitled to know of the fulfillment of one of the prerequisites for separation, in short of the first of the two boots to drop, so that he would be then aware of the impending dropping of the second boot, namely, the expiration of the contract. The Secretary-General made his decision on 17 May 2008. The applicant also was entitled to know of that decision when it was made. There is no explanation of the delay between that date and 27 May 2008 or the further delay to 30 May 2008. Although one could infer that it was just normal administrative processing, in the circumstances here, the applicant was entitled because of the terms of the extensions in this case to be immediately informed or, at the end of the tunnel as it were, placed in the same position as he would have been had he been immediately informed. The date when the decision was passed to the Director, LSO, is immaterial to the applicant's rights.

56. In the particular circumstances here, the applicant's knowledge of the expiry date of his contract was not sufficient. Although notice is not *necessary*, the failure to give timely notice in this case, given its history, gave rise to the legitimate expectation that the contract would be renewed at the end of May. Furthermore, it was agreed that the contract would be extended until the ABCC process was completed, thus, by necessary implication, that he would be notified when this occurred in light of the possibility (which had already happened several times) that the specified expiry date might or might not be the actual expiry date, depending on the completion of that process.

57. It remains to note that, at all events, the contract had been extended to 31 May 2008 and the specification of 30 May 2008 in the letter of separation was therefore incorrect. It is unarguable that, if the extension stated in the email from the Director, LSO, of 18 April 2008, gave rise to a legally binding obligation to continue the applicant's employment to 31 May 2008, the decision to separate him as at 30 May 2008 was a breach of that contract and was accordingly, void. However, this point was not taken by the parties and I mention it for sake of completeness only.

Conclusion

58. The applicant had no legitimate expectation of renewal of his contract. The decision not to renew his initial contract of which the applicant was notified on 21 December 2006 was based on proper grounds and was not affected by irrelevant considerations.

59. The applicant was entitled to be informed of the decision that he was regarded by the Organization as fit for duty but, since no significant adverse consequences followed from this breach, only nominal compensation is payable. I assess this at USD500.

60. The applicant was entitled to have been informed of the recommendation of the ABCC immediately upon its occurrence, having regard to its effect on the expiry of his contract which was agreed by the respondent until 31 May 2008. The period between this date and the date upon which he was informed is nineteen days, which would have been reasonable notice in the circumstances. Accordingly, I award compensation in the sum equivalent to the sum he would have been paid for those nineteen days, had that notice been given on 30 May 2008.

1. 61. Otherwise the application is dismissed.

(*Signed*)

Judge Michael Adams

Dated this 9th day of April 2010

Entered in the Register on this 9th day of April 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York