



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/022/  
JAB/2008/037  
Judgment No.: UNDT/2010/091  
Date: 11 May 2010  
Original: English

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**Before:** Judge Adams  
**Registry:** New York  
**Registrar:** Hafida Lahiouel

ISLAM

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**

Bart Willemsen, OSLA

**Counsel for respondent:**

Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. The applicant, a former staff member of the United Nations Assistance Mission for Iraq (UNAMI), contests the decision not to renew his fixed-term appointment. He had been informed that as a result of restructuring initiated in UNAMI his post was no longer required and would be abolished. The applicant submitted initially that this exercise and consequential abolition of his post were undertaken in order to separate him from the Organization. He later accepted the legitimacy of this process and submitted that, in fact, his contract was not renewed because of alleged performance shortcomings and disagreement with his supervisors over formulation of a work plan (needed for performance appraisal), which issues did not reflect the true position and were unfair evaluations of his performance. He submitted that, at all events, the untrue explanation at the time that non-renewal followed from abolition of his post vitiated the legitimacy of not extending his contract. As evidence of the ill will of senior officials, he claimed that he was not told that he could apply for the new post created when his post was abolished.

## **Note on procedure**

2. In Orders 42 and 43 (NY/2010) I expressed an inclination to exclude the respondent from tendering evidence or making submissions as a consequence of his refusal to comply with the orders for production of documents made in the *Bertucci* case (UNDT/NY/2009/039/JAB/2008/080). I was later informed that the respondent had appealed against my orders in this respect in *Bertucci* and the present case. Although for reasons extensively explained in Orders 59 and 63 (NY/2010), I considered that the appeals were incompetent, I entertained an application in this case made by the respondent for leave to participate in the proceedings by way of staying my order of exclusion. In the result, I did stay my order of exclusion on the ground, essentially, that this was not the case in which the orders were disobeyed and that, the matter being before the Appeals Tribunal

(one way or another), it seemed just to permit participation. In the result, therefore, the respondent was given leave to participate in the present proceeding.

3. I wish to make it clear, however, that I have not at all resiled or qualified my opinion that the respondent should not be permitted to participate in *any* proceeding whilst he is in defiance of an order of the Tribunal, since it is plain that to approach the cases piecemeal is simply to encourage the respondent to pick and choose which orders will be obeyed and which will not. The practice of the UN Administrative Tribunal was to permit the respondent to take this course and it has evidently been insufficient to induce obedience when he sees the interests of management conflicting with those of the administration of justice. The Tribunal cannot concede that such a conflict is possible, let alone that it justifies disobedience of its orders. At all events, it is fundamental that any such conflict is resolved by the Tribunal and not unilaterally by the respondent. For the present, however, in this case (and others) I have granted a stay of the order of exclusion.

### **Background**

4. The applicant, having previously worked for various United Nations entities in the field of IT support, joined UNAMI in September 2004 as a P-3 level IT Officer on a 100 series fixed-term appointment, initially for six months, until 23 March 2005. On 28 September 2004 the applicant was appointed to the post of Chief IT Officer, reporting to the Chief of the Communications and IT Services (CITS) until January 2005. His performance was rated as “very good” at that time. On 11 January 2005 a new Chief of CITS joined UNAMI and remained in that post until the applicant’s separation from the Organization.

5. On 9 March 2005 the applicant received a document entitled “Request for extension of Appointment/Assignment/Secondment of International Staff Members”. The request was signed on 6 March 2005 by the Chief Civilian Personnel Officer (CCPO) and the applicant’s supervisor (Chief of CITS) and indicated that the applicant was rated as partly meeting performance expectations.

The request contained hand-written remarks by the CCPO and the Chief of CITS, stating –

One-month extension only [until 30 April 2005] due to the planned abolition of the function of Chief of IT as per budget authorization for May–Dec. 2005.

The post of Chief of IT (P-3) will be realigned to cover the functions of Budget, Planning and Logistical Support [and called Budget, Planning and Logistics Officer (BPLO)].

6. The new post of BPLO was created as part of the reorganization in UNAMI (including CITS), and was designed to cover IT, administrative, budgetary, and logistical functions. The applicant testified that prior to receiving the March 2005 form he was not advised that there would be a restructuring exercise or that his post would be abolished as a result of the BPLO post being created and he was never informed that he could apply for the new post of BPLO. He said that had he been so informed he would have applied. The evidence of the CCPO and Chief of CITS was to the contrary. They said that not only was the applicant aware of the restructuring but they informed him that he could apply for the post and encouraged him to do so. The CPPO added that the applicant said to him that there was no point in his applying since he believed it was already decided that he should go. Both the CCPO and Chief of CITS said, in effect, that they believed he would have been fairly considered and the former said that he told this to the applicant. Neither of them either participated in the selection panel or made the ultimate selection decision.

7. On 3 April 2005 the applicant filed a rebuttal of the performance rating given to him by his supervisor in March 2005, alleging that his rating was due to the supervisor's "malicious intention of separating [the applicant]". He requested an investigation into the restructuring of CITS and the planned abolition of his post and alleged that the reason for the restructuring was the supervisor's desire to separate him. The applicant's request for investigation was subsequently reviewed by the Chief of the Conduct and Discipline Unit, UNAMI, who found –

correctly, in my view – that the applicant’s allegations of abuse of authority were not really leveled against the applicant’s supervisor but rather against the decision to restructure the office and abolish the applicant’s post.

8. The applicant’s appointment was extended beyond April 2005, until completion of the review of the applicant’s case by a Performance Appraisal Review Board. The Review Board issued a preliminary report on 21 August 2005, recommending, *inter alia*, extension of the applicant’s appointment to allow him to be appraised in accordance with ST/AI/2002/3.

9. By the end of 2005 the selection process for the new post of BPLO was coming to an end. In October 2005 DPKO forwarded to UNAMI a list of short-listed candidates for the post of BPLO. It became clear at the hearing – and I understand this is the view that both parties now share – that the post was not formally advertised on Galaxy (UN’s website for vacancies) and the list of short-listed candidates was drawn from a roster of candidates who had previously applied for similar positions. The person selected for the post testified that he had not applied for the post of BPLO but was invited for an interview because his name had been included in the roster as a result of his participation in a prior selection exercise for an unrelated post. The programme manager reviewed the applications and selected four candidates for interviews. Because three of the four candidates were not interested, only the successful candidate was interviewed. The interview panel concluded that he was a strong candidate and he was subsequently appointed.

10. Upon arrival to UNAMI in January 2006 the new BPLO became the applicant’s supervisor. The applicant was under his direct supervision until 30 April 2006. It is clear that the applicant resented this and would not co-operate in developing his work plan as was later required to enable performance appraisal.

11. On 15 January 2007 the then Chief Administrative Officer (CAO) of UNAMI wrote to the Chairperson of the Review Board requesting the completion

of the review of the applicant's case. The review process was completed on 21 February 2007. By memorandum dated 22 February 2007, the CAO informed the applicant as follows, quoting the Review Board's recommendations (emphasis in the original):

1. Rebuttal Panel [ie Review Board] which reviewed your case has concluded its deliberations and made the following recommendation:

**“As a result of the investigation, the Board recommends the following in relation to the case:**

**– The ambiguity surrounding the contractual status of the staff member be ended and that the staff member, in view of the Fully Satisfactory Evaluation, be given a contract extension. The duration of said to be in line with the current mission standard.**

**– The staff member is re-incorporated back into the CITS section as IT Officer.**

**– The staff member and supervisor(s) utilize the E-PAS [electronic performance appraisal] system of evaluation from April 2007.[”]**

2. I have accepted the recommendation of the Panel under para. 1 above and decided that your contract be extended for six months effective 1 March 2007. In this regard, you will be reincorporated into the CITS, and your title will be IT Officer.

3. By copy of this memo, I am requesting Chief CITS to implement this decision, to prepare terms of reference for [the applicant] as IT Officer not later than 1 March 2007, and to utilize the e-PAS system effective 1 April 2007.

12. The applicant was subsequently provided with a draft work plan and asked by his supervisors to finalise it so that performance evaluations could in due course be done. However, the work plan was not finalised and performance reports were never submitted for reasons about which the parties disagree. The applicant submits that his supervisors failed to give him terms of reference and work plan that provided adequate basis for initiating the performance evaluation process. The respondent, on the other hand, submits that the draft work plan and terms of reference were sufficient to carry out the performance appraisal process.

13. The applicant subsequently served on a number of successive short-term appointments on a variety of projects. By memorandum dated 29 October 2007, the applicant was notified by the new CCPO that his contract would not be extended beyond 30 November 2007. The memorandum stated –

1. Please be advised that under Instructions and in consultation with UNHQ New York, CITS implemented a re-organization of the section and the changes included re-classification of two P-3 posts, formerly Chief Communications and Chief Information Technology which were reclassified as Operations Officer and Budget/Planning Officer. The mission no longer requires the post of Information Technology officer.

[2]. In line with provisions of fax 2006-UNHQ-080774 dated 20 December 2006 from . . . Director, DFS on extension of appointment of mission personnel affected by outsourcing; discontinuance or replacement of a staff member's functions, your appointment will be extended for a further one month through 30 November 2007. This will give you time to apply for advertised posts commensurate with your qualifications and experience in other missions.

[3]. Please note that there will be no further extension of your appointment beyond 30 November 2007 and FPD will be advised accordingly.

14. Subsequent to this the applicant sought, and was granted, certified sick leave from 29 November 2007 to 7 March 2008, after which time his contract was not renewed.

### **Applicant's submissions**

15. In his initial submissions the applicant contended that the restructuring exercise was used as a pretext for the subsequent non-renewal of his appointment and that his post was abolished in order to separate him from service. The applicant subsequently conceded – quite correctly – that the evidence elicited at trial in relation to the restructuring exercise demonstrated that it and the consequent creation of the post of BPLO were carried out in good faith and informed the Tribunal that “he no longer pursues the contention that the exercise

was used as a pretext to separate him”. The applicant now submits that the reasons provided for the non-renewal of his appointment – ie the restructuring of CITS and the creation of the new post – were (though proper) not the true reason for the non-renewal of the contract and the contested decision was based on untrue allegations of performance failures and suggestions of a lack of a constructive attitude with respect to his performance evaluations. Accordingly, the Tribunal should infer that the contested decision was vitiated by failure to disclose the true (and principal) reason and was thereby unlawful.

16. The applicant contends that no competitive selection process was followed for the post of BPLO as it appears that the position was not advertised on Galaxy and in the end only one candidate was interviewed. The Administration failed to follow the rules governing recruitment of staff as laid down in ST/AI/2002/4 (in force at the time) and, as a consequence, the applicant was denied full and fair consideration for the post. Section 4 of ST/AI/2002/4 required that posts approved for one year or longer be included in the compendium of vacancies whenever a new post was created. The Administration was required to include the new post in the compendium. Had the standard recruitment procedures been followed, the applicant would have been eligible for the post of BPLO as he was fully conversant with drafting budgetary submissions and logistical matters and would have applied.

17. The applicant was not told to apply for the post of BPLO and the evidence to the contrary adduced at trial lacks credibility. Had he been informed of the vacancy he would have applied. He was also not considered for or offered other posts that were available at the time in UNAMI and other missions although he had relevant qualifications and experience.

18. The applicant’s supervisors failed to implement the recommendation of the Review Board to incorporate the applicant back into CITS and to utilize the e-PAS system from April 2007. The applicant was prevented from completing his



performance appraisal reports as he was not provided with mutually agreed work plan, terms of reference, and required resources.

### **Respondent's submissions**

19. The applicant's claims of discrimination, abuse of power, and harassment have been disproved. The applicant was separated due to operational requirements dictated by the restructuring of the section to which he was assigned. The reorganization of CITS was part of UNAMI's revised budget submission and was implemented for operational reasons. The applicant was aware of the proposed reorganization. The post of BPLO was not advertised through the Galaxy system but there was a competitive selection process with pre-cleared rostered candidates being considered for the position in accordance with the rules of the Organization. The applicant was given every opportunity to apply but refused to do so. The applicant's rights with respect to his performance evaluation reports were fully respected and the applicant was himself responsible for this process not being undertaken.

### **Discussion**

#### *Non-renewal*

20. The concession of the applicant that the restructuring was properly done was correctly made. It is unnecessary to deal with this issue further. The applicant contends, instead, that the true reason for his separation was the purported dissatisfaction with his performance and his alleged lack of cooperation with respect to his performance evaluations. This submission is largely based on the evidence given by the Chief of CITS that, in his view, the reasons for the non-extension of the applicant's appointment also, and rightly, included dissatisfaction with his performance and failure to cooperate with regard to his performance evaluations. Although the Chief of CITS was certainly not satisfied with the applicant's performance and with the level of his cooperation on performance

appraisal, it does not follow from this that the reason for the non-extension, given by the CCPO in the letter dated 29 October 2007, should not be accepted. The letter was written by the CCPO and not the Chief of CITS and, at all events, the latter did not make the impugned decision. He was not involved in drafting the letter and was not even copied on it. I accept the letter as cogent and reliable evidence that the abolition of the applicant's post and the non-renewal of his contract were due only to the reorganization. That the Chief of CITS was also dissatisfied with the applicant's performance and thought his shortcomings justified non-renewal of his contract is immaterial although, as the evidence presently appears to me, I would be disposed to conclude that the applicant's lack of cooperation with the development of his work plan would have justified non-renewal.

21. Although this is not directly relevant to the present case for the reasons stated above, I should add that, in principle, if a decision-maker has several valid reasons not to renew a staff member's contract, each being sufficient to justify the decision and complying with all necessary requirements (*Beaudry* UNDT/2010/039, para 40), the decision-maker can choose to rely on any of those reasons in making the decision. Therefore, had the non-renewal here in fact been based on two reasons – the restructuring exercise and dissatisfaction with the applicant's performance – and had the Administration failed to identify the second reason, it would not necessarily follow that the decision was unlawful. To prove its unlawfulness, the evidence would need to demonstrate that the unstated reason was mistaken or irrelevant *and* significantly influenced the decision. The evidence in this case does not do this but, rather, shows that the restructuring exercise and the abolition of the applicant's post had nothing to do with his performance evaluation and were the sole ground, in the event, for the non-renewal of his contract.

22. Is it not really disputed that, at the time of his separation, three professional positions were available within UNAMI that would have provided

funds for the applicant to continue his functions. It was theoretically possible that he may have been appointed to them but this cannot mean that the Organization was required to do so, absent a legal right vested in the applicant, which was not the case.

*BPLO selection exercise*

23. I am satisfied that the applicant was aware of the creation of the new post and that he was both informed of his ability to apply and encouraged to do so. In the circumstances, the reasons for his not applying do not need to be determined. I am satisfied they had nothing to do with any inappropriate conduct on the part of the CCPO or the Chief of CITS. The extent to which this matter is relevant to deciding the application is rather doubtful but in fairness to the parties I should make my view of the evidence known.

24. The initial vetting of the candidates for the position was made by DPKO in New York, which went through its existing roster of candidates and identified potential candidates with relevant experience and then proposed short-listed candidates for further consideration by UNAMI in accordance with usual practice. The Chief of CITS testified, and I accept, that, although he was familiar with the successful candidate, his inclusion in the list of short-listed candidates was a recommendation made in New York in the usual way. Although four candidates were selected by the mission for interview, three of them stated that they were not interested and only the remaining (and ultimately successful) candidate was interviewed. The interview panel included four UNAMI staff members and not the Chief of CITS. The successful candidate was “highly recommended” by the panel. The Chief of CITS did not play a part in his selection.

25. Although I am persuaded by the evidence adduced at trial that the applicant was told to make his interest in the post known to the Administration and that he chose not to, it is actually not significant whether the applicant was *encouraged* to apply. The relevant questions are when did he become aware of

the proposed restructuring and whether he had a reasonable opportunity to put his candidacy forward for the new post. Even accepting the applicant's case at its best, he was made aware of the newly-created position no later than March 2005, since it is mentioned in his performance evaluation of this date. The short-listing exercise for the new post was carried out in October 2005, and the applicant therefore had sufficient notice to apply or (on his own account) at least inquire how to apply but he did not even take this step. In the event, I accept the evidence of both the CCPO and the Chief of CITS that they had advised the applicant on several occasions of the restructuring and told him to apply for the post of BPLO and that, in effect, had the applicant expressed interest in the position, he would have been considered for it. I infer from this evidence that, even if the post had been advertised in Galaxy, the applicant – contrary to his evidence – would not have applied. It follows that whether or not the post should have been advertised is irrelevant.

*Applicant's performance evaluation*

26. The applicant submitted that, despite repeated requests, his supervisors failed to provide him with adequate terms of reference and work plan required for him to initiate the performance evaluation process. As explained below, I do not accept this evidence and, in any event, this issue is irrelevant, as I am persuaded that the applicant's contract was not renewed because his post was no longer needed and for no other reason.

27. The applicant was provided in March 2007 with several detailed drafts of his work plan and e-PAS goals. The tendered records show that the applicant's supervisors made real efforts to comply with the recommendations of the Review Board. The applicant complained in general terms that the information provided to him was insufficient to finalise his e-PAS goals and work plan. In fact, the drafts of the terms of reference, goals and work plan for 2007–2008 provided to him were more than sufficiently detailed. The conclusion is inevitable that, for

some reason or other, he found himself unable to finalise them. It is possible that the applicant sincerely felt that the work plan and the terms of reference provided to him were not sufficient (although, objectively speaking, I think they were), but, in that case, he should have engaged in a constructive dialogue with his supervisors. Instead, the applicant appears to have adopted the general stance that the information shared with him was not sufficient and took no active steps to attempt to resolve the problem, which, after all, he had identified. In short, my view is that his supervisors acted reasonably and the applicant did not.

### **Conclusion**

28. The application is dismissed.

*(Signed)*

Judge Michael Adams

Dated this 11<sup>th</sup> day of May 2010

Entered in the Register on this 11<sup>th</sup> day of May 2010

*(Signed)*

Hafida Lahiouel, Registrar, New York