UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/015/ JAB/2008/018
Judgment No.: UNDT/2010/114
Date: 25 June 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ALAUDDIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Duke Danquah, OSLA

Counsel for respondent:
Peri Johnson, UNDP

Introduction

1. On 16 April 2010 I refused an application by the respondent for summary judgment (Order 73 (NY/2010)) in the instant case, which is a challenge by the applicant of the non-extension of the applicant's contract and in effect, the requirement that he resign from his government in order to return to the United Nations Development Programme (UNDP). The case was then adjourned several times to allow discussions to take place about settlement. However, I have now been informed that those discussions have not been able to produce agreement. It is agreed that no further evidence is necessary to enable a determination to be made, at least, on what might be usefully described as the issue of liability. This is that determination. I do not intend to repeat in detail the legal discussion contained in my ruling refusing summary judgment although it will be necessary to refer briefly to some aspects of it.

The basis for the present determination

2. The applicant sought administrative review of the impugned decision upon the grounds that it breached what he contended to be a condition of his contract that it would be renewed whilst his performance remained suitable (which, there is no dispute, it had) and that it was affected by retaliation for his bringing to notice issues of wrongdoing in the UNDP Country Office in Pakistan. The matter was referred to the UNDP Ethics Office (the Ethics Office) in accordance with the *UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct* and the decision not to renew the applicant's contract was set aside and he was placed on leave without pay whilst the investigation proceeded. During this time the applicant returned to work with the Pakistani government. Leaving aside any issues about the precise language of the Ethics Office's conclusion – which were not the subject of dispute – in substance it was that the impugned decision was arbitrary and capricious and may also have been tainted by retaliation. Of course, a decision affecting a staff member which is arbitrary and capricious is necessarily a breach of the contract of employment, whether or not it was affected by retaliation. The Ethics Office

recommended that the applicant should be re-integrated into UNDP. Both the illegality of the impugned decision and the recommendation of re-integration were accepted by the respondent. Moreover, the respondent does not seek to contend that the decision not to renew the applicant's contract was legal. Rather, the respondent's position, as I understand it, is that the application has been rendered moot by the Ethics Office's proceedings and the respondent's acceptance that its decision was unlawful. Problems arose about the proposed re-integration of the applicant in UNDP in Pakistan. These have been detailed in my previous ruling and it is not necessary to repeat them here.

3. I ruled that the applicant, by making a complaint to the Ethics Office, had not abandoned his rights to invoke the jurisdiction of the Tribunal to determine the lawfulness of the impugned decision and to obtain a remedial order, at least of compensation, under the Tribunal's Statute. Of course, where an impugned decision is not merely corrected by acceptance by the respondent that it was wrong and a withdrawal, the injury, if any, caused by the decision, must also be corrected before it can be said that the breach has been resolved.

4. This is, of course, an unusual case, in that the respondent has acknowledged that its decision was a breach of the applicant's contract. The respondent submits that it has attempted to fulfil the recommendations of the Ethics Office but that this has been unsuccessful because the applicant has not satisfied the requirements of the re-integration process. For his part, the applicant contends that the requirements were unreasonable or a further breach of the respondent's obligations and that, as the matter stands, he has not been compensated for the breach of his contract. I dealt with these issues in my earlier ruling, holding, in effect, that the respondent had imposed conditions upon reappointment that were unjustified, leaving the question of compensation still to be determined, necessarily by the Tribunal.

The extent of the breach

5. Although the respondent has agreed that the decision not to renew the applicant's contract was unlawful and has withdrawn it, the nature of the compensation rightly to be ordered depends upon the character of the breach and therefore the compensation or relief necessary to place the applicant in the same position he would have been in had the breach not occurred. I held that the respondent was bound to continue to renew the applicant's contract whilst his performance remained adequate, as had been agreed with him as a condition of his contract of employment at the outset. However, this did not mean that, in effect, the applicant had a permanent appointment whilst ever his performance was acceptable. He was entitled, as the respondent concedes, to the particular renewal (for twelve months) that he sought but whether he was entitled to further renewals was uncertain. Overall, it is fair to infer that the applicant was entitled to such further renewals as were within the policy of the UNDP to grant in cases of contracts of the type by which he was employed. There is the additional complication that the attitude of the applicant's government, which had granted him leave to work for the UNDP, needs to be taken into account and, if it refused an extension, whether the applicant would resign from that position to continue, if he were able, to work for UNDP. As I understand it, UNDP does not usually permit appointments made under fixed-term contracts to extend to five years and, if so, this must mark the outer extent of the applicant's potential term of employment and, hence, the limit of any compensation payable to him.

6. It is for this reason that the significance of the obligation of the respondent under the terms of the letter of offer (as distinct from the letter of appointment) must be considered. The sequence of events and content of these documents is fully narrated in my earlier ruling and I do not intend to repeat it here. In that ruling, I had held, in substance, that a binding agreement to employ the applicant was constituted by the letter of offer and effectuated by the letter of appointment, with the result that the two documents together constituted the contract of employment or, if this be more

consonant with the staff rules, the contract of employment was subject to the conditions bargained for and agreed in the letter of offer.

7. After I delivered my ruling, the Appeals Tribunal, in *El-Khatib* (2010-UNAT-034) dealt with the issue of a withdrawal of an offer before the execution of a letter of appointment, observing that a contract of employment with the United Nations Relief and Works Agency (UNRWA) was not created under the "common law" (this being the translated term but I think what was meant was the "general law") but under the Rules and Regulations of the Organization. Thus, the accepted letter of offer was not binding as the appointment in the circumstances was prohibited by the rules concerning appointment of spouses and no letter of appointment had been executed as the Rules required. The significance of this judgment generally on the relationship between an accepted letter of offer (which would constitute a contract under both the common and civil law) and the letter of appointment is unclear but it does not appear to me to deal with the issue in the present case. Here, there was an accepted letter of offer and an executed letter of appointment. The crucial question is whether, because of the undertaking, expressed both in the letter of offer and, as it happened, verbally by the responsible official on the occasion of issue of the letter of appointment, that the applicant's contract would be renewed if his performance was satisfactory was binding on the Organization. Whether it was binding because it was a condition of the contract or because the applicant had a legitimate expectation that, when the question of renewal was considered, his satisfactory performance would lead to renewal or whether the obligations of good faith and fair dealing entitled him to renewal in that event is of little practical importance, since each approach leads to the same outcome, namely, in the circumstances the applicant had an entitlement to renewal.

8. It is important to observe that it is implicit in the Rules and Regulations and all administrative issuances that the Organization and, for that matter, the staff members are bound to act in good faith and to make decisions in the course of fair dealing and that this obligation is not satisfied by what might be called facial compliance with the text of the relevant instrument. Accordingly, the condition in the

letter of appointment that imports the Rules and Regulations of the Organization carries with it the necessary implication of the legal obligation to act in accordance with the requirements of good faith and fair dealing. (This principle is by no means new and has been consistently stated by the UN Administrative Tribunal, of which *Al-Abed*, Judgment No. 128 of 22 May 1969, is but one example.) That this must be so is easily demonstrated by observing that the notion that the Organization has a legal right to act in bad faith or by unfair dealing is self-evidently impossible to accept; such a proposition only has to be stated to be refuted.

9. The Organization cannot with propriety resort to relying on particular provisions of its Rules or Regulations which might be regarded as arguably inconsistent with a representation such as has been twice made here merely because the Rules and Regulations as a whole are referred to in the letter of appointment. To do so is the equivalent of relying on what is derisively described as "the small print" and rightly regarded as the cunning resort of a rogue. I do not accept for a moment that such a rule could apply in the United Nations or that the respondent would seek to take advantage of it

10. Accordingly, not only was the respondent in breach of its contract with the applicant by deciding arbitrarily and capriciously not to renew his contract but it was in breach of the contract by not renewing it when his performance was not only satisfactory, but more than satisfactory. In other words, he had a right to renewal, not merely to having the decision as to renewal made by a proper process.

Conclusion

11. The respondent was in breach of its contractual obligations to the applicant in refusing to renew his contract as agreed whilst his performance was satisfactory. He would have been entitled to successive renewals in accordance with the general policy of UNDP in respect of contracts of the type involved with the applicant.

Compensation

12. Primarily, the proper order to make is for the applicant's reinstatement upon the same basis that applied to his original contract of employment, namely, secondment or leave from his government or else resignation from service with that government. If the respondent chooses not to reemploy him, the measure of damages – as he has now been separated – is principally the value of the loss of salary and emoluments for the balance of the probable period of appointment, providing the applicant establishes on the balance of probability that he would have been in a position to accept renewal for that period. Since he has been employed by his own government for much of the time up until now, his income from that source must be brought into account and his future income in respect of the future period of entitlement, if any. He is also entitled to the economic loss, if any, that flows from the cutting short of his employment with UNDP which, practically speaking, might well be economically advantageous in Pakistan and elsewhere.

13. However, the impending end of my own term of service as Judge of the Tribunal means that the task of dealing with this issue of compensation must, if the parties are unable to agree, be determined by another Judge.

(*Signed*)

Judge Michael Adams

Dated this 25th day of June 2010

Entered in the Register on this 25th day of June 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York