



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/031
Judgment No.: UNDT/2010/119
Date: 12 July 2010
Original: English

Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Jean-Pelé Fomété

GASKINS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Peri Lynne Johnson, UNDP
Thomas Elftmann, UNDP

INTRODUCTION

1. On 19 August 2008, the former Joint Appeals Board received an appeal from Mr. Alphonso Gaskins (the Applicant) against the administrative decision taken by the Sudan Country Director of the United Nations Development Programme (UNDP) to remove him from the position of Project Manager of the Rule of Law project and to deny him continued employment after he had reached the age of 62. His request for an administrative review of those decisions had been rejected by a letter dated 16 July 2008 from the Assistant Administrator and Director of UNDP's Bureau of Management.

2. The Applicant had previously held various positions with UNDP. This case is concerned with his appointment by UNDP Sudan as the Rule of Law Project Manager in Khartoum, Sudan.¹ Having reached the mandatory retirement age of 62, his appointment ended on 31 July 2008. The Respondent did not use its limited discretion to extend the Applicant's appointment beyond age 62 as he says he was led to believe would happen. The Applicant contends that he had a legitimate expectation that his contract would be extended beyond retirement age until the conclusion of the project on 30 July 2009.

BACKGROUND

The Rule of Law Project

3. The UNDP's project in Sudan, "Capacity Building of the Sudan Judiciary" had as its primary goal to strengthen the capacity of the judiciary in order to enhance its independence, build the knowledge base of judges, and empower the judiciary to apply the law and deliver justice effectively and fairly. As the Rule of Law Project

¹ On 16 February 2007 through 15 August 2007, the Applicant was appointed as the Rule of Law Project Manager, on an Appointment of Limited Duration. However, since he had been on an ALD for the maximum of 4 years, his next appointment on 26 September 2007 was on a 200-series contract but his title, Rule of Law Project Manager, remained the same.

Manager, the Applicant was responsible for arranging training for the Sudanese judges. His contact point within the Judiciary was Judge Hussein Awad Abdul Gasim (Judge Hussein) who was the Director of Judiciary Training and Administration. It was an essential aspect of his duties that he would need to have regular meetings with the Judiciary.

4. The judges attending training were entitled to receive a daily subsistence allowance (DSA). As the Project Manager, the Applicant had responsibility for making the necessary arrangements for disbursement of the DSA. He took into account Judge Hussein's guidance that a more inclusive approach would enhance the relationship with the judiciary. Accordingly, after seeking the advice of UNDP staff, he proposed that the judiciary be given responsibility for distributing the DSA. Chief Justice Osman approved these initial arrangements and provided UNDP with a Judiciary bank account into which the DSA payments were to be made for subsequent distribution to the judges. The Applicant initiated the process of having the necessary funds released to the Sudan Judiciary. However, on 29th January 2008, at the point at which those responsible for financial control within the UNDP had to authorise the release of the funds for the DSA payments, the Finance Manager, Mr. Ahmed Eltayib, stated in no uncertain terms, that the DSA could not be handed over to the judiciary as it would present problems from individual judges.

5. Mr. Christian Schornich, the Assistant Resident Representative, and Mr. Eltayib were of the view, which the Applicant accepted, that UNDP should arrange for payment of the DSA directly to the judges. Following advice from the Finance Unit of UNDP Sudan, whom he had consulted over the arrangements for the payment of DSA to the judges, the Applicant realised that the arrangements that he had discussed and agreed with Judge Hussein would be inconsistent with the proper financial control procedures of UNDP. In the circumstances, urgent steps needed to be taken to ensure that the judges received their DSA payments in line with UNDP's procedures.

Revised arrangements for DSA payments

6. The new proposal involved an arrangement for payment of DSA directly to each judge who was required to produce appropriate identification and to sign a receipt. These arrangements met the requirements of the financial control procedures of UNDP.

7. At this point it is important to consider the following questions which go to the heart of one of the principal issues of contention between the parties:

- a. What were the new proposals?
- b. Did these proposals meet the requirements of the financial control procedures of UNDP?
- c. What steps did the Applicant take to explain and secure the agreement of the judiciary to these new arrangements?
- d. Were these steps appropriate and carried out with due regard to observe the required protocol?
- e. What was the reaction of the Sudan judiciary and was that reaction proportionate to the circumstances?
- f. What demands, if any, did the Sudan Judiciary make in response to what had occurred?
- g. How did the UNDP managers respond to these demands?
- h. Did UNDP's response breach the Applicant's due process right?

8. The Applicant took urgent steps to inform Judge Hussein of the change in procedure for DSA payments and the reasons for such changes. He asked Judge Hussein whether the new arrangements were acceptable to the judiciary. Judge Hussein stated that the new arrangements were acceptable as they would speed up payments to the judges who were under pressure to pay their hotel bills. This discussion took place about 48 hours before the actual distribution of the DSA.

9. The Applicant considered it appropriate to proceed with these new

arrangements given the fact that they had been approved by Judge Hussein with whom he had dealt with as the representative of the Chief Justice. Accordingly, by discussing the revised arrangements and obtaining approval, the Applicant acted appropriately and in accordance with protocol. He did not have direct access to the Chief Justice over such matters and it is reasonable to suppose that had he attempted to go directly to the Chief Justice such an approach may well have been regarded as a breach of protocol. Further, given the interval of 48 hours before the payments were actually made, there was sufficient time for Judge Hussein to contact the Applicant if there were any concerns on the part of the Chief Justice or any other person in authority. The payments were made on 31 January 2008 as agreed with Judge Hussein.

10. At the stage when the payments were completed, there were no difficulties raised by the judges and that part of the task had been satisfactorily completed. However, that evening Judge Hussein called the Applicant to advise him that the Chief Justice was very angry about the fact that UNDP paid the judges directly as opposed to placing the funds into a Judiciary account in accordance with the previous arrangement.

11. Nothing further of significance, in relation to this matter, occurred apart from the fact that on Sunday, 3 February 2008, Judge Hussein met the Applicant and repeated that the Chief Justice was very angry. The training course resumed on Monday when the Chief Justice, Judge Hussein and Judge Yahia Hakim, the Deputy Director of the Judiciary Training Administration, visited the training course without prior notice. They had a private meeting with the judges in the absence of the Applicant and other staff. After the meeting Judge Hussein informed the Applicant that the Chief Justice wanted feedback from the judges as to whether the training was proceeding satisfactorily and whether they were deriving any benefit from it. Forty-two (42) of the fifty (50) judges said that the training was very important and they found it beneficial. One or two judges complained that they had to present their ID cards before the DSA was handed over to them. Judge Hussein expressed the view

that the Chief Justice thought that UNDP had breached the agreement regarding the payment of the DSAs into a Judiciary bank account. The Applicant explained once again to Judge Hussein that the revised arrangements were in accordance with UNDP's financial procedures and that he was obliged to follow them. The Applicant subsequently received a call from Judge Benjamin Baak Deng, Secretary of the National Judicial Service Commission and a member of the Sudan Supreme Court, who provided the same report as did Judge Hussein about the meeting between the Chief Justice and the judges on the training course.

12. Following that meeting on 4 February it would appear that Judge Hussein avoided having further discussions with the Applicant. On 7 February Judge Benjamin informed the Applicant that until further notice, Judge Hussein did not wish to have meetings with him. The Applicant then asked Judge Benjamin if in the circumstances he should continue his work by meeting Judge Hakim to which Judge Benjamin replied that he should not meet with Judge Hakim either.

Management Action

13. On 12 February 2008 a meeting took place between the Country Director, Mr. Jerzy Skuratowicz, and the Applicant. Mr. Skuratowicz informed the Applicant that he would be meeting the leadership of the judiciary in Sudan to resolve the matter before a formal letter of protest was sent by the judiciary to UNDP. However, it would appear that before such a meeting could be convened between the Country Director and the judiciary, a formal letter, written in Arabic, was delivered to UNDP on 5 February 2008. This letter was translated into English and on 21 February the Applicant was called to Mr. Skuratowicz' office and given a copy of the translated version the substance of which was clear. The Applicant was no longer to have further dealings with the senior judiciary. The specific complaint was that the Applicant had "behaved in a manner which humiliated the judges and Judiciary when (you) failed to honour the agreement reached with (them) pertaining to the transfer of funds allotted for the on-going training workshop."

14. After complaining about the procedure that was followed relating to the presentation of ID cards and the fact that there was delay, the letter stated that the judges were humiliated and insulted and affected psychologically. It was claimed that this:

“Lessened their stability and affected their general performance in the workshop. No doubt such behaviour convinced us that the project manager has no confidence in the Sudan Judiciary and this is considered as defamation in its impartiality, independence and honesty. Frankly speaking and in all honesty, we have decided not to deal any longer with the current project manager. As of today's date, we have instructed all Departments to finally withhold their dealings with the current project manager”.

15. There can be no doubt as to the meaning and import of this letter and its effect on the Applicant's ability to perform his duties. The Applicant pointed out that if that state of affairs were to prevail it would be impossible for him to do his job which required substantial face-to-face interaction with the judiciary. Mr. Skuratowicz noted the Applicant's comments and said that these matters would be discussed in a meeting that was being arranged.

16. Shortly after this meeting Mr. Auke Lootsma, Deputy Country Director for Programs, informed the Applicant that Judge Hussein told Mr. Skuratowicz that if he did not have a name other than Mr. Gaskins to discuss, there would be no need to have any meeting. Mr. Lootsma informed the Applicant that Mr. Skuratowicz considered that Judge Hussein was adamant that there would be no further dealings with the Applicant. Accordingly, the rest of the meeting with Mr. Lootsma proceeded on the basis that the judiciary in Sudan would have no further dealings with him.

17. At a meeting between the Sudan judiciary and UNDP, it was clear that there

was an impasse. Mr. Skuratowicz explained that the Applicant had acted in good faith and had followed UNDP financial rules and regulations governing the payment of DSA. The Sudan Judiciary stated that whilst they respected the Applicant's legal expertise, they insisted on having a different Project Manager. They wanted him to focus on the functions of Chief Technical Adviser (CTA). This proposal was discussed with the Applicant on 1 April 2008. He did not accept it. On 7 April 2008, UNDP Sudan again proposed that the Applicant, "fully perform the functions of the CTA from 9 April 2008 until 31 July 2008" adding that a project manager would be separately recruited and that the Applicant's terms of reference would accordingly be changed. By letter dated 10 April 2008, the Applicant formally confirmed that he did not accept the proposal since he had done nothing wrong and he requested that there be a retraction from the judiciary and that his contract be extended through to October 2008. On 22 April 2008 UNDP informed the Applicant that it was maintaining its position adding that the split in functions was consistent with an earlier World Bank commission report.

18. It would appear that reliance on an earlier World Bank recommendation was misleading in that while such a recommendation had been made it had nothing to do with the reason for the change in the Applicant's terms of reference. There can be no doubt that this change was imposed upon the Applicant as a direct result of pressure from the senior judiciary in Sudan.

19. Whilst the Applicant retained the title of Rule of Law Project Manager, in substance he was prevented from performing an essential part of his duties, namely interaction with the Sudan Judiciary. In particular he was prevented from participating in meetings with the judiciary. His status was clearly undermined and it would be reasonable to infer that it diminished him in the eyes of those whom he had to deal with in that it was an effective demotion in status. Furthermore, such a fundamental and unilateral change in the terms of his contractual duties undermined the essential term implied into all contracts of employment, namely that of trust and confidence between the parties.

ISSUES

Applicability of Staff Regulation 1.2(c)

20. The principal issue is whether Staff Regulation 1.2(c) applies in this case, as contended by the respondent, and, if so, whether it was a proper exercise of discretion by the UNDP Administrator to redefine the Applicant's role and to appoint him as the Chief Technical Advisor (CTA) or alternatively whether the decision to alter the terms of his appointment was improper and arbitrary without regard to his due process rights as a staff member, including the question whether the Respondent breached an essential term of the contract of employment? If the Applicant's due process rights were breached, what should the appropriate award be to compensate him for any losses?

21. Staff Regulation 1.2(c) states that staff members are:

“Subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.”

22. The national counterpart in UNDP's Rule of Law Project had written formally to complain about the Applicant's handling of DSA payments for the judicial training programme. They made it clear that they would not have any further dealings with him. Faced with such clear opposition to the Applicant's continued position, the Respondents sought to find a solution in a manner that would be acceptable to all concerned. They met the Applicant in the hope of finding an agreed resolution. Their proposal for him to serve as CTA whilst they recruited a project manager was not acceptable to him. The Respondents accept that whilst he continued to enjoy the title of Rule of Law Project Manager he had no direct contact with the judiciary. In their submission to the JAB they state that, “the only exception was that direct

contacts with the judiciary were eliminated. This meant that the appellant was unable to attend key planning meetings with the counterpart.”

23. This is as clear a statement as one is ever likely to get in an employment context, which is an unequivocal acceptance by the Respondent that the staff member could no longer perform fundamental and essential duties of his employment as Project Manager.

24. The Respondents assert that their actions were fully consistent with staff regulation 1.2(c). They rely on the United Nation's Administrative Tribunal (UNAT) judgments No. 350 Raj (1985) and No. 117 Van der Valk (1968), citing well established UNAT jurisprudence that it is not for the tribunal to determine whether a given office should be organised in a particular way or to substitute its judgment for that of the Administration in respect of reorganization of posts in the interests of economy and efficiency.

25. With the greatest of respect to the Administration these judgments are not helpful since they are not directly to the point. What is at issue here is whether it is consistent with the high standards set by the Charter of the United Nations, Bulletins and issuances of the Secretary-General and the staff regulations, particularly Staff Regulation 1.2(c), to remove a staff member from his position and to deprive him of performing essential aspects of his duties solely as a response to an ultimatum by a project partner, in this case the Sudan Judiciary.

26. The conduct of the Administration in UNDP Sudan in reorganising the Applicant's duties was not done in the interests of economy and efficiency but in response to a peremptory demand by the senior judiciary in Sudan based on what appears to be an unjustified sense of grievance against the Applicant who, it has to be observed, implemented proper financial control procedures in relation to the disbursement of DSA. Furthermore, he followed the appropriate and proper protocol in advising the representative of the Chief Justice as to the changed arrangements and

the reasons for them, which it must be observed was accepted and implemented without objection until it came to the attention of the Chief Justice who took offence. The UN Charter would expect all staff members to conduct themselves in accordance with the highest standards of efficiency, competence and integrity.

27. I would add that whilst this principle should guide conduct in all matters it is particularly important in relation to financial transactions. Staff members should be encouraged and motivated to uphold these high standards and they should not fear retribution for doing so. What happened in this case was not dictated by a genuine attempt to restructure and to reorganise the project in the interests of economy and efficiency or any wider UN principle. The Chief Justice was outraged by the change in the method of payment of DSAs. He laid this squarely at the door of the Applicant. The Respondent was faced with a dilemma. If they had insisted on the Applicant continuing as Project Manager the continuation of the project would probably have been jeopardised. On the other hand, they had an obligation to observe the staff member's due process rights. He had done nothing wrong. He had followed the appropriate procedure as approved by the Assistant Resident Representative and the Finance Manager of UNDP in Sudan. He followed the proper protocol in communicating with the judiciary about the reason for the change in payment method.

28. It is a well known principle of contract law in the context of employment relations that where the employer acts unilaterally in removing an important part of the employee's functions the employer would have repudiated the contract of employment. Furthermore, there is implied into every contract of employment an implied term of mutual trust and confidence between employer and employee. This means that neither party should conduct themselves in a manner that destroys this relationship. Both parties must act responsibly and in good faith. It has to be observed that it is ironic that in a project that is concerned with fundamental rights and the rule of law, as described in paragraph 3 above that there should have been an omission to observe the due process rights of the Applicant. Clearly, the UNDP

Country Director had a difficult choice to make but he failed to take advantage of the opportunity to demonstrate how, in relation to this problem, the rule of law and respect for fundamental human rights would or should operate. Giving in to the ultimatum presented was inimical to the objectives of the project itself. In these circumstances, I do not accept that the action taken by management is protected under staff regulation 1.2(c). The Applicant's due process rights were infringed.

29. This part of the Applicant's claim succeeds. The Applicant is entitled to be compensated for the failure to observe his due process rights and for the humiliation and distress which he suffered as a consequence thereof.

Legitimate Expectation

30. Was the Respondent's decision not to extend the Applicant's appointment beyond retirement age a proper exercise of discretion under ST/AI/2003/8 and former Staff Regulation 9.5 or were the actions of the Respondent of such a nature that they led the Applicant to believe that his appointment would be extended until the end of October 2008 so that in the circumstances he had a legitimate expectation or legal expectancy?

31. The Applicant's claim in relation to the question whether he had a legitimate expectation of continuing in employment after he had reached the mandatory retirement age of 62 is best summarised in his rebuttal to the Respondents reply to the Joint Appeals Board in his letter of 18 December 2008. In that letter he formulates the question in the following terms

“it is an enforceable legitimate expectation created when a United Nations agency country director and other senior officials of the same agency unambiguously advises a UN employee and repeats the same statements to third parties for a period of nearly 17 months, that it will favourably exercise its discretion to request that the advised UN staff member's employment with the UN be continued beyond the normal retirement age because of his/her

critical role in the implementation of an essential agency project”

32. The Respondent does not accept that any promises or assurances were made for and on behalf of UNDP to exercise its discretion favourably to request that the Applicant's appointment be continued beyond the mandatory retirement age. The Respondent contends that it is up to the Applicant to provide evidence in support of his contentions that he had been given promises or assurances.

33. The Applicant, on the other hand, takes the view that the challenge by the Respondent is also not based on any evidence in that they have not provided relevant witnesses or statements to rebut his allegation that such promises had been made. The Applicant argues that the Respondent, without proper investigation, has merely assumed that no such promises were made or assurances given. By Order No. 21, dated 15 February 2010, the Applicant was ordered to provide the evidence in support of his contention that he was given assurances repeatedly that steps would be taken to ensure his continued employment beyond the normal retirement age of 62 years. He has not produced such evidence save for asserting that the World Bank, as one of the main partners in the project, was concerned about the lack of continuity and said so in correspondence. Whilst this is helpful to the Applicant it is still necessary for him to indicate the affirmative evidence which he stated that he had. It is incumbent on the party who makes the assertion to produce the necessary evidence.

34. In Order No. 41, dated 16 March 2010, the Tribunal expressed its concern at the absence of witness statements to support the Applicant's contentions that assurances were given and promises were made. The Tribunal ordered the Applicant to provide evidence in the form of witness statements from two of his witnesses who apparently had difficulty in attending a hearing that was being planned at that stage. The Applicant's representative replied to the effect that having taken into account the difficulties regarding the availability of the witnesses and possible issues regarding their recollection due to the passing of time that he had decided not to rely on their evidence.

35. On the one hand, the Applicant asserts strongly that assurances were given and promises were made, which he had relied upon in good faith. However, he is unable to produce what he described as “affirmative evidence”. The Applicant contends that it is within the power of the Respondent to produce evidence rebutting his assertions that he was given any such promise.

36. In the present case, extensions beyond the normal retirement age were governed by former Staff Regulation 9.5, which provided that:

“Staff members shall not be retained in active service beyond the age of sixty years or, if appointed on or after 1 January 1990, beyond the age of sixty-two years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases.”

37. Thus, these extensions are limited to exceptional circumstances and are rare. Whilst it is correct that the World Bank was concerned about the lack of continuity in the project, it is also the case that extensions beyond retirement age are not the norm. Had the Applicant been able to produce cogent evidence to support his contention that assertions were made and promises given he would have had a more realistic prospect of persuading the Tribunal that but for the intransigence of the Sudan Judiciary, he would have continued in employment beyond age 62 until the conclusion of the Rule of Law Project. In the absence of a sufficiency of evidence in support of the Applicant's contention it is unnecessary to address the authorities on the legal questions. This aspect of the claim fails because of lack of evidence.

CONCLUSION

38. The Applicant's claim succeeds. He was denied his due process rights. There has been a unilateral breach of his contract of employment which resulted in damage to his self image and reputation.

39. It is not part of the Tribunal's function to dictate to senior officials of the United Nations as to what decision they should take in difficult circumstances. However, it is undoubtedly the task and duty of the Tribunal to protect the fundamental rights of staff members to be treated fairly and in accordance with the principles of the United Nations Charter, bulletins and various issuances of the Secretary-General. Above all, nothing should be said or done by or on behalf of the United Nations and or its agencies that would give the impression that the principles and values that are inherent in the Charter can or should be set aside in the interests of expedience. I regret very much to have to say that the evidence that I have seen indicates that this is what happened in this case.

40. I find as fact that the Applicant was humiliated in the workplace by the way in which he was treated and the decision to effectively demote him notwithstanding that he retained the title of Rule of Law Project Manager. He suffered a loss of self esteem and it is reasonable to infer that he was diminished in the eyes of those whom he had to work with until his employment ended upon his retirement.

JUDGMENT


41. The Tribunal orders the Respondent to pay to the Applicant the sum of six months net base salary at the rate applicable on the date of his separation from UNDP with interest at 8% beginning 46 days from the date of issuance of this Judgment until payment is effected.



Judge Goolam Meeran

Dated this 12th day of July 2010

Entered in the Register on this 12th day of July 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi