



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/014/
UNAT/1604
Judgment No.: UNDT/2010/161
Date: 9 September 2010
Original: English

Before: Judge Goolam Meeran
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

AHMED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Salim Shaikh

Counsel for respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Background

1. On 11 April 2008, the applicant filed his statement of appeal before the former United Nations Administrative Tribunal against the decision not to renew his fixed-term appointment which had expired on 31 December 2007.

2. His principal complaint was that in arriving at the decision not to renew his fixed-term appointment the respondent failed to accord to him his due process rights in that there was a violation of former staff rule 110.1 (misconduct).

3. The remedy he sought was that the decision not to renew his fixed-term appointment be rescinded and that he be reinstated with the payment of all benefits. Furthermore, he wished to be protected from acts of retaliation and, finally, he was seeking a monetary award of 36 months net-base salary for what he considered to be irreparable damage to his dignity, integrity and career, together with mental and emotional torture during his last two years of service.

4. It was the respondent's case that the applicant was accorded due process rights in the decision that was made not to renew his fixed-term appointment. It relies on the facts established by the Joint Appeals Board (JAB) in their report No. 1931 dated 26 October 2006. The JAB found that the applicant had been given two consecutive appraisal ratings of "does not meet performance expectations" for the appraisal periods 1 April 2003 – 31 March 2004 and 1 April 2004 – 31 March 2005. The panel was unanimous in its conclusion that the respondent presented a solid case justifying the decision not to renew the applicant's fixed-term appointment. The JAB specifically rejected the applicant's allegations of bad faith or retaliation and confirmed its view that the evidence showed that the decision was based solely on poor work performance.

5. The appeal was not considered by the former Administrative Tribunal and was transferred to the Dispute Tribunal on 1 January 2010.

The Tribunal's Orders

6. By Order No. 80 (NY/2010) of 20 April 2010, her Honour, Judge Ebrahim-Carstens, ordered the parties to cooperate in an attempt to clarify and agree the issues in the case including the legal issues and to state whether they agreed or disagreed with the facts found by the JAB. It is regrettable that there was only a partial compliance with the Order and in particular in relation to whether the parties agreed with the findings of the JAB Panel. The parties made separate submissions in relation to this Order. Legal representatives have a duty to assist the Tribunal and whilst no attempt is being made to apportion blame on this occasion, representatives and parties should know that in an appropriate case certain consequences may flow from a failure to comply with an Order of the Tribunal.

7. On 1 September 2010, a further order (Order No. 233 (NY/2010)) was made requiring responses from both applicant and respondent in relation to certain questions.

Considerations

Legal principles

8. Whether a decision not to renew a fixed-term appointment was motivated by extraneous factors, such as bad faith or retaliation, is to be decided under the relevant staff rules and regulations. Former staff rule 104.12(b)(ii) clearly stipulates, as can also be implied from former staff rule 109.7, that no extension of a fixed-term appointment can be expected beyond its set term.

9. The question has been considered in a number of appeals before the former Administrative Tribunal, whose decisions, even though they are not binding upon the Dispute Tribunal, are informative in establishing the consistent application of legal principles in the context of the Organization's relationship with staff. Whilst a fixed-term appointment does not of itself carry any expectancy of renewal, the Administrative Tribunal has laid down the principle that it was an implied term in the conditions of employment of staff members that all decisions, including a decision not to renew an appointment, should be given full and fair consideration. The former Administrative Tribunal has also upheld the principle that an expectancy of renewal may be created by countervailing circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration. These principles have subsequently been affirmed by the Dispute Tribunal in a number of cases.

10. Section 10.5 of ST/AI/2002/3 (Performance Appraisal System, PAS) states, in relation to the performance appraisal system, that a rating of "does not meet performance expectations" may lead to a number of administrative actions, such as transfer to a different post or function, the withholding of a within-grade increment as further clarified in section 16.6, the non-renewal of a fixed-term contract or termination for unsatisfactory service".

Right/expectancy of renewal

11. The applicant served on a series of fixed-term appointments from June 1985 to December 2005. On first impression, it would seem reasonable for him to have formed the view, after 20 years of service on a series of fixed-term appointments, that he would have by virtue of the conduct of the respondent formed an expectation of renewal. The respondent rejects the allegation that any such expectancy had arisen and asserts that the non-renewal of the fixed-term appointment did not violate the

applicant's due process rights by referring to former staff rules 104.12(b)(ii) and 109.7(a).

12. The various letters of appointment that the applicant had received in the past contained a provision of non-expectancy of renewal. However, as mentioned above, it is clear from several judgments of the former Administrative Tribunal as well as the Dispute Tribunal that an expectancy of renewal may be created by countervailing circumstances. Examples of such circumstances include arbitrary or other extraneous motives on the part of the Administration and particularly the failure to accord to the staff member her/his due process rights. Accordingly, whilst it may be argued with force that there is no automatic right to the renewal of a fixed-term appointment, it is clear that any decision should be based on proper grounds and in conformity with due process. However, the mere fact of a series of consecutive renewals cannot itself be conclusive of a legitimate legal expectancy having been formed. They are nevertheless very important considerations to be taken into account.

Unsatisfactory performance

13. The respondent's primary submission is that the non-renewal of the applicant's fixed-term appointment was based on unsatisfactory performance as evidenced in his PAS reports for 2003-2004 and 2004-2005. It relies on administrative instruction ST/AI/2002/3, which provides at sect. 10.5 that an adverse rating of "does not meet performance expectations" may lead to administrative action which includes the non-renewal of a fixed-term contract.

14. The performance appraisal system is not a punitive process but a developmental process which benefits both the staff member and the managers concerned to ensure that good administration and work performance are maintained in the interests of the United Nations as well as the staff member. An examination of the PAS reports for 2003 – 2004 and 2004 – 2005 shows very clearly that there is no substance in the applicant's assertion that his rights to due process were violated in

the performance appraisal system and unfairly used as an instrument to justify the non-renewal of his contract. There is also compelling evidence in the form of the decision of the rebuttal panel, as discussed below.

The rebuttal panel

15. In accordance with sect. 15 of ST/AI/2002/3, a rebuttal panel was constituted to review the performance ratings given to the applicant in the cycles 2003-2004 and 2004-2005. After reviewing the documentary evidence and hearing from one of the directors concerned, the rebuttal panel concluded that the applicant had been given appropriate encouragement to improve. The panel commented unfavourably on the applicant in relation to various conduct-related matters and observed that the unsatisfactory pattern of conduct appeared to repeat itself and was evident in both the applicant's rebuttal documents and his interview. They concluded that the ratings for the two PAS cycles should remain unchanged. Sect. 15.4 of ST/AI/2002/3 provides that "the rating resulting from an appraisal that has not been rebutted, or from the rebuttal process, shall not be subject to further appeal".

Retaliation or other extraneous or improper factors

16. One of the applicant's principal complaints was that the non-renewal of his fixed-term appointment was an act of retaliation because he reported to the United Nations Information Centres (UNIC) headquarters allegations of financial fraud in the UNIC Islamabad office. These allegations were directed against his colleagues, including his former supervisor. He provided documents in support of these allegations. These allegations were treated very seriously and the UN resident coordinator in Pakistan was asked to investigate the matter. The investigation itself was conducted by the UNDP office for budget and finance in Pakistan. The investigation concluded that there was no evidence to substantiate the allegations made by the applicant. The applicant should note that it is not the function of this

Tribunal to carry out its own investigation into the allegations of fraud. The Tribunal's task is to see whether there was a proper investigation into the allegations and whether the findings were reasonably based given the evidence before the investigating panel. The Tribunal finds that there was a proper investigation into the allegations made by the applicant. Furthermore, the fact that the applicant had made such allegations was unrelated to the decision not to renew his fixed-term appointment. There being no casual link between the two, the applicant's allegations of retaliation are dismissed.

17. The Tribunal concludes that the respondent was entitled to have regard both to the adverse performance appraisal reports as well as the investigation panel's finding that there was no violation of due process rights. In addition, the Tribunal takes into account the fact that the rebuttal panel also concluded that the applicant's performance ratings should remain unchanged.

Special Leave With Pay (SLWP)

18. A further allegation by the applicant is that he was placed on SLWP without his knowledge. The respondent has refuted this allegation, stating he was not put on SLWP, but was provided with three months' salary in lieu of notice. However, the allegation is not one that arises from the initial appeal to the former Administrative Tribunal either in terms of the claim as formulated above in para. 2 or in the remedies sought and outlined above in para. 3. Therefore, this issue does not fall to be determined by the Tribunal.

Conclusion

19. The Tribunal finds that there was no breach of due process either in the decision not to renew the applicant's fixed-term contract or in the factors taken into account and procedures that were followed prior to the making of the decision.

20. The Tribunal does not find any basis upon which to support the applicant's allegation that the provisions of former staff rule 110.1 were violated. In particular, the decision not to renew his fixed-term appointment was taken on proper grounds in accordance with the appropriate procedures and that there was no retaliation against him for bringing to the attention of management allegations of financial fraud and misconduct. These allegations were properly investigated and were found to be lacking in substance.

21. The claim is dismissed in its entirety.

(Signed)

Judge Goolam Meeran

Dated this 9th day of September 2010

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

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry