



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/68

Judgment No.: UNDT/2010/211

Date: 6 December 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. By application dated 25 September 2009 and corrected on 14 October 2009, the Applicant contests the Secretary-General's decision of 29 June 2009 to pay him an indemnity equal to two months net base salary only, for the material and moral damages suffered as the result of the unlawfulness of the decision not to extend his appointment after its expiration date.

2. The Applicant requests the Tribunal, in addition, to order that he be given priority consideration for a post at level P-5.

Facts

3. The Applicant entered the service of the United Nations International Independent Investigation Commission ("UNIIC") on 21 April 2007, at level P-5, on an appointment of limited duration expiring on 20 October 2007 governed by the 300 series of the Staff Rules.

4. With effect from 1 June 2007, UNIIC decided to implement the electronic Performance Appraisal System ("e-PAS").

5. By memorandum dated 29 August 2007, the Applicant's supervisor recommended that his appointment not be extended beyond its expiration date of 20 October 2007 on the grounds that he fell below the level required in three "core competencies": "professionalism", "team work" and "respect for diversity/gender". In that memorandum, she rated him as "partly satisfactory" for "professionalism", and "unsatisfactory" for "respect for diversity/gender".

6. On 18 September 2007, the Applicant stated that he wished to rebut the appraisal of his work contained in the memorandum of 29 August 2007.

7. By letter of 21 September 2007, the Officer-in-Charge, Personnel Section informed the Applicant and his supervisor that a rebuttal process would be started and a rebuttal panel set up pursuant to Administrative Instruction ST/AI/2002/3, so that the Applicant could rebut the ratings he had been given.

8. By memorandum dated 25 September 2007, the Applicant's supervisor forwarded information in support of her appraisal to the Officer-in-Charge,

Personnel Section. She explained that, at the time when the Applicant had entered the service of UNIIIC, staff members were appraised using the Field Operations Performance Appraisal form and that, for staff members hired for a term of less than six months, a Special Performance Evaluation Report was used. She also stated that the decision had been taken not to use e-PAS for the Applicant's appraisal in the light of the recommendation made in August 2007 not to renew his appointment, but instead to use the Field Operations Performance Appraisal form. In the memorandum, the Applicant's supervisor rated him as "partly satisfactory" for the "professionalism" and "respect for diversity/gender" competencies, and "unsatisfactory" for the "team work" competency. The Applicant rebutted the appraisal on 12 October 2007.

9. On 15 October 2007, the Officer-in-Charge, Personnel Section, informed the supervisor that the Applicant's appointment would be extended by one month, to 20 November 2007, to facilitate the rebuttal process.

10. Having heard the Applicant and his supervisor, among others, the rebuttal panel stated, in its report dated 1 November 2007, that "the evaluation process" of the Applicant resulting in the memoranda of 29 August and 25 September 2007 "did not conform to any of the appraisal systems in place within the UN System". It took the view that the ratings given by his supervisor were not substantiated, and that, consequently, they should not be maintained. Those conclusions were brought to the Applicant's attention on 8 November 2007 and, at the same time, he was informed that his appointment would be extended to 20 December 2007, while an advice was awaited from the Field Personnel Division on the next administrative course of action.

11. On 20 November 2007, a work plan was completed for the period 1 June 2007 to 31 March 2008 so that the Applicant's work could be evaluated using the e-PAS system. On 25 November, the Applicant met with his supervisor to draw up his mid-point review; however, he refused to sign off the mid-point review proposed.

12. On 5, 11 and 12 December 2007, the Applicant's supervisor asked him to sign off the mid-point review, but he refused to do so.

13. In early December 2007, the Applicant was informed that his appointment would not be extended after its expiration date, and he ceased working for UNIIIC on 20 December 2007.

14. On 10 January 2008, the Applicant requested a review of the decision not to renew his appointment and on 7 April 2008 he submitted an appeal against that decision to the Joint Appeals Board (“JAB”).

15. In its report dated 3 June 2009, the JAB concluded, by majority, that the process of performance evaluation of the Applicant had been improperly conducted, since his supervisor had not taken into account the report of the rebuttal panel when she drew up the mid-point review on 25 November 2007. It also considered that the Applicant had not been afforded the possibility to improve his performance between the time when his mid-point review was drawn up and the time when he was informed that his contract would not be renewed, while nonetheless pointing out that, by refusing to sign off his mid-point review, he had foreclosed any opportunity to rebut his performance appraisal. Consequently, the panel recommended to the Secretary-General that the Applicant be given priority consideration for a post at level P-5. It further recommended that he be awarded 18 months net salary as compensation for the breaches of due process it had found. One member of the JAB, however, expressed his disagreement with the conclusions of the majority. For that member, “the [applicant] signed off on the work plan of his e-pas that in fact covered the period from 1 June 2007 on [to 31 March 2008]. He therefore agreed that his performance evaluation would include the three-month time span from June to September 2007 that had been previously subject to the rebuttal procedure”. The Applicant had, furthermore, foreclosed any opportunity to rebut the evaluation in his mid-point review when he refused to sign it off.

16. By letter of 29 June 2009, to which the JAB report was annexed, the Administration notified the Applicant of the decision of the Secretary-General to pay him an indemnity equal to two months net base salary and to consider any application he might make “in accordance with the provisions of ST/AI/2006/3”.

17. On 25 September 2009, the Applicant submitted an application to the Tribunal contesting the Secretary-General’s decision.

18. The Respondent submitted his reply on 18 November 2009 and the Applicant filed observations on the Respondent's reply on 22 November 2009. The Respondent submitted his comments on 9 December 2009.

19. By letter of 12 December 2009, the Applicant expressed the wish to be heard by the Tribunal. On 16 November 2010, a hearing was held at which the Applicant and Counsel for the Respondent were present. At that hearing, the Tribunal asked the Applicant to produce a report detailing his earnings since the ending of his appointment, and the Applicant filed the requested document on 22 November 2010.

Parties' contentions

20. The Applicant's contentions are:

a. The decision of the Secretary-General to grant him an indemnity equivalent to two months net base salary appears arbitrary. The amount of the indemnity is insufficient in the light of the recommendation by the JAB that he be paid 18 months net salary, and also of the very grave nature of the conduct to which he was subjected and his improper separation from service. The indemnity should be reviewed in a fair and reasonable manner;

b. No account was taken of the damage to his professional reputation nor was any compensation granted under that head. He enjoys international standing, he made a significant contribution to the investigative work of UNIIC, and his separation from service has deprived him of the opportunity to obtain employment at the Special Tribunal for Lebanon, as had many staff members who had previously worked at UNIIC;

c. Insofar as it was based on a minority opinion of the JAB, the Secretary-General's decision is tainted by bad faith. It is unreasonable to take account of his own refusal to sign off the mid-point review but to take no account of the breach by his supervisor at the time the events took

place, though it was she who was responsible for ensuring compliance with the procedure;

d. The conduct of his supervisor and the Head of UNIIC was discriminatory.

21. The Respondent's contentions are:

a. Only the decision served on the Applicant on 29 June 2009 may be contested before the Tribunal under the transitional measures set forth in the Secretary-General's bulletin ST/SGB/2009/11, which provides that "[d]ecisions made by the Secretary-General between 2 April 2009 and 30 June 2009 on appeals ... may be challenged before the Tribunal";

b. The Secretary-General was not bound to follow the recommendation of the JAB;

c. The Secretary-General's decision was a lawful and reasonable exercise of his discretionary power and the Applicant has not shown either that it was motivated by prejudice or any other unlawful consideration, or that it was arbitrary;

d. The Secretary-General's decision was taken after the procedures had been followed and all the circumstances taken into consideration;

e. The Applicant produced no evidence to the JAB of the damage he claimed to have suffered, in particular with regard to his professional reputation, and the JAB therefore made no findings on that issue. The claim for damages in the Application must therefore be considered as a new claim, which must consequently be rejected.

Judgment

22. Given the nature of the activities of UNIIC and the duties the Applicant was performing at the date on which he was informed that his appointment would not be renewed, the Tribunal deems it necessary not to reveal the Applicant's identity or that of the other persons concerned.

23. The Applicant contests the decision of the Secretary-General to pay him an indemnity limited to two months net base salary as compensation for the damage he had suffered as a result of the unlawfulness of the decision not to extend his appointment beyond its expiration date. He also requests the Tribunal to order the Administration to give him priority consideration for a post at level P-5.

24. As to this latter claim, the Statute of this Tribunal does not permit it to act in the Administration's stead except in certain situations that do not apply to the present case. It follows that the Applicant's claim for an order from the Tribunal compelling the Administration to give him priority consideration for a P-5 post is not receivable and must be rejected.

25. Staff rule 304.4, in force at the time of the events, provides that appointments governed by the 300 series "carry no expectancy of renewal or of conversion to any other type of appointment". Moreover, under staff rule 309.5, such appointments "shall expire automatically and without prior notice on the expiration date of the period specified in the letter of appointment".

26. It is clear from the provisions cited above that decisions concerning the extension of such appointments are a matter for the discretionary power of the Secretary-General. Such decisions must not, however, be arbitrary or improperly motivated, and they must not violate due process. Furthermore, where the Administration gives reasons for the exercise of its discretionary power, especially when deciding not to renew a contract, that reason must be supported by the facts (see, for example, Judgment UNDT/2010/150, *Dzintars*).

27. In the present case, the Administration clearly stated that the decision not to renew the Applicant's appointment was based on the fact that his work was unsatisfactory, so the Tribunal must, first of all, verify that the procedural rules in place for evaluating that staff member's performance were complied with.

28. At the time of the events in question, the staff performance appraisal system was that laid down in administrative instruction ST/AI/2002/3. Section 1 of that instruction provided that application of that system was not mandatory for staff members employed under the 300 series. However, as the Tribunal has recently held, when the Administration decides to use a procedure laid down in an

instrument, such as the rebuttal process laid down in administrative instruction ST/AI/2002/3, it is bound to comply with those provisions in their entirety (see, on the same lines, Judgment UNDT/2010/133, *Eldam*).

29. While the documents on the file do not make it clear which procedure the Applicant's supervisor was following when evaluating his performance between 21 April 2007, the date when he entered the service of UNIIC, and 25 September 2007, the date of the second memorandum from his supervisor, the Tribunal notes that the Administration, at the Applicant's request, set up the rebuttal panel provided for in administrative instruction ST/AI/2002/3 to allow him to rebut his performance appraisal, and that the report of the rebuttal panel makes explicit reference to that instruction. Therefore, by setting up a rebuttal panel, the Administration was, both in fact and in law, applying the rebuttal process laid down in section 15 of that administrative instruction, which provides:

Rebuttal Process

15.3 The rebuttal panels shall prepare with maximum dispatch a brief report setting forth the reasons why the original appraisal rating should or should not be maintained. The report of the rebuttal panel shall be placed in the staff member's official status file as an attachment to the PAS. The performance rating resulting from the rebuttal process shall be binding on the head of the department or office and on the staff member concerned, subject to the ultimate authority of the Secretary-General as Chief Administrative Officer of the Organization, who may review the matter as needed on the basis of the record. Any change in the final rating, and the date of the decision, shall be marked by the executive or administrative office on the final appraisal section of the PAS form, with annotation that the rating was changed as a result of a PAS rebuttal.

15.4 The rating resulting from an appraisal that has not been rebutted, or from the rebuttal process, shall not be subject to further appeal. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be appealed.

30. It is clear from the provisions cited above that, following the rebuttal process, the rebuttal panel must not only state whether the original rating should or should not be maintained, but, if it decides that the original rating should not be maintained, it must also replace it with another rating, in which case the new

rating will be binding on the head of department and the staff member concerned, except where modified by the Secretary-General on final appeal.

31. In the present case, the rebuttal panel took the view in its report of 1 November 2007 that the process followed to evaluate the Applicant's work between 21 April and 25 September 2007 did not conform to any of the appraisal systems in place within the United Nations system. It also took the view, based on the evidence on the file as a whole, that none of the ratings given to the Applicant should be maintained because those ratings were not substantiated. That said, the rebuttal panel did not, as it was required to do by section 15.3 of the administrative instruction, substitute its own ratings for those of the Applicant's supervisor, and, in failing to do so, it committed an irregularity. The Tribunal considers, as a result, that the Administration, which had taken the decision to submit the Applicant's performance appraisal to the rebuttal panel, failed to comply with the procedure it had itself chosen to follow.

32. Following the issue of the rebuttal panel's report, the Applicant's supervisor chose to make a fresh evaluation of his performance, using the e-PAS. In making that evaluation, she relied in part on the previous evaluation, which had been the subject of the review of the rebuttal panel. But, as has been stated above, the rebuttal panel had found, on 1 November 2007, that the appraisal ratings the Applicant had originally been given were unsubstantiated. The Administration contends that the Applicant himself prevented that second evaluation from being completed when he refused, in December 2007, to sign off his mid-point review. But if the first appraisal process had been properly carried out, the rebuttal panel would as a result have attributed the Applicant a rating for the period from 21 April to 25 September 2007, thereby obviating the need for a new appraisal of the Applicant's performance for the period already covered by the existing evaluation.

33. In addition, the file shows that the work plan that should have been used to evaluate the Applicant's performance under the e-PAS system for the period starting 1 June 2007 was completed on 20 November 2007. In the mid-term review that she drew up five days later, on 25 November 2007, his supervisor states: "very detailed e-pas goals established with [the Applicant] provide clear guidance about his duties and ... what is expected of him" and that they could "as

such ... function as a performance improvement plan". On 5, 11 and 12 December 2007, the supervisor asked the Applicant to sign off his mid-term review, which he refused to do, and his appointment came to an end on 20 December 2007. Thus, the Applicant's performance goals were finalised a posteriori, seven months after the start of his appointment, and while, as his supervisor alleges, they amounted to a performance improvement plan, they were in place for less than one month. The second appraisal process cannot possibly have given the Applicant sufficient time to improve his performance, and, contrary to what the Respondent maintains, the Applicant cannot be criticised for having refused to sign off a mid-term review drawn up under the conditions described above.

34. It is clear from all the foregoing that the decision not to renew the Applicant's contract for unsatisfactory performance was taken as the result of two irregular performance evaluations. Furthermore, the Administration has not shown that, if the evaluation process had been properly followed, the Applicant would in any event have received a performance appraisal that was such as to justify the non-renewal of his contract. Therefore, the decision not to renew the Applicant's appointment was, moreover, based on incorrect grounds. As a consequence, the Applicant is entitled to claim compensation for the damages arising out of the non-renewal of his appointment. The Tribunal must now examine whether, in granting him an indemnity of two months net base salary, the Secretary-General made a fair assessment of the damage the Applicant had suffered as a result of the non-renewal, hereby held to have been unlawful.

35. The first matter for examination is whether the Applicant had a real chance of having his initial six-month appointment extended if a proper appraisal process had been used to evaluate his performance.

36. The file as a whole, and in particular the rebuttal panel's report, shows that the Applicant's work did not warrant the poor appraisals given by his supervisor. Thus, if the initial appraisal process had been properly completed, the Applicant would have received an evaluation that did not justify a refusal to renew his appointment. The Tribunal considers that the Applicant might have expected his appointment to be renewed at least for one further six-month period, until 20 April 2008. On the other hand, bearing in mind his difficult relationship with his

supervisor, his chances of having his appointment renewed beyond 20 April 2008 were very slender. Similarly, while the Applicant maintains that the contested decision cost him any chance of being offered a post at the Special Tribunal for Lebanon, which officially started work on 1 March 2009, there is no direct link between that alleged damage and the unlawful decision now contested. Consequently, the Tribunal considers that the Applicant should be awarded, for the material damage suffered, a sum equal to the four months net base salary he did not receive from 21 December 2007 to 20 April 2008.

37. As to the moral damage suffered, it is clear from the file and the oral hearings that the Applicant, who had been recruited as an anti-terrorism specialist, has as a result of the contested decision suffered serious damage to his reputation that may well have negatively affected his living conditions. However, based on the statements made by the Applicant himself at the hearing, and in the document he filed on 22 November 2010, the damage to his reputation has not prevented him from continuing to find intermittent work of the kind he is qualified to do. The Tribunal considers, therefore, that he should be awarded compensation for moral damage equal to two months net base salary.

38. In view of the foregoing, the Applicant is entitled to an indemnity equal to six months net base salary. Consequently, since the Applicant has already received two months net base salary by way of indemnity, the Secretary-General is hereby ordered to pay the Applicant an amount equal to four months net base salary.

Decision

39. For these reasons, the Tribunal DECIDES:

- 1) The Respondent is hereby ordered to pay the Applicant an amount equal to four months net base salary as compensation for the damages suffered as a result of the unlawfulness of the decision not to extend his appointment beyond its expiration date;
- 2) The above-mentioned compensation shall bear interest at the United States prime rate plus five per cent with effect from 60 days from

the date this Judgment becomes executable until payment of the said compensation;

3) All the other claims are rejected.

(signed)

Judge Jean-François Cousin

Dated this 6th day of December 2010

Entered in the Register on this 6th day of December 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva