



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/49
Judgment No.: UNDT/2010/005/Corr.1
Date: 14 January 2010
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

AZZOUNI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Duke Danquah, Office of Staff Legal Assistance (OSLA)

Counsel for respondent:

Susan Maddox, Administrative Law Unit/Office of Human Resources
Management (ALU/OHRM), United Nations Secretariat

Application

1. The applicant, through her counsel, appealed to the New York Joint Appeals Board against the decision of the Executive Secretary of the United Nations Economic and Social Commission for Western Asia (ESCWA) not to renew her fixed-term contract.
2. She requested:
 - (a) Reinstatement in her post or another post at the same level;
 - (b) Substantial compensation for the moral damage caused and the injury to her dignity;
 - (c) That the necessary measures should be taken to draw to the attention of the Executive Secretary the irreparable injury he had caused to the applicant and her family and to prevent him from harming other staff members and the Organization in general.

Facts

3. The applicant entered the service of the United Nations on 27 November 2005 at ESCWA, in Beirut, Lebanon, as an Adviser at the P-5 level with the ESCWA Centre for Women, on a five-week short-term contract under the 300 series of the Staff Rules. Her contract was extended by three months, from 1 January 2006 to 31 March 2006, and she then received an appointment under the 200 series of the Staff Rules applicable to technical assistance project personnel, from 1 April 2006 to 30 June 2006, still as an Adviser with the ESCWA Centre for Women.
4. On 7 June 2006, the applicant was appointed Chief (P-5) of the ESCWA Centre for Women on a two-year fixed-term appointment (100 series of the Staff Rules). Her contract was therefore due to expire on 6 June 2008.
5. In the applicant's Performance Appraisal System (PAS) record for the period from June 2006 to March 2007, the Executive Secretary of ESCWA then in office gave the applicant the overall rating "fully successful performance" and rated her "fully competent" in respect of all competencies.

6. In August 2007, a new Executive Secretary took up his duties at ESCWA.

7. In a memorandum dated 5 March 2008, the Human Resources Management Section of ESCWA, through the Administrative Services Division, informed the Executive Secretary that the applicant's contract was due to expire on 6 June 2008 and asked him whether he wished to renew it or not. A copy of the applicant's most recent PAS record was attached to the memorandum. On an unspecified date, the Executive Secretary indicated, on the above-mentioned memorandum, that he wished to let the applicant's contract expire.

8. In his appraisal of the applicant's performance for the period from April 2007 to March 2008, which was completed on 12 April 2008, the Executive Secretary, like his predecessor, gave the applicant the overall rating "fully successful performance". However, he rated her as "developing" in 14 out of the 19 competencies and "fully competent" in the other five. In his overall comments, he wrote: "The staff member's performance is fully successful. The staff member should work toward achieving gender balance in the recruitment of staff in ESCWA Center for Women".

9. In a memorandum dated 15 April 2008, the Chief of the Administrative Services Division informed the applicant of the Executive Secretary's decision not to extend her fixed-term appointment beyond the expiration date of 6 June 2008.

10. On 16 April 2008, the applicant indicated that she disagreed with the Executive Secretary's appraisal of her performance and wished to initiate a rebuttal process, which she did on 21 April 2008.

11. On 2 May 2008, the applicant filed a complaint with the Panel on Discrimination and Other Grievances, alleging discrimination and harassment by the Executive Secretary.

12. On 29 April 2008, the applicant wrote to the Secretary-General requesting an administrative review of the decision not to renew her contract, and on 7 May 2008, she wrote to the New York Joint Appeals

Board to request a suspension of action on the decision not to renew her contract beyond 6 June 2008.

13. On 30 May 2008, the applicant's contract was extended until 6 July, at the request of the Panel on Discrimination and Other Grievances, and no action was therefore taken on the first request for suspension of action, mentioned above.

14. On 18 June 2008, the applicant filed a second request for suspension of action with the Joint Appeals Board, this time regarding the non-renewal of her contract beyond 6 July.

15. On 25 June 2008, the rebuttal panel issued its report on the rebuttal process initiated by the applicant. Based on the documents provided and interviews conducted with the applicant's subordinates and colleagues, as well as with the applicant and the Executive Secretary, the panel concluded that there were no grounds to change the original overall rating, i.e. "fully successful performance", but that 8 of the 14 core values and competencies rated "developing" by the Executive Secretary should have been given a "fully competent" rating.

16. On 26 June 2008, when a Joint Appeals Board panel was to have met to consider the applicant's request for suspension of action, the Joint Appeals Board was informed that the applicant's contract had been extended until 6 August 2008. No action was taken on the second request for suspension of action.

17. On 26 June 2008, the Chief of the ESCWA Administrative Services Division wrote to the Administrative Law Unit of the United Nations Secretariat to ask whether changes should be made to the applicant's PAS record, noting that, under section 15.3 of administrative instruction ST/AI/2002/3 on the Performance Appraisal System, the rebuttal panel is mandated to determine whether the original appraisal rating should or should not be maintained, but not to issue an opinion on the evaluation of core values and competencies. On 30 June 2008, the Policy Support Unit of the United Nations Secretariat replied that, pursuant to administrative instruction ST/AI/2002/3, the observations of the rebuttal panel regarding

the applicant's core values and competencies were not binding on the management and that, since the panel had concluded that the original overall rating should be maintained, all that the management needed to do was to place the report of the panel in the applicant's official file.

18. In a letter dated 1 July 2008, the Administrative Law Unit, on behalf of the Secretary-General, rejected the applicant's first request for an administrative review, dated 29 April 2008.

19. On 11 July 2008, the Executive Secretary notified the applicant that he had decided to reassign her with immediate effect, "in the interest of ESCWA's work programme", to the Social Development Division as Senior Social Affairs Officer.

20. In a letter dated 24 July 2008, the applicant asked the Secretary-General for a review of the Executive Secretary's decision not to renew her contract beyond 6 August 2008.

21. On 29 July 2008, the applicant filed a third request for suspension of action with the Joint Appeals Board, this time concerning the decision not to renew her contract beyond 6 August 2008. On 5 August 2008, the Joint Appeals Board recommended that the Secretary-General should suspend the decision not to renew the applicant's contract until the Panel on Discrimination and Other Grievances had issued its report.

22. On 6 August 2008, the Secretary-General rejected the recommendation of the Joint Appeals Board, while instructing the Panel on Discrimination and Other Grievances to complete its investigation no later than the end of September 2008.

23. On 6 August 2008, the applicant's fixed-term appointment expired.

24. In a letter dated 29 September 2008, the Administrative Law Unit, on behalf of the Secretary-General, rejected the applicant's second request for an administrative review, dated 24 July 2008, considering that the decision not to renew her contract was proper.

25. On 6 October 2008, the Panel on Discrimination and Other Grievances submitted its report on the applicant's complaint to the Assistant

Secretary-General, Office of Human Resources Management. The report concluded that there was inadequate evidence to support the allegations of discrimination and harassment but that the decision not to renew the applicant's contract was vitiated by prejudice and abuse of authority.

26. On 30 October 2008, the applicant lodged an appeal with the Joint Appeals Board in New York.

27. Under the transitional measures contained in United Nations General Assembly resolution 63/253, the case was referred to the United Nations Dispute Tribunal on 1 July 2009.

28. On 6 October 2009, the Dispute Tribunal asked the respondent to produce the files of the rebuttal panel and the Panel on Discrimination and Other Grievances on the applicant's case, including the reports on the interviews conducted by the two panels.

29. On 13 October 2009, the respondent produced some of the documents relating to the work of the Panel on Discrimination and Other Grievances on the applicant's case, and on 14 October 2009, it produced all the documents relating to the work of the rebuttal panel.

30. On 20 November 2009, the counsel for the applicant sent the Dispute Tribunal an e-mail containing a list of nine people who could testify on the applicant's behalf.

31. On 24 November 2009, the Dispute Tribunal made an order requiring the presence of the Executive Secretary and the former Secretary of ESCWA at a hearing.

32. On 24 December 2009, following several reminders by the Dispute Tribunal, the respondent retrieved from the archives and transmitted to the registry the complete file of the Panel on Discrimination and Other Grievances on the applicant's case. However, apart from what appeared to be brief notes on an undated interview with the Executive Secretary of ESCWA, the file did not contain any interview reports.

33. On 7 January 2010, the Dispute Tribunal held a hearing in which the counsel of the applicant and the counsel of the respondent participated by

videoconference from New York, and the applicant, the Executive Secretary of ESCWA and the former Secretary of ESCWA participated by telephone from Ramallah, Beirut and Vienna respectively.

Parties' contentions

34. The applicant's main contentions are as follows:

(a) Initially, the Executive Secretary of ESCWA did not give any reason for his decision not to renew the applicant's fixed-term appointment, a decision reached one week after he had given the applicant an overall rating of "fully successful performance" in her performance appraisal. However, after the applicant initiated a rebuttal process against her performance appraisal, the Executive Secretary claimed before the rebuttal panel that there was a problem with the applicant's performance, although he had not previously spoken to her about it, nor had he given her the opportunity to improve her performance, as is required under the rules governing the Performance Appraisal System. This proves that the Executive Secretary's decision was based on improper motives such as bias and prejudice;

(b) The Executive Secretary's decision not to renew the applicant's contract was the outcome of the professional and psychological harassment to which she was subjected by him. That decision was in fact arbitrary and based on the Executive Secretary's prejudices against the applicant, owing to her Christian faith and her work to promote gender equality;

(c) The Panel on Discrimination and Other Grievances (hereinafter "the Panel on Discrimination") concluded in its report that the process surrounding the decision not to renew the applicant's contract was tainted by irregularity and that the decision itself constituted an abuse of authority and was based on bad faith and improper motives;

(d) The Panel on Discrimination also concluded that the applicant could claim a legitimate expectation of contract renewal;

(e) The Chief of the Administrative Services Division offered her a one-year contract in the Social Development Division if she agreed to withdraw the complaint she had filed with the Panel on Discrimination. The decision to transfer her to another post 10 days before the end of her contract was humiliating and an act of retaliation by the Executive Secretary following the applicant's complaints.

35. The respondent's main contentions are as follows:

(a) The applicant cannot claim a legitimate expectation of contract renewal. Rule 104.12 (b) (ii) of the Staff Rules states that "the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment" and rule 109.7 (a) provides that "a temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". No special circumstances exist in the applicant's case that could have created a legitimate expectation of renewal. The United Nations Administrative Tribunal constantly reiterated its jurisprudence that good performance is irrelevant with regard to the renewal of a fixed-term contract. According to that jurisprudence, employment with the Organization ceases on the expiration of a fixed-term appointment and a legal expectancy of renewal would not be created by efficient or even outstanding performance. The United Nations Administrative Tribunal also held that the extension of the workload beyond the expiration date of the contract did not justify the renewal of a fixed-term appointment. Contrary to the claim made by the counsel of the applicant, the Panel on Discrimination did not conclude in its report that the applicant had a legitimate expectation of renewal;

(b) The decision not to renew the applicant's contract was proper. Such a decision must not be based on improper motives. In

the case under consideration, the Panel on Discrimination concluded that there was no evidence of a consistent pattern of discrimination and harassment and that the allegations of the applicant fell within the scope of performance issues under the Performance Appraisal System. With regard to the allegation that the decision was based on improper motives and constituted an abuse of authority, the burden of proof lies with the applicant, according to the jurisprudence of the United Nations Administrative Tribunal;

(c) With regard to her performance appraisal, the applicant benefited from the guarantees of due process since she was able to initiate a rebuttal process. In any event, the rating “fully successful performance” does not imply that a fixed-term appointment will be automatically renewed.

Judgment

36. The applicant is appealing before the Dispute Tribunal the decision not to renew her contract.

37. Rule 104.12 (b) (ii) of the Staff Rules then in force states that “the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment” and rule 109.7 (a) provides that “a temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment”. However, the judge is required to determine whether the management allowed the applicant to believe that she could reasonably expect her contract to be renewed. In the case under consideration, the applicant was informed on 15 April 2008 that her contract, which was due to expire on 6 June 2008, would not be renewed and she does not maintain that the management had previously given her any assurance that her contract would be renewed.

38. The applicant maintains that the contested decision not to renew her contract was taken for improper motives and, in particular, on the grounds of her religion.

39. According to established jurisprudence, even though the staff member does not have a right to the renewal of his or her contract, that decision may not be taken for improper motives. The Dispute Tribunal is therefore required to consider whether the motives for the decision were proper.

40. Based on the documents in the file and the oral proceedings held on 7 January 2010, during which the Executive Secretary of ESCWA, the author of the contested decision, was heard as a witness at the Dispute Tribunal's request, it appears that the Executive Secretary took the contested decision on the grounds set out below.

41. Firstly, he maintains that, in general, the applicant appears to have encountered difficulties in managing the Centre for Women of which she was Chief. The author of the contested decision states that at least three members of the Centre's staff complained in writing about the way in which she issued instructions and that the applicant dedicated much of her time to promoting herself rather than the Centre that she managed.

42. The assessment of the applicant's performance is reflected in the PAS record completed by the Executive Secretary for the period from April 2007 to March 2008. Although the Executive Secretary gave the same overall rating, "fully successful performance", as his predecessor had done, the applicant contested that rating and initiated a rebuttal process on 21 April 2008. On 25 June 2008, the rebuttal panel issued its report, in which it concluded that there were no grounds to change the original overall rating given by the Executive Secretary but that he should have assigned the applicant a higher rating in respect of some competencies.

43. Although it could be considered that the Executive Secretary gave the applicant a harsh performance evaluation in his assessment of her competencies, it is evident from what has already been stated that he was not fully satisfied with her.

44. Furthermore, the Executive Secretary explained his decision not to renew the applicant's contract as follows: the applicant, who held the post of Chief of the ESCWA Centre for Women from 7 June 2006 and who reported

to the author of the contested decision from August 2007, had on several occasions behaved in a manner that showed she was not suited to her duties. For example, she had submitted to him for publication a study on the reservations made by Arab States to the Convention on the Elimination of All Forms of Discrimination against Women; he had disagreed with the contents of the study, mainly because, in his opinion, it insensitively handled religious issues of which the applicant had a poor knowledge, and was therefore bound to offend Member States. It was for that reason that he had refused to allow it to be published.

45. Furthermore, the Executive Secretary of ESCWA criticized the applicant for having strongly urged him to intervene with Saudi Arabia on behalf of a woman sentenced after she had been raped. He had not wished to become involved in such an issue, since it did not fall within the scope of activities of ESCWA, which essentially had an economic and social mandate.

46. It is evident from the documents in the file and the oral proceedings, in the course of which the applicant was also heard, that, following the Executive Secretary's decisions not to take action on the applicant's proposals, the professional relationship between the applicant and her supervisor deteriorated, with the applicant reproaching the Executive Secretary for not sufficiently supporting women's rights in an Islamic environment, and the Executive Secretary considering that the applicant lacked discernment and sound judgement on sensitive religious issues. The Dispute Tribunal is not required to determine whether the decisions taken by the Executive Secretary in his capacity as the applicant's supervisor were appropriate. It is sufficient to note that, following the specific incidents described above and the applicant's performance appraisal, the applicant, who held the important post of Chief of the ESCWA Centre for Women, had lost the confidence of the Executive Secretary, while she herself considered that her supervisor did not support her in her role as Chief of the Centre. Therefore, faced with such a situation, while the responsibilities of each party do not need to be established, the Executive Secretary might have considered it legitimate to take the opportunity presented by the expiration

of the applicant's contract in order to end a conflictive situation that was bound to adversely affect the efficient functioning of the Centre for Women.

47. The applicant maintains, however, that the real reason why her contract was not renewed is that she is Christian and the Executive Secretary considered that a Christian woman could not, as a matter of principle, serve as the Chief of the Centre for Women in a mainly Muslim environment. While the discriminatory nature of such a motive means that its existence would, in itself, vitiate the contested decision, it is the applicant's responsibility to prove the discrimination to which she was allegedly subject.

48. In support of her statements, first of all she cites the Executive Secretary's refusals, described above, to approve the study for which she was responsible and to intervene on behalf of a Saudi Arabian woman. However, the fact that the Executive Secretary criticized the content of a study handling sensitive religious issues related to sharia should not in itself be considered to demonstrate religious discrimination. Similarly, the Executive Secretary's criticism of the applicant for having taken an interest in the fate of a Saudi Arabian woman sentenced by her country after she had been raped cannot be considered an act of religious discrimination against the applicant.

49. The applicant also maintains that the Executive Secretary had stated publicly that he placed the values of Islam above the values of the United Nations. However, this allegation is strongly denied by the Executive Secretary.

50. At the hearing, the former Secretary of the Commission testified, at the applicant's request, that the Executive Secretary had told him that the applicant was not suited to the post she held because she was Christian. Nevertheless, this one testimony, however specific, was categorically denied by the Executive Secretary at the hearing and cannot therefore be held to prove that the remarks attributed to the author of the contested decision were actually made.

51. The applicant has therefore failed to establish that the decision not to renew her contract was taken solely because of her Christian faith. Furthermore, although the file contains the report of the Panel on Discrimination and Other Grievances on the complaint submitted by the applicant after she had been informed of the contested decision, the conclusions of that report are contradictory and insufficiently substantiated, and cannot in any case be binding on the Dispute Tribunal, which must reach its conclusion based on all the documents in the file and the oral proceedings.

52. Since a conflictive situation and a mutual loss of confidence existed between the Executive Secretary and one of his senior managers, the efficient functioning of the service was bound to be adversely affected, which in itself justified bringing that situation to an end as soon as possible, especially when the applicant's contract was to expire. In addition, the applicant has failed to demonstrate that the decision was discriminatory or that any of the motives for that decision were improper. Consequently, the application is rejected in its entirety.

Decision

53. For these reasons, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 14th day of January 2010

Entered in the Register on this 14th day of January 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva