



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

FARRAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Carmen Artigas

Counsel for respondent:
Robert Nadelson, UNDP

Introduction

1. By application dated 31 August 2009 the applicant contests the decision of the Secretary-General dated 2 June 2009, rejecting the recommendation of the Joint Appeals Board (JAB) in favor of the applicant with respect to his appeal against the decision dated 7 May 2007 to terminate his appointment for activities of a limited duration (ALD) with immediate effect.

Facts

2. On 1 March 2007, the applicant entered the service of the United Nations Development Programme (UNDP), Programme of Assistance to the Palestinian People (PAPP) in Ramallah, as Project Manager for the Deprived Families Economic Empowerment Project (DEEP) at the AL 4/3 level, on the basis of a one-year ALD, under the 300 series of the former Staff Rules.

3. Section 3, paragraph 2, of the letter of appointment stated that:

“This appointment may be terminated prior to its expiration date in accordance with the relevant provisions of the Staff Regulations and the Staff Rules, in which case both parties will give thirty days written notice. Should UNDP terminate the appointment prior to its expiration, the Administrator of UNDP, in addition to the thirty days notice will provide compensation in lieu of notice period.”

4. Paragraph 4 of Section 3 of the letter of appointment further stated that:

“In the event of summary dismissal for serious misconduct, there is no entitlement to either a period of notice or an indemnity payment.”

5. On 2 May 2007, the applicant sent an email entitled “Challenges and suggestions for successful implementation of DEEP” to his supervisor’s manager.

6. By letter dated 7 May 2007 from the Deputy Special Representative, UNDP, Jerusalem, the applicant was informed that his ALD would be terminated “for administrative related issues”, effective the same day. He was further informed that he would be compensated in lieu of notice period (thirty days) in addition to receiving a termination indemnity equivalent to one week of net salary for each month of uncompleted service.

7. On 8 May 2007, the applicant wrote an email to the Special Representative, UNDP, Jerusalem, requesting a written explanation for the decision to terminate his ALD with immediate effect. He stressed that he had been told orally that the reason behind the decision was the above-referenced email of 2 May 2007. The Deputy Special Representative, who was copied on the email, responded the same day, noting that in view of the nature of his appointment, UNDP had the right to terminate it and that they had respected the contract details.

8. On 20 May 2007, the applicant wrote to the Associate Ombudsperson from the Office of the Joint Ombudsperson with respect to the termination of his appointment. He was informed by email dated 21 May 2007 that someone from the Office could look into the matter and contact him shortly.

9. By email dated 26 July 2007, a Consultant Ombudsperson from the Office of the Joint Ombudsperson confirmed to the applicant that he was entitled to submit a request for administrative review and that with respect to the applicable time limits, he should contact the Panel of Counsel (PoC). He noted that the intervention of the Office of the Joint Ombudsperson was concluded and that the applicant would now begin the formal process.

10. On 24 August 2007, the Coordinator of the PoC responded to an email of the applicant, noting “that the Office of the Joint Ombudsman informed [him] on 26 July 2007 that their informal intervention [was] concluded and therefore [his] time limit for starting the formal process ... for submitting a request for review pursuant to [s]taff [r]ule 111.2 (a) [was] 26 September 2007”.

11. On 26 September 2007, the applicant submitted a request for administrative review of the decision of 7 May 2007 to the Secretary-General, copied to the Assistant Administrator and Director, Bureau of Management, UNDP. The latter responded to the applicant’s request for review on 21 November 2007, stressing that in view of former staff rule 311.1 his letter to the Secretary-General was time-barred and that there was no legal basis to overturn the decision to terminate the applicant’s appointment.

12. The applicant submitted a statement of appeal to the JAB in New York on 21 December 2007.

13. The JAB issued its report on 28 February 2009, concluding unanimously that the respondent violated the applicant's right to due process in terminating his contract without observing former staff regulation 9.1 and ST/AI/292. It therefore recommended that the applicant receive compensation in the amount of USD 1,000 and "that the termination letter in his official record be amended in conformity with the Staff Regulation (sic) and that, should the letter contain any material adverse to him, that he be allowed to file a written rebuttal, as per ST/AI/292".

14. In his decision dated 2 June 2009, the Secretary-General rejected the findings of the JAB, concluding that the decision to terminate the applicant's ALD was taken in accordance with former staff rule 309.2 (b) which states that "The appointment of a staff member under these Rules may be terminated at any time if, in the Secretary-General's opinion, such action would be in the interest of the United Nations" and stressing that there is no provision that explicit reasons should be given for the termination. The Secretary-General further concluded that the letter of termination is not adverse material in the sense of ST/AI/292 and that no further action should be taken in this respect.

15. On 31 August 2009, the applicant submitted an application against the above-referenced decision of the Secretary-General dated 2 June 2009 to the United Nations Dispute Tribunal (UNDT).

16. The respondent submitted his reply to the application on 16 November 2009, raising *inter alia* the issue of the receivability *ratione temporis* of the application.

17. By letter dated 18 December 2009, the Tribunal requested the applicant to provide clarifications and documentary evidence concerning the information he had obtained from the Ombudsman and the PoC with respect to the applicable deadlines for the submission of the request for review to the Secretary-General. The applicant submitted the requested information on 15 January 2010.

18. After a directions hearing held on 23 February 2010, the proceedings in front of the Tribunal were suspended in order to give the parties the opportunity to reach an amicable settlement. On 15 April 2010, the parties informed the Tribunal

that they had not been able to arrive at a mutual agreement and that they agreed that the case would need to now proceed on the merits.

Parties' contentions

19. The applicant's principal contentions are:

- a. In reference to staff regulation 9.2 (c) then in force the applicant questions if the Secretary-General's discretionary authority in assessing what constitutes "the interest of the Organization" was properly exercised. He notes that it is "hard to understand how the Secretary-General could have considered that an abrupt termination of a contract without justified reasons and while a staff member was delivering to his best ... was an action 'in the interest of the Organization'";
- b. Invoking "administrative related issues" to terminate the appointment with immediate effect is arbitrary and misleading and impacts on the applicant's rights to fair and transparent conditions of service, including his performance evaluation; also, there is no room to equate the term "administrative related issues" with that of "in the interest of the Organization";
- c. The applicant should at least have been given a warning and/or the issues concerning the "interest of the Organization" should have been discussed with him. The applicant considers that the actual reason for the termination of his appointment was the email entitled "Challenges and suggestions for successful implementation of DEEP" the applicant wrote to his supervisor's manager five days before he was terminated;
- d. Both UNAT and UNDT have decided that if the Administration provides a reason for the non-renewal of a fixed-term appointment, that reason must be supported by the evidence; this reasoning must also be applied to cases of termination;

- e. The applicant's performance during his tenure with UNDP was evaluated as being excellent. There were no budgetary reasons for the termination and the applicant, at his level, did not pose any challenges to the interest of the United Nations;
- f. The decision of the Secretary-General with respect to the question whether the letter of termination constitutes adverse material cannot stand since as the JAB stated, "anyone reviewing the [applicant's] employment record will stumble upon the letter terminating his contract prior to expiration" and "the Administration's reliance on 'administrative-related issues' and further respondent's haste in terminating the applicant's appointment with immediate effect only underscores the doubt that separation was for cause", hence the record "contains material just as adverse as if it would have contained a performance or some other assessment of [applicant] that was actually adverse";

20. The applicant requests the Tribunal to confirm the JAB findings in the applicant's case and to order:

- "a. That the applicant be given the real reasons for the termination of his contract...;
- b. that the applicant be given due process in the evaluation of his performance (if this was the case for termination), including the opportunity for rebuttal;
- c. that the applicant receive a written apology for the unfounded verbal accusations made by UNDP-PAPP Special Representative ... regarding the reasons for termination of applicant's contract;
- d. that adverse material be withdrawn from the applicant's file (basically, the termination letter focusing on 'administrative related issues'); and,
- e. that the applicant be granted compensation for the harm inflicted. As expressed before in the proceedings, the applicant's request is **not** for financial compensation..."

21. The respondent's arguments can be summarized as follows:
- a. The application is time-barred since the applicant failed to submit his request for review to the Secretary-General within the time limits prescribed by the Staff Rules then in effect and he did not provide evidence of any exceptional circumstance beyond his control preventing him to comply with those time limits;
 - b. The applicant's ALD was terminated in accordance with the applicable Staff Regulations and Rules; former staff regulation 9.1 (c) allows for the termination of an ALD "at any time", at the discretion of the Secretary-General if "in his or her opinion" the decision is "in the interest of the United Nations", while staff members serving on permanent or fixed-term appointments may be terminated for a range of reasons as per former staff regulation 9.1 (a) and (b) (abolition of post, reasons of health, etc.); this difference in wording between former staff regulation 9.1 (c) on the one hand and former staff regulation 9.1 (a) and (b) on the other hand is justified by the very nature of an ALD which is a non-career appointment and which implies the need for maximum flexibility;
 - c. UNDP Country Offices recruit and manage ALD locally and compensate its holders by providing a different, generally higher salary scale than those appointed under the 100 series;
 - d. The decision "was taken in the interest of the UN in light of the circumstances under which the Country Office was operating"; in view of the delicacy of the UN operations in the Palestinian Territories in which the applicant was employed, political considerations are of relevance in order to assess the interest of the Organization hence the question whether an individual appointment may be terminated on that grounds may at times require immediate action;
 - e. Such considerations may be of such a nature that they cannot be extensively detailed or justified without risking the exposure of

sensitive issues; in any case, the applicant was not entitled under the applicable Staff Regulations and Rules to receive a detailed explanation or justification for the decision;

- f. The decision contained in the termination letter does not intend to reflect upon the applicant's character, reputation, conduct or performance and the respondent is willing to put a clarification to this effect on the applicant's Official Status File;
- g. Former staff rule 309.3 provided that holders of ALDs are entitled to written notice of termination but the Secretary-General may authorize payment in lieu of notice and they are entitled to a termination indemnity equivalent to one week for every month of uncompleted service; the termination procedure was observed in the present case since the applicant was paid an indemnity and provided compensation in lieu of notice;
- h. The Secretary-General did not err in fact or law in citing former staff regulation 9.1 (c) and upholding the decision;
- i. The phrasing of the termination letter does not carry any particular adverse inference and as such does not constitute adverse material and administrative instructions, like ST/AI/292 quoted by the applicant, are not binding upon the UNDP;
- j. Since there is no error of fact or law necessitating that the decision of the Secretary-General be changed or over-turned, the respondent requests the Tribunal to uphold the decision of the Secretary-General and to dismiss the application.

Considerations

22. The application is receivable since it is not time-barred. It is true that the applicant's request for review of the decision dated 7 May 2007 was only received on 26 September 2007 and, therefore, exceeded the two months time limit provided for in former staff rule 111.2 (a). Nevertheless, in the case at hand, exceptional circumstances call for a waiver of this time limit, under the terms of former staff rule 111.2 (f).

23. The Tribunal has already stated that, during the transition to the new system of administration of justice, it has jurisdiction to waive time limits imposed by the former Staff Rules (see UNDT/2009/052, *Rosca*, paragraph 15; UNDT/2010/019, *Samardzic et al.*, paragraph 31).

24. With respect to the concept of exceptional circumstances, the Tribunal follows the definition developed by the former United Nations Administrative Tribunal, according to which exceptional circumstances “consist of events beyond the applicant’s control that prevent the applicant from timely pursuing his or her appeal” (see Judgment No. 372, *Kayigamba* (1986); No. 713, *Piquilloud* (1995); No. 868, *Bekele* (1998); see also UNDT/2010/019, *Samardzic et al.*; UNDT/2010/031, *Bidny*).

25. In the case at hand, the applicant started his efforts to get explanations with respect to the decision to terminate his appointment immediately after having been notified of that decision. Within the time limits provided for in former staff rule 111.2 (a) with respect to a request for review, the applicant also contacted the Office of the Joint Ombudsperson. The Office of the Joint Ombudsperson finally advised the applicant to send his request to the PoC “in order ... to clarify the issue of 60 days deadline”. One day later, the applicant turned to the PoC where he was informed, in writing, that the time limit for submitting a request for review in his case was 26 September 2007. That is the day the applicant submitted his request for review.

26. It must be noted that during the whole process, the applicant always addressed his requests to offices within the former system of internal justice and followed their advice subsequently. At no time did he rely on other information than the one he had received from officials who were competent and had the authority to deal with the questions raised by the applicant. As a layperson, the applicant was entitled to trust this information and act accordingly. Under the given circumstances, it could not be expected from a reasonable person to do more than what the applicant did. Therefore, it has to be considered as beyond the applicant’s control that, in the end, the request for review did not reach the Secretary-General within the time limit provided for in former staff rule 111.2 (a).

27. The application is successful on the merits. The decision of 7 May 2007 to terminate the applicant's contract effective the same day is in not in compliance with the terms of appointment laid down in the applicant's letter of appointment (see article 2.1 (a) of the statute of UNDT).

28. According to this letter of appointment, a termination of the ALD prior to its expiration requested from both parties to give thirty days written notice. In case of termination by UNDP, in addition to the thirty days notice, compensation in lieu of notice period would be provided. Only in cases of summary dismissal for serious misconduct was there no entitlement to a period of notice or an indemnity payment. It has to be underlined that according to this letter of appointment – and unlike former staff rule 309.3 (b) – compensation was to be paid not instead (“in lieu”) of the notice period, but in addition to it.

29. It follows from the clear and unambiguous wording of these provisions that in the applicant's case - where no summary dismissal took place - thirty days of written notice were an absolutely indispensable condition for any kind of termination. Therefore, it was impossible to legally terminate the applicant's appointment by a decision with immediate effect. It follows from the foregoing that the contested decision from 7 May 2007 to terminate the applicant's contract effective 7 May 2007 did not comply with the terms of his appointment.

30. In light of the above there is no need to deal with the contentions of the parties. Since the contested decision is illegal for the reason stated above, the Tribunal will not assess any other, potentially doubtful grounds.

31. With respect to the remedy sought it has to be recalled that, according to article 10, paragraph 5, of its statute, the Tribunal may order as part of its judgment (a) the rescission of the contested decision or specific performance, provided that, where the contested decision concerns, among others, termination, the Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission, and/or (b) compensation which shall normally not exceed the equivalent of two years' net base salary of the applicant. If the Tribunal would order other remedies, such as apologies, explanations etc., it would exceed its jurisdiction. As such, the remedies sought by

the applicant could only have been obtained in the framework of an amicable settlement, which, in the case at hand, unfortunately failed.

32. The Tribunal has already stated that, as a general rule, it is necessary to rescind the contested decision once the Tribunal has established its illegality (see UNDT/2010/009, *Allen*). There is no reason in the case at hand that may justify making an exception to this rule.

33. It results from article 10, paragraph 5 (a), of the UNDT statute that since the contested decision in the present case concerns a termination, the Tribunal has to fix an amount of compensation which the respondent may elect to pay as an alternative to the rescission. In order to fix a proportional sum of money for compensation, it is necessary to take into account the duration of the appointment that was terminated. This criterion reflects, in an appropriate way, what the contractual relationship between the parties would have been, had the unlawful decision to terminate the contract not been taken. The applicant's contract would have expired on 29 February 2008. Since the termination took place on 9 May 2007, a further duration of about ten months may be used as a basis of calculation, which should be combined with the applicant's net base salary at that time.

34. Although the applicant wants to be granted compensation for the harm inflicted, he also has stressed that his case is not about financial compensation. Since article 10, paragraph 5 (b), of the Tribunal's statute provides that compensation shall normally not exceed the equivalent of two years' net base salary, it is clear, that the Tribunal may not grant any other compensation than a financial one. If, as in the present case, the applicant explicitly denies to be interested in financial compensation, no such compensation can be awarded.

Conclusion

35. In view of the foregoing, the Tribunal ORDERS that:

- 1) The decision to terminate the applicant's appointment dated 7 May 2007 be rescinded;
- 2) In case the respondent elects to pay compensation as an alternative to the rescission, the applicant be paid a sum of USD 45,000 within 60 calendar days of receipt of this judgment;

3) All other pleas are rejected.

(Signed)

Judge Thomas Laker

Dated this 28th of April 2010

Entered in the Register on this 28th day of April 2010

(Signed)

Víctor Rodríguez, Registrar, Geneva