UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/33
UNDT/GVA/2009/40
Judgment No.: UNDT/2010/108
Date: 22 June 2010
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

LARKIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Shelly Pitterman, UNHCR

Introduction

1. By application filed on 8 September 2009 and registered under case No. UNDT/GVA/2009/40, the applicant contested the final decision by the Secretary-General on an appeal before the Geneva Joint Appeals Board (JAB) against the decision not to renew his fixed-term appointment beyond 30 November 2007. The Secretary-General's decision, notified by letter dated 6 May 2009, endorsed the JAB conclusions that "the reason alleged for not extending the [applicant's] fixed-term appointment ha[d] not been duly established, and that on that ground [he] was entitled to reparation", and awarded the applicant compensation of three months' net base salary.

2. On 12 May 2009, the applicant filed an appeal before the Geneva JAB challenging the "[d]ecisions taken by the Appointments, Posting and Promotions Committee (APPC) to conceal from [him] communications concerning [his] employment submitted by the Representative of the United Nations High Commissioner for Refugees (UNHCR) at the Branch Office London (BO London) … and also the fact that such submission had been made".

3. As the case remained pending at the time of the JAB abolishment, the case was transferred to the Tribunal as of 1 July 2010, in compliance with section 2.3 of ST/SGB/2009/11. It was attributed case number UNDT/GVA/2009/33.

Facts

4. The applicant entered service at the United Nations in September 2006, as Finance Assistant at the UNHCR BO London on the basis of a fixed-term appointment at the G-6 level, which was extended twice, namely in December 2006 and March 2007.

5. In March 2007, the Office of Internal Oversight Services (OIOS) conducted an audit in the BO London.

6. In April 2007, the applicant was granted a six-month probationary appointment as Administrative and Financial Assistant, under an assignment of the APPC. This contract expired on 30 September 2007. The Representative of the

High Commissioner at BO London (the Representative), who was the applicant's supervisor, did not recommend its extension.

7. On the basis of the audit conducted in March 2007, OIOS issued an Audit Report on "UNHCR Operations in the United Kingdom" on 29 June 2007, which stated that "the operation's system of internal control was assessed as below average" and that "prompt corrective action [was] required by management to significantly improve the application of key controls". It recommended, *inter alia*, that "the reason for the high staff turnover should be determined" and that "the Representation should develop its induction training and knowledge management system". In the area of administration and finance, the OIOS noted that "internal controls were weak" (segregation of duties not at all times observed, proper certifying, approving and authorizing procedures not always in place, and financial and cash management procedures not fully established), and that the "provision of training and/or on-the-job coaching to staff was required".

8. From the end of June 2007 to 7 September 2007, the Representative was frequently absent from the office due to health and family reasons (even though this is not reflected in her attendance sheet). She did come to the office on several occasions, but according to the applicant, he could not know in advance when she would be present. The Representative maintains that, despite her prolonged absence, the Deputy Representative kept her informed of the office business and developments.

9. The applicant asserts that in August 2007, he had a discussion with the Representative and the Deputy Representative of the UNHCR at the BO London on the response of the office regarding the implementation of OIOS recommendations. According to the applicant, the Representative and the Deputy Representative criticized the work of the auditor and stressed that he had exceeded his terms of reference, while the applicant defended the auditor's methods as being standard auditing procedures and welcomed the resulting report.

10. On 7 September 2007 (first day in office of the Representative after her annual leave), a meeting took place between the applicant and the Representative

in the framework of the applicant's Career Management System (CMS)/Performance Appraisal Report (PAR).

11. A note for the file on that meeting reported that the applicant had not completed the self-assessment component before the meeting, contrary to what the Representative had expected. It was further noted that he had previously been advised that the completion of the PAR was essential "in view of the fact that confirmation of his appointment by the APPC to his post [was] subject to satisfactory performance during a six-month probationary period". The note for the file elaborated on several shortcomings of the applicant related to his attendance (starting work late), his management competence (failure to set priorities, leading to delays and missed deadlines), his technical knowledge (despite coaching and training, not yet able to handle HR matters autonomously; lack of interest in becoming operational; and ignoring directions and advice from supervisors and other senior colleagues).

12. By email dated 11 September 2007, the applicant sent the Representative his comments for a response to the Audit Report established by OIOS.

13. According to the applicant, on 20 September 2007, the Representative e-mailed him the note for file on the meeting of 7 September 2007.

14. On 24 September 2007, a meeting took place between the applicant and management of the BO London, during which the applicant gave his views on various issues related to his attitude at work and his performance and the preparation of his PAR. A note on this meeting was drafted and signed by the Representative on the same day.

15. By memorandum dated 5 October 2007 and sent on the same day, the Representative informed the applicant that she had approved a new fixed-term appointment running from 1 October to 30 November 2007, which included a one-month period of prior notice required for separation. It was specified that this contract would not be extended. It was further stated that the decision not to recommend to the APPC the extension of his probationary appointment was due to concerns about his performance which had been shared with him on various occasions, prior to and during the series of recent meetings to discuss his PAR.

She stressed her disappointment that the applicant had not yet sent her his self-assessment in the context of the PAR or any written response to the feedback provided to him at and after the meeting of 7 September 2007. The Representative expressed her view that his attitude over the last months had been "sometimes bordering on insubordination". She invited the applicant to use the two-month fixed-term appointment to complete any responses he might have on his PAR.

16. On 26 October 2007, the Representative sent to the APPC a memorandum dated 12 October 2007. She recalled that the applicant had been granted a fixed-term appointment covering a six-month probationary period, which ended on 28 September 2007, and stated that "the staff member's performance during his probation had been judged not to be entirely satisfactory and … therefore … [she was] unable to recommend the further extension of his appointment by the APPC". The letter mentioned a series of attachments documenting the performance issues raised with the staff member. The memorandum stressed that the applicant had been advised of this decision in the course of a discussion with him on his performance appraisal and, subsequently, of the decision to issue him two months' fixed-term contract prior to his separation from service.

17. By email dated 13 November 2007, the applicant responded to the note for the file on the meeting of 7 September 2007. He explained that he had finalised the CMS/PAR objectives in July 2007, and had been pushing the PAR process, and that it was due to the long absences of his supervisor that the matter could not be handled on time. He further asserted that it had never been agreed that he would complete his self-assessment for the meeting, since the finalised objectives had not been confirmed at the time. He added that it would make sense to finalise his self-assessment only at the end of the review period (i.e. early October), and that he considered it an important task which he was not ready to prepare in a hurry. The applicant challenged the contention that he had been late regularly, and asked the Representative to cite specific dates and times; he affirmed that, on the contrary, since joining UNHCR in September 2006, he had never been on sick leave and had not taken annual leave, but had routinely come in early and worked late into the evenings, and sometimes over weekends, leading to average working hours of 45-50 per week. He strongly contested the alleged lack of technical

competence, stressing his educational background, achievements and commitment. With respect to his management competences, the applicant noted that when he started working at the BO, the situation had been grave as morale was low and staff turnover was high (many staff members of the Finance Section had resigned owing to heavy workload), adding to the workload for the remaining staff. He stressed that the Representative did not support his efforts to get voluntary support (administrative intern) and, even though the audit report called for further training for him and his colleague, this, too, was not supported by the Representative.

18. By email dated 14 November 2007, the applicant contacted the UNHCR Mediator Office. An agent of the Office responded by e-mail dated 22 November 2007, stating that the Director of the Europe Bureau was not prepared to reconsider the decision not to extend his contract and therefore she could be of little help. She advised the applicant that he could address the matter through the formal channel of the JAB.

19. On 28 November 2007, the applicant sent a request for review of the decision not to extend his contract to the Secretary-General.

20. After sending an incomplete statement of appeal, the applicant filed an appeal against the administrative decision not to renew his fixed-term appointment beyond 30 November 2007 with the Geneva JAB on 13 March 2008 (JAB Case No. 598).

21. On 8 September 2008, in the course of the exchanges pertaining to the procedure of a different appeal introduced by the applicant before the Geneva JAB, the respondent addressed to the Secretary of the Geneva JAB a memorandum providing response to a request for additional information made by the JAB. In the said memorandum, reference was made to a letter dated 12 October 2007 to the APPC Secretariat with regard to the non-extension of the applicant's fixed-term appointment. The applicant subsequently informed the JAB that he had never seen this letter.

22. In its report of JAB Case No. 598, dated 26 January 2009, the JAB concluded that the reason alleged for not extending the applicant's fixed-term

appointment had not been duly established, and that on that ground the applicant was entitled to reparation. It recalled that the applicant requested reinstatement for a further year to be granted as a remedy, and recommended that, should reinstatement not be considered a viable option, the applicant be awarded a compensation of three months' net base salary at the rate in effect at the date of the adoption of the decision.

23. Based on the above recommendation, the Deputy Secretary-General decided, by letter dated 6 May 2009, to accept the JAB findings and conclusions and to award the applicant "compensation of three months net base salary at the rate in effect as to the date of [his] separation from the Organization".

24. As regards case No. UNDT/GVA/2009/40, on 6 August 2009, the then counsel for applicant submitted a motion for waiver of time-limit to contest the decision pursuant to article 35 of the rules of procedure. He requested a 30-day extension, i.e. until 5 September 2009, on account of the inability of OSLA to appoint a counsel to the applicant with sufficient time to enable the preparation of his submission. Such extension was granted until 8 September 2009.

25. The counsel for applicant filed the relevant application on 8 September 2009. The respondent's reply followed on 16 October 2009, which was transmitted to the applicant for information.

26. On 11 December 2009, OSLA informed the Tribunal via e-mail that it was no longer in a position to represent the applicant in his cases before the Tribunal.

27. On 3 March 2010, the applicant submitted on his own initiative supplementary comments on the respondent's reply. They were transmitted on 4 March 2010 to the respondent, who presented comments thereon on 18 March 2010, as per the Tribunal's request.

28. On 9 February 2009, the applicant had requested administrative review of the decision taken by the APPC, UNHCR, to conceal from him communications concerning his employment submitted by the Representative in the United Kingdom and also the fact that such a submission had been made.

29. ALU notified the applicant of the outcome of the administrative review by letter dated 7 April 2009 (postmarked 13 April 2009). The request was considered

to be not receivable, as it was not directed against an administrative decision, inasmuch as the concerned documentation took the form of internal communications submitted on a strictly confidential basis.

30. On 12 May 2009, the applicant lodged an appeal against this decision before the Geneva JAB, which was transferred to the UNDT as of 1 July 2009, in accordance with ST/SGB/2009/11 on "Transitional measures related to the introduction of the new system of administration of justice". It was then registered under case No. UNDT/GVA/2009/33.

31. The respondent submitted his reply thereon on 31 August 2009, which included the letter of 12 October 2007 as annex 3, marked as confidential. In the account of facts included, it was confirmed that the letter dated 12 October 2009 was sent to the APPC on 26 October 2007.

32. By letter dated 7 September 2009, the Tribunal requested the respondent to provide the reasons for the confidentiality of annex 3 of his reply. The respondent answered by memorandum dated 15 September 2009 that confidentiality of this document was based on paragraph 31 of the APPC Rules of Procedure. "However, since none of the information contained in the memorandum [was] new to the Applicant or concern[ed] other staff members, [the respondent] consent[ed] to this Annex being shared with the Applicant".

33. At the applicant's request, the Tribunal instructed the respondent, by letter dated 2 October 2009, to provide the notes for file and letters that were attached to the 12 October 2007 memorandum to the APPC, as per the last sentence of the second paragraph of the above-mentioned annex 3. The respondent did so on 9 October 2009; specifically, he transmitted a note for file dated 7 September 2007, a note dated 2 October 2007, the memorandum dated 5 October 2007 and the memorandum dated 12 October 2007.

34. The applicant submitted observations on the respondent's reply on 19 October 2009.

35. An oral hearing on the two above-mentioned cases, as well as on two more applications filed by the applicant, took place on 13 May 2010.

Parties' contentions

36. As regards case No. UNDT/GVA/2009/40, the applicant's principal contentions are:

a. While the Secretary-General stated in the decision letter that he accepted the JAB findings and conclusions, there is a discrepancy between the amount of compensation paid to the applicant and what the JAB had recommended. The JAB recommended the award of compensation of three months' net base salary at the rate in effect at the date of the adoption of the decision, whereas the Secretary-General decided to award compensation of three months net base salary at the rate in effect as is the date of the applicant's separation from the Organization. In the applicant's understanding, the date of adoption of the decision is the date of the letter notifying the applicant of the Secretary-General's decision (6 May 2009), whereas the date of the applicant's separation was 30 November 2007. The "net base salary" should be calculated on the basis of the Annual Salaries and Allowances applied for the General Service Category. Thus, as per the applicant's calculation he should have been paid £8,178, while he received £7,893.75 from UNHCR;

b. Compensation recommended by the JAB is not adequate or commensurate with the damage caused by the procedural irregularity found by the JAB and in respect of which the JAB recommended reinstatement or compensation in lieu thereof. In its judgement No. 1237, *Hussain* (2005), former United Nations Administrative Tribunal held that the amount of compensation was determined on a case by case basis taking into account all the circumstances of each case. In former UNAT judgement No. 1420 [*sic*] (2008), presenting similar procedural irregularities in the performance evaluation process, the applicant was granted six months' net base salary;

c. The applicant stated in his supplementary comments of 3 March 2010 that all the submissions made on his behalf by his counsel before the JAB in case No. 598 "remain valid" and that he "respectfully submit[ed] them for the consideration of the Dispute Tribunal". The said submissions developed the argument that the non-renewal of the applicant's fixed-term appointment "was based on extraneous factors and amount[ed] to abuse by the Representative of her discretionary power".

37. Based on the above considerations, the applicant requests:

a. That he be reinstated and paid all salary and benefits retroactively to the date of his separation from UNHCR (30 November 2007);

b. Adequate and sufficient compensation that, in light of the harm caused by the grave nature of the procedural irregularity found, would be higher than that recommended by the JAB, reflecting a net base salary at the rate in effect at the date of judgment, with interest payable at 8% per annum as from 90 days from the date of distribution of the judgment until payment is effected;

38. Regarding case No. UNDT/GVA/2009/40, the respondent's principal contentions are:

a. The JAB was an advisory body; it issued recommendations which the Secretary-General was not bound to follow, as recognized by former UNAT in judgement No. 1237, *Hussain* (2005);

b. At the time of the applicant's separation he was subject to the salary scale effective 1 October 2007 for staff in the General Service Category in London. Therefore, the amount of compensation he received is correct;

c. The two cases cited by the applicant when arguing for higher compensation do not support his request, since they both considerably differ from the case at hand. In the present case, the JAB considered that the absence of a PAR assessing the applicant's performance was the responsibility of both the applicant and the

Administration. In the absence of a PAR, the JAB deemed that the evidence supporting unsatisfactory performance was not sufficient and, hence, the allegations could not be established;

d. All the circumstances of the case were taken into account by the JAB in determining the amount of compensation to be awarded to the applicant, in accordance with former UNAT jurisprudence relied upon by the applicant. In addition, as per judgement No. 1430 of the former UNAT, "generally speaking, length of service is undoubtedly a factor in considering compensation". In the present case the applicant served only 6 months;

e. The fact that the unsatisfactory performance was not sufficiently established does not mean that his performance was satisfactory. It cannot be said that a correct evaluation process would have led to the extension of his appointment, as in judgement No. 1237 of the former UNAT;

f. The respondent considers that the compensation recommended and granted was commensurate with the procedural irregularity.

39. In view of the foregoing, the respondent requests the Tribunal to reject the application as unfounded.

40. Concerning case No. UNDT/GVA/2009/33, the applicant's principal contentions are:

a. On receivability, the administrative review dated 7 April 2009 was received by the applicant on 17 April 2009;

b. The applicant is not contesting the 12 October 2007 letter *per se*, but rather the manner in which the APPC reacted upon receipt of it. Unless the contrary can be proven, its reaction must have involved a failure to act in two respects: 1) to decide not to advise the applicant that a memorandum had been received, and 2) to decide to conceal the actual content of the memorandum. Logically, any administrator receiving allegations from one staff member about another one would wish to hear the other side. Failure to act in

such circumstances amounts to a unilateral, unwritten administrative decision in an individual case;

c. On the merits, the letter of 12 October 2007 to the APPC was still not made available to the applicant at the time he filed his appeal. Also the fact that the Representative had even contacted the APPC was kept secret until the 10 December 2008 memorandum by the respondent. Had the applicant been aware that the Representative had communicated her opinion that his performance was not satisfactory, he would have defended himself vigorously. He would have expected the APPC, upon receipt of the 12 October 2007 letter, to have informed him and asked him to give his version on those allegations;

d. The applicant did not believe that the Representative had shared with anyone her allegations on his performance. Due to a number of surrounding factors, the threat contained in the 5 October 2007 memorandum announcing the non-extension of the applicant's contract lacked credibility. Management encouraged him to believe that he should continue to work tirelessly to ensure the operation of the office and thus to retain the expectation that his contract would be extended. Had the applicant known that the Representative had approached the APPC, he would have seen the memorandum of 5 October 2007 in a far more serious light. Management sought to mislead the applicant and to encourage his expectation that the option to extend his contract was very open. In this connection, the fact that the APPC had been informed of the intention not to extend the applicant's contract had to be kept secret;

e. The content of the 12 October 2007 memorandum is defamatory, insofar as allegations about the applicant's performance are made which have been found to be false in the course of JAB appeal No. 598. The decision making of the APPC did have a damaging impact on the applicant, as he would have made submissions to the

APPC to defend his professional reputation, had he known about the content of the above-mentioned memorandum;

f. The APPC failed to request further information on the alleged unsatisfactory performance or confirmation that the system of graduated warning had been adhered to. By circulating allegations which have been shown to be untrue, the Secretary of the APPC damaged the applicant's reputation. Accepting the memorandum by the Representative of the BO London without any questioning was reckless and negligent;

g. The respondent misquotes paragraph 31 of the APPC Rules of Procedure, on which he based the confidentiality of the material put at the APPC disposal. In fact, this provision continues "except as provided for by these Rules and Regulations or where otherwise instructed by the Chairperson or Vice-Chairperson, with the agreement of the members of the Committee". Hence, the APPC is free of action and should exercise discretion whenever it encounters a situation where a staff member's right to fair treatment and due process may be jeopardised. In addition, the manner in which the APPC is expected to exercise this power can be gauged by reference to paragraph 79 of the APPC Procedural Regulations;

h. Failure of the APPC to properly fulfil its oversight responsibilities amounts to collusion with the BO London management. It did not treat the applicant in a fair and transparent manner or in accordance with their good faith obligation;

i. Having been transmitted the respondent's reply as well as the documents disclosed upon the Tribunal's instructions, the applicant noted that he had been sent the note for file dated 7 September 2007 on 20 September 2007 and the memorandum dated 5 October 2007 on the same day. He further declared that he

had never seen the note dated 2 October 2007 and the memorandum dated 12 October 2007;

j. However, the most significant fact was that the note for file on the 24 September 2007 meeting was not attached to the 12 October 2007 memorandum to the APPC. The withholding of this document, in which it is clear that the applicant was vigourously contesting her allegations, is conclusive proof that the Representative of the BO London was making her submission to the APPC in bad faith to mislead the latter;

k. Whereas the present case concerns the conduct and decision making of the APPC, the APPC failed to explain how it dealt with the 12 October 2007 memorandum. No information has been disclosed as to how the APPC fulfilled its responsibility to ensure fairness in decisions affecting staff.

41. Based on the above, the applicant requests:

a. Full disclosure by the APPC of all documents concerning the applicant which are in its possession or control, redacted to protect the confidentiality of other staff members as necessary. APPC members ought to be required to give an account of the manner in which they discharged their responsibilities in the applicant's case;

b. To direct that the Rules of Procedure of the UNHCR APPC be revised as necessary to stipulate that a situation similar to his will not recur;

c. Financial compensation, in an amount to be determined, for the infringement of the applicant's right to be treated in a fair and transparent manner, and also with respect to the fact that concealment contributed to his not being able to avail of a proper notice period;

d. Additionally, that the Secretary of the APPC be ordered to cooperate in circulating a letter prepared by the applicant and

enclosed in his observations dated 19 October 2009 with the aim of exercising his "right of reply".

42. On case No. UNDT/GVA/2009/33, the respondent's principal contentions are:

a. The appeal is not receivable *ratione materiae*, as it is not directed against an administrative decision, within the meaning of staff rule 11.4 (a), as per the definition given by the former UNAT in judgement No. 1157, *Andronov* (2003);

b. No administrative decision was taken to conceal from the applicant the information contained in the memorandum from the Representative to the APPC;

c. The fact that the memorandum was not shared was fully in line with paragraph 31 of the APPC Rules of Procedure, which establishes: "… All information submitted to the Committees and their recommendations shall be treated as strictly confidential, not to be shared or discussed with persons outside the Committees …";

d. The memorandum constituted an internal communication aimed at informing the APPC of the administrative decision not to extend the Applicant's appointment which had already been taken. The non-renewal decision is *res iudicata*, as it was decided upon further to JAB Case No. 598;

e. The communication in question between the Representative and the APPC was in accordance with paragraph 43 of the APPC Procedural Regulations, which provide that, concerning newly recruited staff appointed through the APPC and serving on a fixed-term appointment covering a six-month probationary period, "the manager should confirm (directly to the relevant personnel/administrative bodies) the staff member's satisfactory performance and will request an extension of the Fixed-Term appointment";

f. Moreover, none of the information contained in the memorandum was new to the applicant, since he had already been notified of the non-extension decision by memorandum dated 5 October 2007. The memorandum did not affect the applicant's rights or conditions of employment;

g. As regards the merits of the case, the respondent makes two preliminary observations:

- The applicant claims that the content of the memorandum is "defamatory", insofar as he considers that the allegations of unsatisfactory performance were disproved and that the JAB so concluded in Case No. 598. However, the relevant JAB report did not state that the applicant's performance was satisfactory;

- While the applicant asserts that management encouraged him to believe that his appointment would be extended, the matter was already addressed in his appeal against his separation. The JAB report in Case No. 598 read in this connection: "…after reviewing the facts of the case, [the Panel] identified no particular circumstance warranting a finding that the Applicant had solid prospects for renewal of his fixed-term appointment".

h. Paragraph 31 of the APPC Rules of Procedure provides that:

> "All information submitted to the Committees and their recommendations shall be treated as strictly confidential, not to be shared or discussed with persons outside the Committees except as provided for by these Rules and Regulations or where otherwise instructed by the Chairperson or Vice-Chairperson, with the agreement of the members of the Committee".

i. The information contained in the memorandum of 12 October 2007 was treated confidentially, fully in compliance with the above-cited provision. Furthermore, the APPC did not have to make use of the

exceptions provided in paragraph 31 of the APPC Rules of Procedure in this case. None of the APPC Rules and Regulations provide for the disclosure of information communicated by managers under paragraph 43 of the APPC Procedural Regulations. The memorandum clearly stated that the applicant had been advised of the decision to separate him from service for unsatisfactory performance by memorandum of 5 October 2007;

j. In this regard, the APPC Rules and Procedures do not provide staff members on fixed-term appointments with a right to submit their comments to the APPC when their appointment will not be renewed after probation. Paragraph 79 of the APPC Procedural Regulations relate to the termination of indefinite appointments;

k. Paragraph 43 of the APPC Procedural Regulations on fixed-term appointments provides that:

> "…Before the end of the six-month probationary period, the manager should confirm (directly to the relevant personnel/administrative bodies) the staff member's satisfactory performance and will request an extension of the Fixed-Term Appointment … In the absence of a confirmation form the manager, the Fixed-Term Appointment will automatically expire."

l. Accordingly, the APPC will only consider the extension of a staff member's fixed-term appointment if the manager makes a request for such extension, which was not made in the case at hand.

43. In light of the foregoing, the respondent requests the Tribunal to find the application not receivable and/or to reject it as unfounded.

Considerations

44. The Tribunal decided that cases No. UNDT/GVA/2009/40 and UNDT/GVA/2009/33 would be jointly considered, since they both arise from the same factual situation and challenge closely related acts.

45. Indeed, in case No. UNDT/GVA/2009/40, the applicant contests the non-renewal of his fixed-term appointment, notified to him by memorandum of

5 October 2007, whereas, in case No. UNDT/GVA/2009/33, he questions the fact that his supervisor having communicated the non-renewal decision to the APPC by letter of 12 October 2007, the latter failed, upon receipt of this letter, to inform the applicant of its existence and content.

46. Being the subject of case No. UNDT/GVA/2009/33 as identified above, this case must be deemed irreceivable, as falling out of the Tribunal's jurisdiction *ratione materiae*. Under the terms of article 2.1 (a) of the UNDT statute, the Tribunal's competence is strictly limited to review the legality of "administrative decisions". This notion was authoritatively defined in judgement No. 1157, *Andronov*, (2003) of the former UNAT as:

> "a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order".

47. This definition, which has been subsequently adopted by UNDT (see UNDT/2009/077, *Hocking, Jarvis, McIntyre*; UNDT/2009/086, *Planas*; UNDT/2010/085, *Ishak*) and United Nation Appeals Tribunal (see judgments 2010-UNAT-013, *Schook v. Secretary-General*; 2010-UNAT-030, *Tabari v. UNRWA*), makes clear that only a decision creating direct legal effects is to be considered as an "administrative decision" for the purpose of its formal contestation in front of the Tribunal.

48. Against this background, the Tribunal notes that paragraph 43 of the Rules of Procedure of the UNHCR Appointments, Postings and Promotions Committee provides that, as regards staff newly recruited through the APPC, before the end of the six-month probationary period, the manager should confirm the staff member's satisfactory performance and request an extension of the fixed-term appointment; and adds "[i]n the absence of such confirmation, the Fixed-Term Appointment will automatically expire".

49. It results from the wording of this provision that the power to decide to let expire a fixed-term appointment at the end of the probationary period is conferred to the supervisor, with no involvement of the APPC. The committee will only enter into review of a certain case if and once the relevant supervisor has requested the extension of the appointment.

50. As a matter of fact, the decision not to renew the applicant's appointment was made before the APPC received the 12 October 2007 letter; in fact, by the time APPC was informed of the non-renewal decision, the applicant had already been notified thereof, by memorandum dated 5 October 2007.

51. In these circumstances, the APPC omission to share the letter of 12 October 2007 with the applicant could not, by and in itself, have affected in any manner the legal situation of the latter. This letter appears as no more than an internal communication. At the highest, the sending of this letter may be regarded as one step within a composite procedure. In this connection, the UNDT has previously recognized that such procedural steps do not constitute "administrative decisions" within the meaning of article 2.1 (a) of its statute (see UNDT/2010/085, *Ishak*).

52. Turning to case No. UNDT/GVA/2009/40, there is a fundamental discrepancy between the parties on the motives behind the decision not to extend the applicant's appointment. Whereas the reason explicitly given for it was the unsatisfactory performance of the staff member, the applicant claims that this decision was based on extraneous factors; specifically, that it was prompted by the applicant's support to the OIOS audit conducted in the BO London and to the resulting report, which was considerably critical of the Office's management.

53. It is appropriate to recall, at the outset, that the applicant held a fixed-term appointment. This type of appointment does not carry any expectancy of renewal or conversion and "expire[s] automatically and without prior notice on the expiration date specified in the letter of appointment", in accordance with former staff rules 104.12 (b) and 109.7.

54. The foregoing does not imply, nonetheless, that the Organization has unfettered power. The decisions of the administrative authority "must not be arbitrary or motivated by factors inconsistent with proper administration", as was constantly affirmed in the jurisprudence of the former UNAT and recently upheld by the United Nations Appeal Tribunal (see judgment 2010-UNAT-020, *Asaad v. UNRWA*).

55. However, the burden of proving the alleged improper motivation lies with the staff member who is contesting the decision (see judgment 2010-UNAT-020, *Asaad v. UNRWA*; UNDT/2009/083, *Bye*; UNDT/2010/009, *Allen*; judgments No. 834, *Kumar* (1997); 1134, *Gomes* (2002), 1203, *Hjelmqvist* (2005) of the former UNAT). Accordingly, in the case at hand, it is incumbent on the applicant to show that the impugned non-renewal was the result of his discrepancies with his supervisor regarding the OIOS audit report.

56. After careful examination of the applicant's lengthy submissions, the Tribunal is not satisfied that the applicant has discharged this burden. The applicant builds his case on the premise that the sequence of events demonstrates his allegations of improper motivation. However, the account of facts relied on by the applicant includes a number of aspects which are not in themselves verifiable, such as the details of the applicant's meeting with the Representative and the Deputy Representative in August 2007. Even assuming that his account of facts was completely accurate and objective, it remains that the applicant makes far-reaching inferences exclusively on this basis, namely that the applicant's positive appreciation of the critical OIOS report brought about prejudice or hostility towards him by his supervisor, and, further, that this was the cause of the non-renewal. In fact, no concrete elements back such conclusions.

57. In sum, the elements adduced fall short to establish that the contested decision was based on extraneous factors. While realizing the difficulty in gathering material evidence in cases of this kind, the Tribunal is unable to accept so serious allegations on such weak grounds.

58. On the other hand, the Tribunal finds equally unsubstantiated the justification put forward by the Representative of the BO London for taking the contested non-renewal, i.e. the applicant's unsatisfactory performance.

59. In this regard, the Organization has failed to provide any correspondence, note or other material documenting the applicant's poor performance. The first document included in the case file recording the Representative's dissatisfaction with the quality of the applicant's work is the note on the meeting of 7 September 2007. Conspicuously, this note, as well as subsequent documents

adduced as evidence of the alleged bad performance, contains nothing more than general statements of professional shortcomings, with no concrete instances or details thereof. It appears that the applicant's supervisor was unable, despite specific requests to do so, to present one single note or e-mail pointing out any mistakes or delays by the applicant in fulfilling his functions or conveying a complaint by a client or colleague, or at the very least to cite specific incidents of the kind.

60. It is also noticeable that those documents allegedly supporting the poor quality of the applicant's work, not only were vague and inconclusive, but were all entirely drafted by the Representative of the BO London alone. This conveys the strong impression that they reflected, at best, the Representative's subjective opinion, with no objective record to back it. Such declarations seem all the less reliable in light of the fact that the Representative remained absent from the Office most of the time during the last three months of the applicant's appointment; this amounts approximately to half of the applicant's six-month probationary period.

61. As the former UNAT repeatedly stated, whilst the Administration is not bound to provide a justification for not extending a fixed-term appointment, where it chooses to give a motive for their course of action, the reason alleged must be supported by facts (Judgements No. 1191, *Aertgeerts* (2004); No. 1177, *Van Eeden* (2004); No. 1003, *Shasha'a* (2001)). In the same vein, the United Nations Appeals Tribunal recently found proven that the motives for a contested decision were erroneous, inconsistent or fallacious, on the grounds that the measure taken against the staff member was "based not on specific facts but on generalized reasons" and the respondent did not provide any evidence indicating that the reasons given by the Organization justified the decision (United Nations Appeals Tribunal judgment 2010-UNAT-020, *Asaad v. UNRWA*).

62. In addition, if genuine concerns existed regarding the applicant's performance, it was his supervisor's duty to make him aware of them and to provide him adequate guidance, so as to give him a genuine chance to improve. This would have been in keeping with the procedure foreseen in the UNHCR Policy and Procedures for managing performance as well as, more generally, with the principles of good faith, transparency and proper administration.

63. However, there is no indication that the applicant was informed of any concerns relating to his performance prior to the 20 September 2007, date on which the Representative emailed to him the note on the meeting of 7 September 2007 she had drafted. Considering that the decision on the non-renewal of his appointment was notified to the applicant on 5 October 2007, it becomes evident that the applicant was not given the gradual warnings and guidance one would expect from a responsible manager. He was thereby deprived of a reasonable opportunity to rectify any shortcomings.

64. For all the foregoing, the decision not to renew the applicant's fixed-term appointment must be deemed not to be in conformity with the applicant's terms of appointment.

65. According to article 10.5 (a) of its statute, the UNDT may order to rescind a decision when its illegality has been established. Furthermore, in general, illegal administrative decisions cannot stand, as already stated in judgment UNDT/2010/009, *Allen*. Consequently, the said decision should be rescinded, pursuant to article 10.5 (a) of the Tribunal's statute.

66. The foregoing notwithstanding, article 10.5 (a) of the Tribunal's statute prescribes that when the contested decision concerns an appointment, the Tribunal has to fix an amount of compensation which the respondent may elect to pay as an alternative to the rescission. The administrative decision not to renew a staff member's temporary appointment has to be considered as such an appointment decision. Since every temporary or fixed-term appointment expires automatically on the expiration date (see staff regulation 9.4), the decisions about renewal of such appointments refer to a new appointment. For this reason, every decision in this respect – be it positive or negative – concerns "appointment" within the meaning of article 10.5 (a) of the Tribunal's statute.

67. In order to fix an adequate sum as an alternative compensation, it is appropriate to consider the length of the appointment that the applicant would have been granted should the contested decision not have been taken. Although the duration of a hypothetical subsequent appointment cannot be known with certainty, it is most likely, in view of the previous contracts of the applicant since

his joining of the Organization, that he would have been offered a further six-month fixed-term appointment. This duration will thus be taken as the basis for calculation. Nevertheless, it must not be neglected that, as provided in the memorandum of 5 October 2007, the Organization did grant the applicant two additional months of appointment beyond its due date of expiration, i.e. 28 September 2007.

68. Based on these considerations, the Tribunal sets the amount of four months' net base salary at the rate in effect at the time the decision not to extend the applicant's appointment was made as an alternative compensation in case the Administration chooses not to effectively rescind the impugned decision.

69. Regarding the compensation for harm suffered, the applicant's claim that the compensation already received pursuant to JAB Case No. 598 was not commensurate to the injury sustained.

70. The Tribunal considers, on the contrary, that three months' net base salary constitutes adequate compensation. In assessing this point, it is crucial to take into account the full set of circumstances of the case. In this connection, the two cases cited to support his claim, judgements No. 1237, *Hussein* (2005) and 1430 (2008) of the former UNAT, involved different – and more serious- facts and violations.

71. In the first place, they involved an obviously unfair performance evaluation process which led to arbitrary ratings in the relevant performance reports; in both cases, the respective rebuttal panels reached the solid conclusion that the Administration was responsible for grave procedural flaws. Unlike in these cases, in the absence of a finalised PAR and a subsequent rebuttal process, it has never been proven that the applicant's performance was incorrectly appraised or maliciously under evaluated. Instead, the limited elements available in the present case merely permitted to conclude that the allegations of bad performance purported by the applicant's supervisor were not established.

72. Moreover, bearing in mind that the "length of service is undoubtedly a factor in considering compensation" (see judgment No. 1237, *Hussein* (2005) of the former UNAT), the Tribunal needs to give proper weight to the circumstance

that the applicant served the Organization for the relatively short period of fourteen months.

73. Therefore, given that the applicant has already been awarded the amount equivalent to three months' net base salary by decision of 6 May 2009, the Tribunal shall not grant additional compensation under article 10.5 (b) of its statute.

Conclusion

74. In view of the foregoing, the Tribunal DECIDES:

1) Case No. UNDT/GVA/2009/33 is rejected as irreceivable;

2) The decision not to extend the applicant's fixed-term appointment is hereby rescinded. However, in compliance with article 10.5 (a) of the UNDT statute, the respondent may opt, as an alternative to the rescission, to pay a compensation of four months' net base salary at the rate in effect at the time the contested decision was made;

3) All other pleas are rejected.

(*Signed*)

Judge Thomas Laker

Dated this 22nd day of June 2010

Entered in the Register on this 22nd day of June 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva