



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/058
(UNAT 1720)
Judgment No.: UNDT/2010/150
Date: 20 August 2010
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

DZINTARS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Edward P. Flaherty

Counsel for respondent:

Bettina Gerber, UNOG

Introduction

1. On 29 June 2009, the applicant, a former staff member of the United Nations Economic Commission for Europe (ECE), filed an application with the United Nations Administrative Tribunal (UNAT) against the decision not to renew his fixed-term appointment.
2. Having been pending before UNAT, the application was, pursuant to the transitional measures set out in General Assembly resolution 63/253, transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010.
3. The applicant asks the Tribunal to order:
 - a. His immediate reintegration into ECE with retroactive effect to 2 September 2007;
 - b. That ECE make him a written apology;
 - c. The payment of one million euros as compensation for damage and of 25,000 euros for legal costs;
 - d. The reimbursement of salary equivalent to the paternity leave he was forced to forego;
 - e. The payment from the date of his request for administrative review of interest at the rate of ten per cent per annum on the compensation awarded him.

Facts

4. On 13 May 2005, the applicant joined the Technology Section, Transport Division, ECE, as a Mechanical Engineer at the P-3 level on a two-year fixed-term appointment running until 12 May 2007. His appointment was subsequently extended, for administrative reasons, on a monthly basis until 2 September 2007, when he was separated.
5. The applicant's electronic performance appraisal system (hereinafter "e-PAS") rating for the 2005-2006 cycle was "Partially meets performance

expectations”. At the mid-point review, in January 2006, a performance improvement plan was instituted.

6. By email dated 9 October 2006, the applicant’s first reporting officer reminded him that a performance improvement plan had been instituted because his performance had been rated at the mid-point review in the 2005-2006 cycle as not meeting expectations. He stated that, although a slight improvement was noted at the end of the 2005-2006 cycle, the applicant still needed close supervision and the documents he prepared still needed extensive corrections. He also stated that the quality of the applicant’s work and his performance had not improved since the end of the 2005-2006 cycle and that the applicant still had a very limited knowledge of the regulations with which he had to deal. He further reminded the applicant that he had advised him several times that, if his performance did not improve, he would be unable to recommend the renewal of his contract and informed him that, given the circumstances that obtained, he was not in fact in a position to do so.

7. On 20 October 2006, the applicant was sent a performance improvement plan in connection with his e-PAS for the 2006-2007 cycle.

8. In a memorandum dated 5 April 2007 addressed to the Executive Secretary, ECE, the Director, Transport Division, ECE, stressed that, despite the enormous efforts and continuous assistance of his two supervisors, the applicant had been unable to perform satisfactorily the tasks inherent to his position and that, in view of the applicant’s unsatisfactory performance during his two years with ECE, he was not recommending extension of his contract.

9. On 16 April 2007, the applicant’s first and second reporting officers signed off on his e-PAS for the 2006-2007 cycle, with the rating “Does not meet performance expectations”. The applicant signed his e-PAS on 25 April 2007, expressing his disagreement with the rating.

10. By letters dated 3 May 2007, a representative of the Russian Federation in Geneva and the Ambassador of Ukraine to the international

organizations in Geneva expressed their appreciation of the applicant's work in ECE.

11. On 8 May 2007, the applicant initiated rebuttal proceedings against his e-PAS for the 2006-2007 cycle.

12. On 10 May 2007, a Human Resources Officer transmitted to the applicant a memorandum dated 1 May 2007 informing him that he would be separated when his appointment expired on 8 June 2007.

13. On 29 May 2007, the applicant's first reporting officer asked the chairman of one of the working parties of which the applicant was secretary for his opinion concerning the applicant's performance. The chairman of the working party replied the same day, stating that, as he had informed the first reporting officer several times, the applicant's performance was inadequate and that the working party needed a secretary on which it could rely.

14. By memorandum dated 1 June 2007 addressed to the Director, Transport Division, ECE, the applicant requested renewal of his contract for one month and his transfer to another post in ECE.

15. In its report dated 1 June 2007, the rebuttal panel recommended that the applicant's performance rating for the 2006-2007 cycle should be upgraded from "Does not meet performance expectations" to "Partially meets performance expectations".

16. By memorandum dated 4 June 2007, the Director, Transport Division, ECE, replied to the applicant's memorandum of 1 June 2007 and agreed to recommend a one-month extension of his contract to enable him to wrap up his affairs. The applicant was placed on another post in another section of the Transport Division.

17. On 5 June 2007, the Executive Officer, ECE, transmitted the rebuttal panel's report to the applicant.

18. By letter dated 11 June 2007, a representative of the French Ministry of Agriculture answered the first reporting officer's request for his opinion on the applicant's performance. He told the first reporting officer that he and

two chairmen of the working parties of which the applicant was secretary were dissatisfied with his performance.

19. On 12 June 2007, the applicant's contract was extended by a month, until 8 July 2007.

20. The same day, an internal vacancy announcement was issued for the post the applicant had occupied since May 2005. The applicant applied for the post.

21. On 22 June 2007, the applicant submitted to the Secretary-General a request for administrative review of the decision not to renew his contract. On the same day, he appealed to the Geneva Joint Appeals Board (JAB) for suspension of action on the contested decision. On 3 July 2007, the Secretary-General, as recommended by JAB, rejected the request for suspension of action.

22. On 27 June 2007, the chairman of another working party of which the applicant was secretary also said that the applicant's performance was unsatisfactory.

23. On 6 July 2007, the applicant was placed on sick leave. His appointment ended on 2 September 2007.

24. On 21 August 2007, the Secretary-General rejected the applicant's request for administrative review. On 19 September and 25 October 2007 respectively, the applicant submitted an incomplete and a full statement of appeal to JAB.

25. On 14 August 2008, JAB submitted its report. It recommended that the Secretary-General award the applicant USD3,000 as compensation for violation of his due process rights in the appraisal of his performance.

26. By letter dated 6 November 2008, the Secretary-General rejected the JAB recommendation to award the applicant USD3,000 as compensation and decided to take no further action on his appeal.

27. On 9 December 2008, the applicant filed before the former UNAT an incomplete application against the Secretary-General's decision of 6 November 2008. His full application reached UNAT on 22 June 2009.

28. The respondent submitted his reply on 22 December 2009 and the application was transferred to UNDT on 1 January 2010.

29. By letter dated 16 June 2010, the Tribunal informed the parties that it considered an oral hearing unnecessary and gave them one week to state their positions on that matter. Neither party submitted an objection.

30. On 22 July 2010, the applicant submitted his observations on the respondent's reply.

Parties' contentions

31. The applicant's contentions are:

- a. The Organization explicitly, in writing and orally, created a legitimate expectancy that his contract would be renewed if his performance improved. The Organization made him a promise to that effect and the relevant jurisprudence is in his favour;
- b. The Administration failed to take a definite decision on the non-renewal of his contract and to give him reasonable notice. He never received a copy of the memorandum of 5 April 2007 recommending the non-renewal of his contract. His right to due process was therefore violated;
- c. By failing to inform him of the recommendation not to renew his contract, the Administration violated his right to be heard. The decision was taken before his e-PAS for the 2006-2007 cycle was completed, whereas the Administration should have given him an opportunity to comment before taking a final decision on the non-renewal of his contract;
- d. The Administration failed to give legal reasons for the refusal to renew his appointment. According to International Labour

Organisation Administrative Tribunal (ILOAT) jurisprudence, however, the Organization must state the reason for non-renewal and the staff member must be advised what it is within a reasonable time, failing which the contract is implicitly renewed;

- e. According to ILOAT jurisprudence, an organization must comply with the rules it establishes and no adverse decision can be taken on the basis of a staff member's poor performance unless the rules regarding performance appraisal have been followed. In deciding not to renew his contract, ECE took into account a performance appraisal report based on improper motives. The Administration breached the provisions of administrative instruction ST/AI/2002/3 and ECE Directive No. 9; he never received a job description for his post and the latest such description dated from 1993, since when the workload had increased significantly to the point of being excessive, as the rebuttal panel recognized in its report. His duties were therefore more akin to those of a P-4 than of a P-3 and his post should have been reclassified;
- f. As the rebuttal panel also noted, the second performance improvement plan was not drawn up in accordance with the administrative instruction on the performance appraisal system. The Administration should have first considered withholding a within-grade increment or transferring him to another post. His performance appraisal was discriminatory and the appraisal process was conducted in a non-transparent manner so as to justify the non-renewal of his contract;
- g. The Administration refused to take seriously his candidacy for an internal vacancy for which he was qualified;
- h. The Administration's actions damaged both his professional and his personal reputation.

32. The respondent's contentions are:

- a. The applicant's contract was governed by the then staff rule 104.12(b)(ii), which provided that "[a] fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment", a condition clearly stipulated in the applicant's letter of appointment. Hence, as UNAT has consistently held, the Secretary-General has wide discretion in the matter and even a staff member whose performance was rated as outstanding would have no legitimate expectancy of renewal on that ground;
- b. The Administration warned the applicant soon after he joined ECE, including in January 2006 at the mid-point review of the 2005-2006 e-PAS cycle and in July 2006 at the end-of-cycle appraisal, that his work was below standard and must be improved. It made it clear to him that his contract would not be renewed unless his performance improved. Consequently, the applicant cannot claim that he had a legitimate expectancy of renewal ;
- c. Pursuant to UNAT jurisprudence, it is for the applicant who claims that a decision is discriminatory or based on improper motives to prove his allegations. The applicant fails to do so;
- d. Contrary to what the applicant contends, the Administration did give him the reason for the non-renewal of his contract, namely his unsatisfactory performance, and he was informed on several occasions that if his work did not improve his contract would not be renewed;
- e. Since there were still performance issues at the end of the applicant's second year with ECE, his supervisors recommended that, in the interests of the Organization, his contract should not be renewed. Even if the Organization had waited until the end of the appraisal process for the 2006-2007 cycle to take the contested decision, that would not have altered the applicant's record of unsatisfactory performance during the previous cycle. After

observing his performance for two years, his supervisors felt that he did not have the competencies needed for the post;

- f. The Administration subsequently extended the applicant's contract until September 2007 to enable him to take his paternity leave and use his sick-leave entitlement, so giving him the time to prepare his rebuttal of his e-PAS and await its outcome. His due process rights had therefore been respected;
- g. The Administration was under no obligation to place the applicant on another post after the non-renewal of his contract;
- h. The Administration complied with the rebuttal panel's recommendation to upgrade the applicant's rating from "Does not meet performance expectations" to "Partially meets performance expectations";
- i. The contested decision was a legitimate exercise of the Secretary-General's discretionary power regarding non-renewal and the applicant's due process rights were respected;
- j. The applicant's pleas for compensation were excessive and without merit and should therefore be rejected.

Judgment

33. The applicant contests the decision not to renew his fixed-term contract. Staff rule 104.12(b)(ii) in force at the time of the decision stipulated that "[a] fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment" and staff rule 109.7(a) 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".

34. It follows from the above provisions that decisions on the renewal of fixed-term appointments are within the Secretary-General's discretionary power, as has been asserted by the former UNAT, which, however, has

stipulated that they must not be improperly motivated and must not violate due process (see, for example, UNAT judgement No. 981, *Masri* (2000)). The former UNAT has also stated that when the Administration gives a justification for the exercise of its discretionary power, especially as regards non-renewal of a contract, the reason must be supported by the facts (see, for example, UNAT judgement No. 1177, *van Eeden* (2004)).

35. In the case in question, the Administration made the reason for the non-renewal of the applicant's contract, namely his poor performance, very clear. While the Tribunal's control over supervisors' assessment of staff members' performance is limited to cases of manifest error, it is for the Tribunal to check, on the one hand, that supervisors have complied with the procedural rules for performance appraisal and, on the other, that the rating given warranted the Administration's not renewing a contract on the ground of performance.

36. Administrative instruction ST/AI/2002/3 on the performance appraisal system reasserts the Administration's discretionary power regarding the non-renewal of fixed-term contracts. Its section 10.2 provides that the three highest ratings ("Fully successful performance", "Frequently exceeds performance expectations" and "Consistently exceeds performance expectations") "establish full satisfaction with the work performed and shall be so viewed when staff members having received those ratings are considered for renewal of a fixed-term appointment ... without prejudice to the principle that such decisions remain within the discretionary authority of the Secretary-General".

37. Administrative instruction ST/AI/2002/3 further provides as follows:

8.3 As soon as a performance shortcoming is identified, the first reporting officer should discuss the situation with the staff member and take steps to rectify the situation, such as the development of a performance improvement plan, in consultation with the staff member.

...

10.4 ... A rating of "partially meets performance expectations" may justify the withholding of a within-grade increment, particularly if the same rating is given

for a second consecutive year, as further clarified in section 16.5.

10.5 A rating of “does not meet performance expectations” may lead to a number of administrative actions, such as transfer to a different post or function, the withholding of a within-grade increment ..., the non-renewal of a fixed-term contract ...

...

16.4 One annual rating of “partially meets performance expectations” may justify the withholding of a salary increment, provided it is documented that, during the corresponding performance year, a performance improvement plan was put into place, in accordance with section 8.3, but that the staff member’s performance failed to rise to a level that would justify a rating of “fully successful performance”.

16.5 Two consecutive annual ratings of “partially meets performance expectations” shall normally lead to the withholding of a salary increment.

38. It follows from these provisions that when a staff member with a fixed-term contract is given the lowest rating, “Does not meet performance expectations”, the Administration is entitled not to renew the staff member’s contract on the ground of underperformance alone. When a staff member obtains the rating “Partially meets performance expectations”, meaning that shortcomings have been found in his/her work, the Administration cannot decide not to renew the staff member’s contract on the ground of underperformance without having first taken steps, in consultation with the staff member, to enable improvement of the staff member’s performance.

39. The documents on file show that, from the beginning of his service with ECE, the applicant’s supervisors drew his attention to shortcomings in his work and warned him that if his performance did not improve his contract would not be renewed. Firstly, in January 2006, a mere eight months after he joined ECE, a performance improvement plan was instituted at the mid-point review for his 2005-2006 cycle e-PAS. At the end of the appraisal period for the 2005-2006 cycle, he was given, and did not contest, the rating “Partially meets performance expectations”. In October 2006, at the mid-point review for the following, 2006-2007 appraisal cycle, a new performance improvement plan was instituted to help

him improve his work. Notwithstanding, the rating given him at the end of the cycle was “Does not meet performance expectations”. This he rebutted, and the rebuttal panel upgraded his final rating to “Partially meets performance expectations”.

40. He therefore received the rating “Partially meets performance expectations” for two consecutive years despite the fact that his supervisors tried, by means of performance improvement plans and regular supervision, to help him improve his work.

41. When the recommendation not to renew the applicant’s contract was made, on 5 April 2007, his supervisors took into account his work over a period of 23 months and, although the applicant had not signed his e-PAS at that point, the 2006-2007 appraisal cycle was already over. The applicant’s contract was subsequently extended for administrative reasons, so enabling him to initiate rebuttal proceedings against his performance rating for the 2006-2007 cycle and the rebuttal panel to complete its report.

42. While it follows from the provisions of administrative instruction ST/AI/2002/3 that the Administration cannot refuse to renew a staff member’s appointment when he/she first receives the rating “Partially meets performance expectations”, the Tribunal considers that the Administration is entitled to refuse renewal when, after it has taken steps to try to improve his/her work, the staff member receives that rating for the second consecutive year.

43. Hence, the applicant fails to prove, on the one hand, that the motive for the contested decision was not that asserted by the Administration and, on the other, that his supervisors did not follow the proper procedure in appraising his performance. Furthermore, as stated above, his rating entitled the Administration not to renew his contract.

44. While the applicant claims that he had a legitimate expectancy that his contract would be renewed, the evidence shows that he was told why that would not be done, namely because of his unsatisfactory performance, on several occasions before the decision took effect.

45. Regarding the applicant's claims that his supervisors wrongly assessed his workload, the Tribunal observes that the rebuttal panel, an independent body, looked thoroughly into his allegations and none the less simply recommended that his rating be upgraded to "Partially meets performance expectations". The applicant therefore fails to prove to the Tribunal that the appraisal of his work over a period of approximately two years was tainted by a manifest error of judgment.

46. It follows from the foregoing that the applicant has not proved the decision not to renew his contract to have been unlawful and that the whole of the application must therefore be rejected.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 20th day of August 2010

Entered in the Register on this 20th day of August 2010

(signed)

A. Coutin
p.p. Víctor Rodríguez, Registrar, UNDT, Geneva