



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/09/
UNAT/1582
Judgment No.: UNDT/2010/197
Date: 19 November 2010
Original: English

Before: Judge Shaw
Registry: Nairobi
Registrar: Jean-Pelé Fomété

BOWEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Josianne Muc, UNDP

Introduction

1. The Applicant has challenged the Secretary-General's decision to terminate his employment on an appointment of limited duration with the United Nations Development Programme (UNDP) in March 2004. The termination was effected three months before the expiry of his contract on grounds of poor performance.

2. This case was transferred from the United Nations Administrative Tribunal (former UN Administrative Tribunal) to the United Nations Dispute Tribunal (UNDT) in Nairobi on 1 January 2010 pursuant to the provisions of ST/SGB/2009/11 on *Transitional Measures Related to the Introduction of the New System of Administration of Justice*.

3. The Applicant raised a number of issues about this termination. The essence of his case is that as his performance was not managed by the Respondent according to the established processes, the termination of his contract on grounds of poor performance cannot be deemed to have been lawful. In his appeal he alleged lack of proper management structure and performance evaluation, lack of due process and fraud and falsification of documents. He contends that he had a legitimate expectation that his contract would last for longer than the express contractual term of 1 year.

4. The Applicant also claims that the Joint Appeals Board (JAB) failed to conduct a fair and thorough appraisal of the facts and arguments produced to it. This is not a matter within the jurisdiction of the Tribunal. Pursuant to Article 2.1(a) of the UNDT Statute, the role of the Tribunal is to hear an appeal from an administrative decision that is alleged to be in non-compliance with the terms of employment or the contract of employment. This does not include the decisions of the JAB. This part of the Applicant's claim cannot be considered by the Tribunal as it has no power to review either the conduct or the recommendations of the JAB.

5. The Applicant seeks remedies for (i) loss of income for the remainder of the term of this contract and for the 2 years following for which he alleges he had an expectation of employment, (ii) violation of his rights to due process, (iii) delays in the hearing process and (iv) compensation of USD20,000 for moral injury suffered by him and his family as a result of the termination of his employment.

6. Issues

7. The issues for decision are:

- a. Did the Respondent's management structure enable it to meet its responsibilities concerning performance evaluation of staff members employed at Data Exchange Platform for the Horn of Africa (DEPHA)?
- b. Was the Applicant's performance managed in accordance with the Rules and Policies applicable to UNDP?
- c. Was the termination of the Applicant's contract of employment based on proper evaluations of his performance and in accordance with due process?
- d. Did the Applicant have a legitimate expectation of employment beyond the one year contract?
- e. Did the termination of his contract cause harm to the Applicant?
- f. What remedies, if any, is the Applicant entitled to?

Facts

8. Mr. Bowen joined UNDP on 28 June 2003 on a one year, 300 Series Appointment of Limited Duration. He was engaged as Programme Manager of the DEPHA at P4/1

level. DEPHA was an inter-agency project tasked to acquire, develop and disseminate information exchange resources for humanitarian and development planning in the Horn of Africa. The Project Manager was based at the United Nations Office at Nairobi (UNON), within the Division of Early Warning and Assessment (DEWA) of the United Nations Environment Programme (UNEP).

9. His letter of appointment stated that the appointment was non-career based in nature and did not carry any expectancy of renewal or conversion to any other type of appointment with UNDP.

10. An integral part of his terms of appointment were the DEPHA project's terms of reference. As well as describing the inter-agency nature of the project, these also provided a detailed description of the Applicant's responsibilities as Project Manager. These included:

- a. to expand DEPHA's client base and geographical coverage.
- b. to develop strong partnerships with governments and inter-governmental organizations in the region.
- c. to provide technical and institutional leadership to the DEPHA project.
- d. to meet reporting requirements and
- e. to administer and manage the DEPHA project on a day-to-day basis.

11. Mr. Bowen was required to report to a small management team representing stake holders and to the DEPHA Project Steering Committee (PSC) which represented donors, NGOs and the UN community. Mr. Philip Dobie chaired the PSC.

12. The Drylands Development Centre (DDC) provided administrative support for the DEPHA project. Mr. Dobie was the Director of DDC at the time. He told the Tribunal that DEPHA was an unusual project in that it provided services for several

different agencies both inside and outside the United Nations. He described himself as the “senior officer responsible for the Project but not the technical supervisor.”

13. Ms. Fikerte Assefa, a P3, was the Special Assistant to the Director of the DDC and the Management Specialist on the DEPHA Project. In the latter capacity, Ms. Assefa oversaw the administrative management of the Project and therefore worked most closely with Mr. Bowen.

14. The day-to-day supervision of the DEPHA Project Manager was left to the UNEP/DEWA. Mr. Dobie frankly accepted that because of this unusual structure, certain responsibilities towards the Project and the Programme Manager fell between the cracks.

15. The Respondent’s witnesses told the Tribunal that there were growing concerns about Mr. Bowen’s lack of performance. Ms. Assefa said that Mr. Bowen also had many concerns about the composition and membership of the PSC, the administration of the project and the procedure for managing the project. The Project Document itself appeared to exist only in draft form and the methodology for the project needed clarification. Mr. Bowen maintained that he was recruited to manage a project, not design one, and the drafting of a Project Document was therefore not within his competence. Subsequently, a consultant was engaged to do this.

16. Ms. Assefa said that all her discussions with Mr. Bowen were friendly and professional but she could not comment on the quality of his work because he did not produce much.

17. She complained to Mr. Dobie about the amount of her time that was being consumed by what she considered to be very long fruitless discussions with Mr. Bowen. Mr. Dobie met with Mr. Bowen but described the meeting as unsatisfactory. Mr. Bowen had challenged the authority of the PSC and elements of the administration and in Mr. Dobie’s words “it was hard to get down to brass tacks.”

18. As evidence of Mr Bowen's inadequate performance, the Tribunal was provided with a note-to-file dated 5 November 2003 by a P2 Programme Officer in the Sustainability Unit of UNDP, Ms. Sorenson, who was a member of the PSC of DEPHA. She listed a number of concerns about Mr. Bowen's performance. Among these were the Applicant's inability and incompetence to produce the DEPHA project document and the lapse of several deadlines for it, following which it became necessary to engage the services of an external consultant. She also noted:

- Mr. Bowen's unwillingness to support her. He preferred to report only to the UNDP resident representative.
- He had verbally abused her.
- Other colleagues had experienced very similar problems.

19. Mr. Bowen was not advised of this adverse material or given an opportunity to respond to the allegations in it. He only became aware of the existence of the document when produced to the Tribunal as part of the Respondent's case.

20. Mr. Bowen provided the Tribunal with a thread of emails to and from himself, covering the period of Ms. Sorenson's note. These include positive comments from Mr. Dobie and others about his work and results. For example, in an email dated 25 November 2003, Mr. Dobie thanked Mr. Bowen for his first DEPHA report. He described it as very good with an excellent pictorial /graphical approach. Mr. Dobie explained to the Tribunal that in this e-mail he was trying to be encouraging and positive to Mr. Bowen.

21. During the same time Mr. Bowen had some concerns about the administration and resourcing of DEPHA. In December 2003 he wrote to Mr. Dobie requesting support. In particular he said he needed to give Mr. Dobie a full briefing and to hear Mr. Dobie's ideas on roles and action in order to prepare for the reactivation of the DEPHA Project Steering Committee. He also had concerns about day-to-day administration of the project and some ideas about DEPHA funding. Ms. Assefa said she was happy that a meeting was being arranged because she saw it as an

opportunity to get the matters that Mr. Bowen had been troubling her about sorted out.

22. On the evening of Friday, 6 February 2004, Mr. Bowen received an email from Ms. Assefa inviting him to make a presentation at a meeting of the DEPHA Steering Committee at 11am on Monday, 9 February 2004. The presentation was to cover the progress of the Project, future plans as well as challenges he may have encountered in his efforts to implement the Project. Apologising for the short notice, the email read “I am sure you’re on top of it, as you have been preparing presentation[s] for all UN visitors.”

23. On the morning of 9 February 2004, less than an hour before the meeting was scheduled to take place, Ms. Assefa wrote to Mr. Bowen referring to a preceding telephone conversation to confirm that the scheduled meeting had been postponed. Responding to this email, Mr. Bowen asked for information on the processes employed to “re-enact the PSC” and for a list of PSC members.

24. The PSC meeting was held on 18 February 2004. Mr. Bowen made the same presentation to the steering committee that he had been giving to UN visitors to the project, unaware that his performance and that of the whole project was being evaluated.

25. Minutes of the meeting recorded the lack of progress of the DEPHA project; Mr. Bowen’s failure to perform and produce results in accordance with the terms of reference; the frustration with Mr. Bowen’s management style; the decision of one agency not to give remunerative work to the project; and Mr. Bowen’s inability to prepare a report in over four months or to convene the mandatory meetings.

26. The meeting also noted a number of specific findings about Mr. Bowen and concluded that his continued engagement would be detrimental to the DEPHA project. It recommended that his contract be reviewed with a view to foreshortening it in accordance with applicable staff references.

27. Directly after the meeting Mr. Bowen sent an email to the same people questioning how the committee operated. He also expressed his dissatisfaction with how the meeting had been planned and attended. He asked for information on how DEPHA staff salaries were calculated so that he could do an audit of the existing salaries and scales because he had concerns that DEPHA staff were not receiving a fair wage. He also repeated a request he had made a week or so before for a signed copy of the DEPHA Project document and to meet Mr. Dobie to discuss these and other unresolved issues. The record is silent as to whether this email was responded to, or if the issues raised in it were dealt with.

28. Mr. Dobie wrote a letter to Mr. Bowen on 12 March 2004 in which he enclosed the minutes of the 18 February meeting, and drew the Applicant's attention to the "findings of the Steering Committee and their recommendations." The letter also conveyed Mr. Dobie's deep concerns with the lack of progress in the Project's activities, particularly Mr. Bowen's

[I]nability to work with our partners contrary to the main objectives of the programme....and [his] inappropriate management style which leads to high staff turn-over...

29. UNDP Kenya was copied on the correspondence of 12 March 2004 for 'appropriate action.' The Applicant was also invited to comment on the findings of the Committee and respond with any additional information he would like to be considered.

30. Mr. Bowen told the Tribunal that he never received the letter. Ms. Assefa said she assumed he had received it because it was sent by messenger and was not returned. Mr. Dobie knew nothing of how the document had been transmitted.

31. I am persuaded that despite the best efforts of Ms. Assefa, Mr. Bowen did not receive the letter. One of the reasons for this conclusion is that there is no record of a response from him. Given his assiduous correspondence and responses to all earlier e-mails his silence in the face of this letter is uncharacteristic. On the contrary he

continued to correspond by email to Mr. Dobie and Ms. Assefa without any reference to the impending termination of his employment.

32. On 17 March 2004, the Applicant wrote to the UNDP Resident Representative expressing his concerns with regard to the DEPHA Project, and attached a document entitled “Future Plans for the Funding and Fund Management of the DEPHA”.

33. This document was forwarded to Mr. Adama Zampalegre on 22 March 2004. Mr. Zampalegre responded on the same day asking if he had any progress reports with concrete outcome and indicators that could be shared with the stake holders as they wanted to show something tangible to the stakeholders before requesting additional funding. Mr. Bowen replied, also on the same day, attaching the report of 18 November 2003 which he had previously sent to Mr. Dobie, with a brief description of some of the progress made and drawing attention to his continuing concerns as highlighted to the Resident Representative. This correspondence is unlikely to have occurred had he known his employment was in jeopardy.

34. On 23 March 2004 Mr. Bowen was informed in writing of the decision of UNDP to terminate his employment effective 1 April 2004, with a payment of one month’s salary as compensation *in lieu* of notice. The letter said (in part):

Your ALD Contract expires on 27 June 2004... this is to inform you that owing to the appraisal of the DEPHA Project’s Steering Committee and their decision thereof to terminate your services with immediate effect we therefore hereby issue a notice to terminate your contract effective 01/04/2004.

35. Mr. Dobie accepted there had been no formal evaluation of the Applicant’s performance. He told the Tribunal that he was familiar with the UNDP Results and Competency Assessment procedure but he did not think it applied to staff members on ALD contracts. It was his sincere belief that in all the circumstances, including the need to take urgent action to get results from the DEPHA project, he took appropriate steps to foreshorten Mr. Bowen’s contract. On 30 March 2004, Mr.

Bowen sought a stay of the decision to terminate his contract. In response on 8 April 2004, the Resident Representative of UNDP sent him a letter refusing his request. He referred to Mr. Bowen's "apparent lack of resolve over 9 months; frustration with the lack of results achieved by the project so far; his failure to convince the Committee of his side of the story; failure to respond to the minutes of the 18 February 2004 meeting; and his inability to secure a single agreement after nine months.

36. Following administrative review of his case, Mr. Bowen took his appeal to the Nairobi JAB. The process at the JAB took from August 2004 to October 2006 before a recommendation was made to the Secretary-General to deny the appeal. Its decision was that there had been no evidence of extraneous factors in the decision to terminate but the JAB would have expected to see more documentation over the course of his service reflecting the organisation's dissatisfaction with his service. The Secretary-General accepted the JAB recommendations.

37. In relation to the effects of the termination Mr. Bowen says that his father died three weeks after his termination, and his wife passed away the day before he was informed of the JAB recommendations. He gave detailed evidence of the suffering he and his family endured waiting for the JAB report. He was without work for 2 years and his wife had suffered anxiety and high blood pressure from worrying about their financial security. He said his children's education suffered as a result of the termination because of financial uncertainty. He regrets that he was not given a proper evaluation that would have enabled him to improve his performance had it shown that it was necessary.

The Law

Staff Rules

38. The former 300 Series of the Staff Rules apply in this case.

39. Staff rule 304.4 provided that:

All appointments under these Rules are temporary appointments for a fixed term, the period of which is specified in the letter of appointment. Appointments granted under these Rules may be terminated prior to their expiration dates in accordance with the provisions of rule 309.1. Appointments under these Rules carry no expectancy of renewal or of conversion to any other type of appointment.

40. Section 309.2(b) referred to termination of appointments. It provided:

The appointment of a staff member appointed under these Rules may be terminated at any time if, in the Secretary-General's opinion, such action would be in the interests of the United Nations.

41. Rule 301.4 concerned performance of staff. It required that staff members be:

[E]valuated for their efficiency, competence, and integrity through performance appraisal mechanisms that shall assess the staff member's compliance with the standards set out in the Staff Regulations and Rules for the purpose of accountability.

42. UNDP's performance management system at the relevant time was contained in the *UNDP Results and Competency Assessment 2003-2004 Guidelines (RCA)*.

43. The RCA covered staff members up to and including D2 level who held contracts continuously for more than six months. The performance cycle for the purpose of the RCA was from 1 February to 31 January of the following year. It had an annual cycle of 4 steps: a) the development of annual work plans, b) individual performance planning, c) mid-year review (August September) and d) year-end review in February, March of the following year.

44. The progress of staff was measured by the staff member's supervisor in a results score card and learning plan. These were discussed at the mid-year review and at the annual performance assessment and included self-assessment by staff members. Clause 17 provided that during the year, supervisors were expected to be fully

engaged in people management, employing a suitable array of informal and formal approaches to assure a staff member's performance and learning plans were on track

45. Overall assessments were done by a Career Review Group (CRG) which had responsibility to make a final recommendation and assign a rating to the overall performance of the staff member. The review had to take into account consideration of circumstances beyond the staff member's control and the staff member's feedback.

46. The staff member had the right to rebut the rating or comments of the supervisor or CRG.

The Applicant's Contract

47. A contract of limited duration is essentially a fixed term contract. According to its terms, such a contract may be terminated before its expiry either with notice or payment *in lieu* of notice.

48. In the present case, the offer of appointment signed and accepted by the Applicant, and therefore forming part of his contract stated that it was for:

[A] period of **one year** from the effective date of appointment above. It therefore expires on 27 June 2004. The appointment expires automatically on this date and without prior notice, unless an extension is mutually agreeable to you and to UNDP.

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 the Administrator of the UNDP will give 30 days' written notice or will provide compensation in lieu of notice period.

49. Under the heading 'Special Conditions' the contract stated:

This appointment is **non-career** in nature and does not carry any expectancy of renewal or of conversion into any other type of appointment. (Emphases as in the document)

Expectancy of renewal

50. It is an important part of the Applicant's case that he had an expectancy that his one year contract would in fact last for up to three years

51. Notwithstanding the rules and contractual provisions which fix a term of employment, the concept of legitimate expectation may be invoked to justify an extension to that fixed term although in limited circumstances. Whether a staff member has a legitimate expectation will depend on whether it can be established that anything was said or done by the administration which amounted to a firm commitment to renew the contract so that in spite of the wording of his contract a staff member could reasonably have expected an extension. A verbal statement by a supervisor indicating that an appointment will be extended beyond the expressly stated expiry date is, for example, an act which would give a staff member a legitimate expectation that his or her contract will be renewed.

Reasons for early termination

52. Where the Administration terminates a fixed term contract before the stated expiry date and gives reasons for the termination, such reasons must be supported by the facts.¹ If the allegation is of unsatisfactory performance then it is incumbent on the Respondent to support this allegation with cogent evidence. This much is well established.

53. An associated question which arises in this case is whether the reasons for termination proffered by the Respondent, at the time and subsequently, are capable of being considered factually correct if the process by which those reasons were arrived at was unlawful in the sense that they did not follow the established regulations, rules and administrative requirements of the Organization. Is a breach of these a mere technicality or does it invalidate the factual basis of the reasons given?

¹Former UN Administrative Tribunal Judgment No. 1170 *Lejeune* (2004); *Larkin* UNDT/2010/108

54. The answer to this question lies in the rationale for those regulations, rules and administrative instructions.

55. In the first place, performance appraisals for staff members are mandatory. Staff rule 301.4(a) states:

(a) The performance of staff members shall be evaluated to assess their efficiency, competence and integrity and to ensure their compliance with the standards set out in the Staff Regulations and Rules for purposes of accountability.

(b) Performance reports shall be prepared regularly in accordance with procedures established by the Secretary-General.

56. Next, the purpose of the appraisals is expressly stated to be that of accountability and, finally, the performance reports are to be prepared in accordance with procedures promulgated by the Secretary-General.

57. From the language in rule 301.3 it is apparent that the performance appraisals are an important and compulsory aspect of staff management in the United Nations.

58. The UNDP RAC set out a comprehensive process for the evaluation of performance. It was characterised by the right of staff member to be advised formally of negative findings and to be given the opportunity not only to respond but to formally rebut those opinions. It provided a procedure by which any misunderstandings, misconceptions and errors of fact concerning the alleged failures of performance of a staff member could be rectified where appropriate.

59. It is a truism that the apparently obvious may become less so when it is subjected to due process. In the case of performance management and evaluation, when the person who is allegedly failing has an opportunity to explain and rebut, the original impressions may alter when considered by open minded supervisors.

60. Fair and lawful adherence to the prescribed procedure for performance appraisal is an essential element of performance evaluation. It is particularly important if the

Administration wishes to rely on its assessment as a basis for the termination or non-renewal of a contract.

Discussion

Did the Respondent's management structure enable it to meet its responsibilities concerning performance evaluation of staff members employed at DEPHA?

61. The Respondent submitted that the management structure required Mr. Bowen to report to the management team, and that he was also supervised on a day-to-day basis by UNEP/DEWA. The Respondent contends that the DEPHA's lack of progress was solely and exclusively attributable to the Applicant's acts and/or omissions.

62. I find that in spite of the theoretical management structure in practice, Mr. Bowen was left to get on with managing the Project with the administrative support of Ms. Assefa. Although UNEP was cited as the supervisor there was no evidence that it assumed this role which is hardly surprising given that Mr. Bowen was actually employed by UNDP.

63. The responsibilities of the management team were largely undefined except for Mr. Dobie whose role did not include being involved in the day-to-day management of the Project. He was the only one who took any responsibility but only intervened when problems arose.

64. The programme had serious structural defects which meant that any failings by its manager were not promptly or appropriately addressed.

Conclusion

65. The management structure for DEPHA was not sufficiently defined to enable it to fulfil its legal obligations in relation to the evaluation of a staff member's performance as envisaged by the RCA.

66. In reaching this conclusion the Tribunal is mindful of the special and unusual nature of the DEPHA project. It was a project that deserved to succeed and the disappointment felt by Mr. Dobie at the way matters transpired is appreciated. However, that is insufficient justification for allowing its management to be undertaken without a well-defined and clear structure which assured accountability of its most important staff member, the Project Manager.

How was the Applicant's performance managed? Was this in accordance with the Rules and Policies applicable to UNDP?

67. Mr. Dobie frankly admitted to the Tribunal that at the time he did not think that the RCA applied. Ms. Assefa correctly acknowledged that it was not appropriate for her to undertake the supervisor's role.

68. The Respondent now accepts that the RCA did apply to Mr. Bowen but submitted that it was constrained by the fact that it ran from February to January whereas Mr. Bowen's contract began mid-year. This meant that in the absence of any guidelines on how to adjust the times for evaluation it was not possible to complete an evaluation as required by the RCA.

69. The Respondent also submitted that it had met the RCA guidelines by providing Mr. Bowen with ample feedback on his performance before the 18 February 2004 meeting and by giving him ample opportunity to improve on his performance. This was said to be by making him aware of the issues and his shortcomings by noting them and discussing them with him. It was also submitted that the Applicant's 'supervisors' were both the Management Committee and the PSC.

70. The Respondent's position is contradictory. As the RCA did apply, the processes adopted by the Respondent did not comply at all with its requirements.

71. Although there were timing issues in the application of the RCA, this should not have prevented the appropriate person from raising performance issues with Mr.

Bowen in a formal manner long before they reached the crisis point that prompted the calling of the 18 February 2004 meeting. Clause 17 required full engagement by supervisors on performance issues. It was for the Director to ensure that when performance issues were raised with him a proper process of enquiry, evaluation and mentoring was put in place. If the employee remained unresponsive after that, appropriate action to terminate his contract could have been instigated. That did not occur in this case.

Conclusion

72. I find that the Respondent did not properly manage the Applicant's performance. The Respondent breached its obligations under staff rule 301 by failing to conduct proper performance evaluations as stipulated in the RCA

Was the early termination of the Applicant's contract of employment lawfully based on proper evaluations of his performance and in accordance with due process?

73. It follows from the findings on the previous issues that the Respondent did not undertake proper performance evaluations of Mr. Bowen. He was not accorded due process by the Steering Committee when it assessed the way in which he carried out his contractual responsibilities.

74. Other than one general and unsatisfactory discussion with Mr. Dobie, Mr. Bowen was not required to give feedback on specific issues that were concerning his colleagues. Judgments were made about his performance without him being given notice of the concerns, and without an opportunity to answer them. I am satisfied that he did not receive a copy of the critical note written by Ms. Sorenson until well after the termination of his contract.

75. The Respondent submitted that there was wide spread dissatisfaction with his performance which he was sufficiently and appropriately apprised of. The evidence

does not support this submission. The Respondent relied on a document authored by a staff member junior to the Applicant and which the Applicant had no notice of until his termination became the subject of a dispute within the internal justice system. This is a breach of due process.

76. One example of the consequence of the failure of due process is the allegation that his management style led to high staff turnover. Although those allegations had been noted by other staff members, the first time Mr. Bowen had an opportunity to explain the circumstances under which two of his staff members left was during the hearing by the Tribunal. From his evidence it is possible that what appeared to the Respondent to be high staff turnover caused by his behaviour had a more innocent explanation. Mr. Bowen explained to the Tribunal that two staff members left to pursue studies and both expressed a desire to return. Too much time has passed to verify this one way or the other. But as this was one of the reasons given for the early termination of his contract he should have had a fair opportunity to explain his side before a conclusion was reached. Mr. Bowen also pointed out that the basis of the evaluation as revealed to him subsequently was very limited as it relied on only a few of the performance indicators in his terms of reference.

Conclusion

77. The early termination of his contract was not based on a proper or lawful evaluation of the Applicant's performance. The reasons given for the termination are no longer capable of objective verification. In the absence of a comprehensive and fair performance evaluation done at the time, the reasons given by the Respondent cannot be regarded as cogent or reliable because the Applicant did not have an opportunity to refute, answer or rebut them. They therefore represent just one side of the story and, however strongly felt by the Respondent, are not a reliable basis for a lawful termination of the contract before its expiry date.

78. This is not a question of improper motivation. There is no evidence that the Respondent was motivated by anything other than a desire to have the project functioning efficiently. The Respondent's failure was in not treating the Applicant in a fair and lawful manner in accordance with the Staff Rules and UNDP procedure.

Did the Applicant have a legitimate expectation of employment beyond the expiry of the one year contract?

79. In his written appeal Mr. Bowen alleged that he had a legitimate expectation that his contract would in fact last at least three years and seeks compensation for two extra year's income. Although he did not pursue this at the hearing it is canvassed for completeness.

80. His submission is that his contract gave him a legal expectation of a renewal of his contract for a further 2 years. He bases this on the wording of the terms of reference of the DEPHA project that stated that the appointment may be renewed subject to the availability of funds and performance appraisal. He submitted that because there had been no performance appraisal (one of the preconditions for the renewal) and there were funds available there was no reason not to expect renewal.

81. This submission falls well short of the test for expectancy of renewal of a contract. I accept the Respondent's submission on this point. The terms of reference of the project stated that it "may" be renewed subject to the availability of funds and performance appraisal. Although there was no performance appraisal this failure does not give rise to a firm commitment of renewal.

82. The terms of his contract were explicit and clear and there is no evidence that Mr. Bowen was given any assurances or promises that there was even a possibility of an extension of his contract as opposed to the continuation of the project.

Conclusion

83. The Applicant had no legitimate expectation of his contract lasting more than the one year to which he agreed when he signed his offer of appointment.

What harm, if any, was caused to the Applicant as a result of the termination of his contract?

84. The main breach of the Staff Rules by the Respondent was the failure to give Mr. Bowen a performance evaluation as required by rule 301.

85. The consequences of this were the unexpected early termination of his contract and a denial of his right of rebuttal before the negative assessment of the Steering Committee resulted in the early termination of his contract. Financially, he lost the remuneration that he could have expected to receive had the contract run its full course.

86. Mr. Bowen also claims compensation for the effect on him and his family for the consequences of the loss of his position. It is most unfortunate that in the course of his employment and termination of his contract both his wife and father passed away. No doubt the stress caused by the termination of his employment was exacerbated by these tragic events. But they cannot be taken into account in the calculation of compensation as they were neither caused by the unlawful acts of the Respondent nor were they a foreseeable outcome of the termination.

87. That being said, it is quite clear that both the fact of and manner of the termination caused Mr. Bowen enormous stress and anxiety. He had little if any warning that he was in jeopardy of losing his position before the expected expiry date and suffered the frustration of his employer relying on allegations of poor performance that he had not had an opportunity to answer. His failure, in spite of his efforts, to obtain work over the following two years was also in part a consequence of his abrupt departure from the UN project.

Conclusion

88. The Applicant did suffer harm as a consequence of the termination of his contract.

What remedies, if any, is the Applicant entitled to?

89. Article 10(5) provides for rescission of the contested decision or specific performance and an amount of compensation the Respondent may elect to pay as an alternative.

90. The decision to terminate the contract before 24 June 2004 was unlawful and is rescinded.

91. Because of the inordinate amount of time that has passed since the contract was breached, there is no possibility of the Applicant being reinstated. The order rescinding the early termination of the contract therefore amounts to a formality. In its place, Mr. Bowen should receive the amount of money and benefits he would have received had the contract run its full course less the payment of notice in lieu he received.

92. In addition to his actual monetary losses, Mr. Bowen is entitled to an award of compensation for the negative effects on him of the early termination and the failures of procedure.

93. I have considered whether the compensation should be reduced by what the Respondent no doubt would view as contributory conduct on his part. This is rejected. The lack of adherence to the performance evaluation process means that many of the adverse findings made against Mr. Bowen are, at best, suspect. From this distance and without a full enquiry it is impossible to arrive at a fair assessment of how he performed in his work in 2003. Other relevant factors are that he was without work for two years following the termination and that the process for hearing his appeal was inordinately delayed. That delay can be dealt with by the imposition of interest on the awards of compensation.

Conclusion

94. The Tribunal ORDERS:

- i. The Respondent's decision to terminate the Applicant's contract on 23 March 2004 is rescinded.
- ii. Payment to the Applicant of the salary and other entitlements he would have received until the end of his contract on 24 June 2004 less the payments in lieu of notice.
- iii. Payment of two years' net-base salary at the rate which applied at the time of the termination of his contract.
- iv. Interest on the sums in orders ii and iii at the applicable US Prime Rate, accruing from 24 March 2004 to the date of this Judgment.
- v. The payments shall be made within 60 days of this Judgment becoming executable. The applicable US Prime Rate shall apply from the date each monthly payment was due and until date of payment. If the Respondent fails to pay these sums within 60 days from the date the Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate from that date until payment.



Judge Shaw

Dated this 19th day of November 2010

Entered in the Register on this 19th day of November 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi