



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Santiago Villalpando

ZUÑIGA ROJAS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Carmen Artigas

Michael Hantke Domas

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant contests the decision not to extend his fixed-term appointment with the Economic Commission for Latin America and the Caribbean (“ECLAC”) beyond its expiration date of 4 June 2009. The Respondent contends that the Applicant’s appointment was not renewed because of financial and staffing considerations, namely the ending of temporary funding for the Applicant’s position. The Applicant contends that this reason was not legitimate and that the decision was tainted by discrimination and based on other factors that were not disclosed to him. He claims that the Respondent created an expectancy of renewal of his appointment as a result of the promises given by his supervisor (the Chief of the Security and Safety Section (“SSS”), ECLAC). The Applicant further submits that his due process rights were violated during an investigation that was carried out into an incident in March 2009, which involved misplaced isotonic drinks (the “Isotonic Drinks incident”).

2. The Applicant seeks compensation equivalent to six months’ salary for the actual financial damage and emotional distress caused by the non-renewal of his contract. He also requests the Dispute Tribunal to order that his case be reviewed under art. 10.8 of its Statute, which states that the Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

3. The main legal issues in this case are whether the reasons given for the non-renewal of the Applicant’s contract were valid and lawful, whether he had a legitimate expectation of renewal, and whether he was unfairly discriminated against in the non-renewal of his contract.

4. Five case management orders were issued in this case: Orders No. 54 (NY/2010) (29 March 2010), No. 162 (NY/2010) (24 June 2010), No. 169 (NY/2010)

(15 July 2010), No. 170 (NY/2010) (16 July 2010), and No. 174 (NY/2010) (20 July 2010). A case management hearing was held on 24 March 2010. On 22 July 2010 the Dispute Tribunal held a hearing on the merits by video link with Santiago, Chile. The Tribunal heard testimony from the Applicant, the Chief of SSS, and the Chief of the Human Resources Section, ECLAC. The proceedings were conducted through an interpreter. The parties were thereafter ordered to file final submissions.

## **Facts**

5. The following findings of facts are made from the record before the Tribunal and the evidence received at the hearing on the merits.

6. In January 2008 the Department of Safety and Security in New York requested assistance from ECLAC in identifying Security Officers who could be deployed, at short notice, to the International Commission to Combat Impunity in Guatemala (“CICIG”). On 4 February 2008, in response to this request, seven SSS Security Officers were deployed to CICIG.

7. The Applicant joined ECLAC on a GS-3 level appointment of limited duration, initially for one month, from 4 June to 3 July 2008. He was recruited, along with six other Security Officers, to temporarily replace members of the SSS who had been deployed to CICIG. The Applicant’s contract was funded through general temporary assistance funds from CICIG. The Applicant was made aware at the time of his employment that future extensions of his appointment were subject to the availability of funds and the staffing needs of SSS.

8. Throughout the entire period of the Applicant’s employment, his salary was paid using general temporary assistance funds allocated by CICIG. The Applicant’s salary was billed by ECLAC’s Finance Section to CICIG every month through a special account.

9. The Applicant's contract was extended from 4 July 2008 to 4 June 2009 through a series of short-term extensions due to the nature of funding and staffing arrangements. Below are the dates and duration of each of these extensions:

- Extension of 28 days, from 4 July to 31 July 2008;
- Extension of one month, from 1 to 31 August 2008;
- Extension of four months, from 1 September to 31 December 2008;
- Extension of three months, from 1 January to 31 March 2009;
- Extension of two months, from 1 April to 31 May 2009; and
- Extension of four days, from 1 to 4 June 2009.

10. On 1 September 2008 the Applicant's appointment was converted to a fixed-term contract. Thereafter, ECLAC initiated an electronic performance appraisal system ("e-PAS") review in relation to the Applicant. On 13 March 2009 the Applicant's supervisor (the Chief of SSS) signed his mid-point review, stating:

During [the Applicant's] first months at ECLAC, his performance has been less than expected, owing to a lack of motivation and commitment to his post. He has received guidance from his supervisor and the Operations Officer in relation to his behaviour. He should improve his attitude and commitment to work, in accordance with goal 2 of his work plan.

11. The Applicant signed off on the mid-point review on 16 April 2009.

12. On 27 April 2009 ECLAC was notified by CICIG that the Security Officers were no longer required and would return to ECLAC. They returned to their regular functions at ECLAC by 4 May 2009. By that time, all officers who had been recruited on a temporary basis in 2008—with the exception of the Applicant—were already absorbed in SSS because several regular posts had opened up due to resignations of other SSS officers. The evidence demonstrates that the gradual absorption of Security

Officers who were financed through temporary funding was carried out on the basis of their ongoing performance. The Applicant was the only Security Officer who remained in a post financed through temporary funds that were no longer available. In early May 2009 he was informed by his supervisor about the non-renewal of his contract.

13. On 5 May 2009 the Applicant met with the Officer-in-Charge, Human Resources Section, ECLAC, who confirmed to the Applicant that his contract would not be renewed and that the reason for the non-renewal was the return of the Security Officers from CICIG and the cessation of the CICIG funding. The Applicant's contract was extended to 4 June 2009 due to the placement of the Applicant on sick leave.

14. The Applicant's final e-PAS report was signed by the Chief of SSS, as the first reporting officer, on 13 May 2009. The second reporting officer signed the e-PAS report on 15 May 2009. The Applicant was rated as "partially meet[ing] performance expectations" in the final e-PAS report. He was rated as "Fully Competent" with respect to all core values and competencies, with the exception of "Communication" and "Teamwork", for which he was rated as "Developing". The "Overall Comments" section of the e-PAS report contained the following comments by the Applicant's supervisor:

**Comments on the Work Plan Accomplishments—  
Goals/Performance Expectations**

[The Applicant] has partially met the goals of his work plan in this first PAS cycle. After going through the regular induction process, [the Applicant] has been included in shift work. His performance has been irregular, with a number of absences on sick leave and for family emergencies. [The Applicant] has also had problematic relations with some of his more senior colleagues, which has led to complaints from his colleagues, reflecting a shortcoming in relation to the goals in item 2 of his work plan.

...

### **Overall Comments**

[The Applicant], in his first months with the ECLAC Security and Safety Service, has tried to adapt to a new system of work and become part of the team, and needs to make further efforts in these areas. He is technically well-qualified, thanks to his previous experience as a police officer, and he has the potential to become a very good security officer. For this he can count on the support of his supervisor.

15. On 29 May 2009 the Applicant signed off on his e-PAS report and added the following comment:

### **Staff member's comments**

As my appraisal was positive with regard to technical and professional matters, the rating given is not justified as it does not reflect my efforts and dedication to the Organization, especially as my continuing employment with the Organization has been restricted for reasons that are not professional or technical. I do not agree with the appraisal.

16. The Applicant, however, did not formally rebut his e-PAS report under the provisions of ST/AI/2002/3 (Performance Appraisal System).

17. On 25 May 2009 a Human Resources Assistant from the Human Resources Section, ECLAC, sent an email to the Applicant requesting him to finalise the required separation formalities. The Applicant separated from service on 4 June 2009.

18. On 10 July 2009 the Applicant filed a request for management evaluation. In this request he challenged, *inter alia*, the propriety of his e-PAS assessment and of the investigation of the Isotonic Drinks incident that took place in March 2009, and questioned whether the non-renewal of his contract was based on lawful reasons.

19. In a letter dated 24 August 2009, sent in response to the Applicant's request for management evaluation, the Under-Secretary-General for Management informed him that, upon review of the circumstances of his case, the Management Evaluation Unit had concluded that, *inter alia*, the decision not to renew the Applicant's appointment was based on legitimate financial considerations and was not influenced by any improper motives and factors, and that the Applicant had no legitimate expectation of renewal of his appointment.

20. On 19 November 2009 the Applicant filed an application with the Dispute Tribunal.

### **Applicant's submissions**

21. The Applicant's main contentions may be summarised as follows:

a. The decision not to renew the Applicant's contract was not prompted solely by economic considerations, contrary to the Respondent's submission. The decision was also influenced by the Applicant's supervisor's views of his performance. Since the Respondent had failed to inform the Applicant that his employment performance was one of the factors taken into account in the decision not to renew his contract, the Applicant could only guess at the reasons for his separation from ECLAC. Had the Applicant been aware of these performance-related reasons from the start, he would have been in a better position to defend his rights.

b. All other Security Officers hired with the Applicant had their contracts renewed and additional Officers were hired. The Applicant questions the basis and criteria for deciding which of the Security Officers were to be retained.

c. The Applicant's supervisor created an expectation of renewal of his contract by including the following statement in the "Overall Comments" section of his e-PAS report for 2008–2009: "[The Applicant] has the potential to become a very good security officer. For this he can count on the support of his supervisor". This statement was indicative of an intention to renew the Applicant's appointment. It would be contrary to the purpose of the performance appraisal system, as set out in ST/AI/2002/3, to make comments of this nature during the performance appraisal process, and subsequently not to renew his appointment. After the conversation between the Applicant and his supervisor in early May 2009, at which the Applicant was informed of the non-renewal of his contract, the supervisor offered the Applicant an

opportunity to join another duty station. The Applicant declined, but the offer was a factor in his thinking that his performance was satisfactory since it implied a vote of confidence on the part of his supervisor.

d. The decision not to renew the Applicant's appointment might have been influenced by the Isotonic Drinks incident of 8 March 2009. The Applicant had brought some isotonic drinks (belonging to one of his colleagues) home from work as he was afraid that they might go missing otherwise. He returned them the following day. However, one bottle was missing and it turned out that it was misplaced by a young member of his household. It was later found and returned. According to the Applicant, he was subjected to "an investigation or fact-finding process" in relation to this incident even though his supervisors were made aware that the incident resulted from a confusion which had been clarified. The Applicant found the investigation humiliating and felt that it "raise[d] doubts as to whether this episode also contributed to the way in which the Applicant's future prospects were dashed". The Applicant's decision to seek advice from the Staff Council in relation to the matter made him an "inconvenient" person for his supervisors. Further, there was a lack of clarity as to how the incident was handled, and this lack of clarity, regardless of whether or not the Administration connected it with the non-renewal of his contract, constituted a violation of his right to due process.

### **Respondent's submissions**

22. The Respondent's main contentions may be summarised as follows:

a. The reasons provided to the Applicant for the non-renewal of his contract are lawful, supported by facts, and consistent with the evidence before the Tribunal. The Applicant's contract was not renewed as a result of financial constraints and staffing requirements. He was recruited on a temporary basis to cover for ECLAC Security Officers who were deployed to



CICIG. When the deployment ended, those Security Officers returned to ECLAC and the funding for the Applicant's position ceased. Some Security Officers who had also been recruited on a temporary basis were, over the period, absorbed by ECLAC due to the resignations of other staff members. At the time the Applicant's fixed-term contract expired, all posts within SSS were fully encumbered and the Applicant's position was no longer required.

b. There was no discrimination, improper motive, or procedural irregularity behind the decision not to extend the Applicant's contract. The Isotonic Drinks incident had no role in the non-renewal of the Applicant's contract. The Applicant has not produced any evidence that this incident was taken into account in the making of the decision. No disciplinary measure was taken against the Applicant and no adverse notes were attached to his file. There is also no evidence that the Applicant's due process rights were violated with respect to the inquiry into the incident.

c. The Applicant had no legal expectancy of renewal of his fixed-term appointment. No express promise of renewal was given to the Applicant. The creation by the Administration of a legal expectancy of renewal requires clear action by the Administration and a firm commitment to renewal revealed by the circumstances of the case, and not mere verbal assertions unsubstantiated by conclusive proof. The mere adherence to the performance appraisal system cannot be construed as a commitment by the Organisation to renew the Applicant's contract.

### **Findings and consideration**

*Were the reasons for the non-renewal of the Applicant's contract valid and lawful?*

23. It is not disputed that the temporary funds used to finance the Applicant's work ended in June 2009. At the time the Security Officers, who had been deployed to CICIG, returned to ECLAC, the Applicant was the only staff member who

remained funded through this temporary funding, as other Security Officers hired with him took advantage of other opportunities and moved to vacant regular posts that gradually became available due to the resignation of Security Officers assigned to those posts. As no regular posts were available in June 2009, the Applicant could not be retained when the temporary funding for his post ceased.

24. The Tribunal finds that in filling the vacant regular posts with the Security Officers hired on a temporary replacement basis, ECLAC took into account the best interests of the Organisation in retaining the most suitable Officers. The Chief of SSS testified—and this was not contradicted—that the Applicant was not among the best performers and was, in fact, the only Security Officer among those on temporary funding who received the rating of “partially meet[ing] performance expectations”. This assessment is in line with the mid-point and end-of-cycle comments in the e-PAS report, which contained critical comments concerning the Applicant’s performance. The Applicant did not rebut his final e-PAS rating of “partially meet[ing] expectations”, and this rating must be accepted by the Tribunal as final (*Glasgow* UNDT/2010/201). The Chief of SSS further testified that, following the Applicant’s departure, no additional Security Officers were hired. His evidence was not challenged under cross-examination.

25. The Tribunal finds that the Applicant was provided with valid and legitimate reasons for the non-renewal of his contract. (The Applicant did not seek to argue that any separation or notification procedures or formalities were not properly followed and, in any event, he was informed of the separation both verbally and via email.) The Applicant testified that he met with his supervisor at the latter’s office and that the supervisor explained to him that due to financial reasons the contract was not going to be renewed. This evidence is consistent with the record in this case. Notably, even in his own request for management evaluation, dated 10 July 2009, the Applicant stated that his e-PAS report was signed by his supervisor “on 13 May 2009, although [he] was then informed that [his] contract would not be renewed due to economic reasons”.

26. The Tribunal finds that the Applicant failed to provide any evidence of the basis for any type of discrimination against him. In fact, the evidence before the Tribunal indicates that the Chief of SSS was well disposed towards the Applicant. The comments of the Chief of SSS in the Applicant's e-PAS report appear balanced and objective. The Chief of SSS even offered the Applicant his assistance in obtaining a job at another duty station. Regrettably, however, the Applicant was not successful in his efforts to secure further employment with the Organisation.

27. The Tribunal finds that the Applicant's contract was not renewed as a result of the return of the Security Officers he was hired to temporarily replace and the cessation of the temporary assistance funds that were used to finance his salary. Therefore, the Tribunal finds that the reason provided to the Applicant for the non-renewal of his contract was valid, not tainted by any improper considerations, and lawful.

*Isotonic Drinks incident*

28. It is undisputed that the Isotonic Drinks incident of 8 March 2009 was a result of a misunderstanding. Nevertheless, the Chief of SSS was required under sec. 2 of ST/AI/371 (Revised disciplinary measures and procedures) to undertake an initial inquiry to determine whether there was "reason to believe" that the Applicant had "engaged in unsatisfactory conduct for which a disciplinary measure may be imposed" and whether a formal preliminary fact-finding investigation was warranted. As part of this initial inquiry, the Applicant was requested to provide a statement in relation to the incident. The initial inquiry, which the Applicant felt was heavy-handed, eventually proved that the entire incident was simply a misunderstanding between two colleagues, which was later resolved. No formal preliminary investigation was ever carried out and no disciplinary proceedings were ever initiated. The Chief of the Human Resources Section, ECLAC, testified at the hearing that the Applicant's file did not contain any record of any disciplinary proceedings against him. There is no basis to conclude that the Applicant's integrity and reputation were

in any way compromised as a result of the initial inquiry. On the contrary, this inquiry allowed the Applicant to be cleared of any suspicion of impropriety.

29. There is also no basis to conclude that the Applicant's seeking assistance from the Staff Council in resolving the Isotonic Drinks incident resulted in any kind of retaliation. The case was closed without a formal investigation against the Applicant once the Chief of SSS realised that the matter was not worthy of any further review. The Chief of SSS testified before the Tribunal that he was aware that the Applicant went to the Staff Council and recalled discussing the incident with the Applicant and informing him that it was nothing serious and that he expected no further developments. The issue, in his view, was so insignificant that it did not warrant any mention in the e-PAS report. He further testified that the Isotonic Drinks incident played no role in the decision not to renew the Applicant's appointment. The Chief of SSS stated that he had 50 staff members under his supervision and most of them were members of the Staff Council, and this was never an issue for him and he did not draw any negative conclusions from it. The Tribunal sees no basis to question the credibility of this evidence. Indeed, the fact that there is no mention of this incident in the Applicant's e-PAS report, prepared by the Chief of SSS, is indicative that this incident was not a matter of concern.

30. The integrity of the Applicant is not and never has been in doubt. The Tribunal finds that the Isotonic Drinks incident and the initial inquiry into the incident, conducted by SSS, had no role in the non-renewal of the Applicant's contract.

*Did the Applicant have a legitimate expectation of renewal?*

31. Whether a staff member has a legitimate expectation will depend on whether it can be established that anything said or done by the Administration amounted to a firm commitment to renew the contract so that in spite of the wording of her or his contract a staff member could reasonably have expected a renewal (*Bowen* UNDT/2010/197).

32. The Applicant submitted that his expectation of employment continuity arose from his supervisor's comments in the e-PAS report and from some verbal statements made by the supervisor in late 2008 and early 2009.

33. In his application the Applicant stated that in late 2008 and early 2009 (the Applicant did not identify the exact dates when these conversations took place) the Chief of SSS told the Applicant and other Security Officers on temporary funding that their posts were safe and that they would remain in their posts until the end of 2010. This submission, however, is contradicted by the Applicant's own oral evidence and is inconsistent with the documentary evidence in this case and with the testimony of his supervisor. The Applicant candidly testified he was never promised that his contract would be renewed beyond 4 June 2009 or that he would receive a permanent contract. This was corroborated by the testimony of the Chief of SSS, who stated that no such promises had been made and that he would not have discussed contract renewals with staff as those matters are handled by the Human Resources Section. Based on the evidence before the Tribunal, I am satisfied that the Applicant was made aware that his contract extensions were contingent upon the availability of temporary funds. This follows from the nature of the numerous short-term extensions that the Applicant received and from the testimony of the Applicant's supervisor.

34. Notably also, there is no contemporaneous record, including any email, letter or comment in the e-PAS report indicating that the Applicant himself had at the time an *actual* expectation of renewal. He would have been expected to make such a claim as a first response to the non-renewal of his contract. Even the Applicant's request for management evaluation did not contain any assertions of an actual promise. There is no cogent evidence that the Applicant was induced by anything said or done on behalf of the Respondent to believe that there was a legitimate expectation of renewal, as distinct from speculation that his contract might be renewed.

35. As correctly stated by the Respondent, the performance appraisal system is designed to assess work performance and identify future areas of development. Comments relating to performance appraisal, made in the course of a performance

evaluation process, do not give rise to an expectation of renewal. In discussing the Applicant's potential areas of future development, the Applicant's supervisor was, in fact, merely discharging his responsibilities under ST/AI/2002/3 to support the career development of staff, and not committing to continue to employ the Applicant.

36. The Tribunal therefore finds that the Applicant did not have a legitimate expectation that his contract would be renewed beyond 4 June 2009.

### **Conclusion**

37. The Tribunal finds that the decision not to renew the Applicant's appointment was based on valid and legitimate reasons, was not influenced by any improper considerations, and was lawful. The Tribunal finds that the Applicant was not unfairly discriminated against in the non-renewal of his contract. The Tribunal further finds that the Applicant did not have a legitimate expectation that his contract would be renewed beyond 4 June 2009.

38. The application is dismissed in its entirety.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 28<sup>th</sup> day of December 2010

Entered in the Register on this 28<sup>th</sup> day of December 2010

*(Signed)*

Santiago Villalpando, Registrar, UNDT, New York