



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/037

Judgment No.: UNDT/2011/013

Date: 13 January 2011
English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Victor Rodríguez

MANDOL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Monika Ona Bileris

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision of 12 October 2006 of the Chief Administrative Officer, United Nations Assistance Mission for Iraq (“UNAMI”), not to renew his appointment beyond 31 October 2006.
2. He requests the Tribunal to order that:
 - a. He be immediately reinstated;
 - b. The Respondent pay him compensation for the material and moral damage suffered;
 - c. The Respondent pay him USD10,000 in costs;
 - d. That the unlawful negative performance appraisals be expunged from his file.

Facts

3. The Applicant entered the service of the United Nations in 1992 as a Volunteer. Starting in May 1994, he performed administrative functions under contracts of limited duration with a number of peacekeeping missions.
4. In November 2004, he joined UNAMI as a Budget Officer on an appointment of limited duration governed by the 300 series of the Staff Rules in force at the time, and extended by decision of the Chief Administrative Officer from 6 January 2005 to 19 May 2005.
5. On 20 February 2005, the Chief Administrative Officer sent the Applicant an email setting out a number of criticisms of his work.
6. On 10 April 2005, the Chief Administrative Officer recommended that the Applicant’s contract not be renewed and evaluated his performance during his first months of work as not meeting expectations.
7. On 9 May 2005, the Applicant instituted a rebuttal process against that performance appraisal. Thereafter, his contract was renewed on a monthly basis pending the outcome of the rebuttal process.

8. By memorandum of 21 December 2005, the new Chief Administrative Officer notified the Applicant of the conclusions of the rebuttal panel contained in its report of 31 October 2005. Considering that the Applicant's performance appraisal had not complied with Administrative Instruction ST/AI/2002/3, the panel recommended that the Applicant's contract be extended for six months with effect from the arrival of a new Chief Budget Officer, and that the latter prepare a work plan for the Applicant to be periodically reviewed during the six months, at the end of which, the Chief Budget Officer, as the Applicant's supervisor, was to make a report on the quality of his work. That recommendation was accepted by the Chief Administrative Officer in his above-mentioned memorandum of 21 December 2005. It also stated that since the staff performance appraisal system under Administrative Instruction ST/AI/2002/3 was to be introduced at UNAMI in April 2006, the Field Operation Performance Appraisal Form ("FOPA") would meanwhile be used for each staff member's contract extensions.

9. On 2 April 2006, a new Chief Budget Officer was appointed and he drew up a work plan for the Applicant shortly afterwards.

10. On 21 June 2006, the Chief Administrative Officer drew up a performance appraisal for the Applicant using the FOPA. The FOPA covered the period from 1 April 2005 to 31 March 2006 and was signed by the Applicant on 22 June 2006. It rated his work as "partly satisfactory". That document stated that the Applicant's contract should be extended to 30 September 2006 and a new performance appraisal report made by the Chief Budget Officer on the basis of the work plan drawn up.

11. On 18 July 2006, the Applicant sent a request to his supervisors to institute a rebuttal process in respect of that performance appraisal, on which the Administration took no action.

12. On 24 September 2006, the Applicant filed a complaint with the Chief Administrative Officer, alleging that the Chief Budget Officer was subjecting him to moral harassment and expressing the fear that the Chief Budget Officer would not give him a fair review.

13. On 28 September 2006, the Chief Budget Officer sent a confidential memorandum to the Chief Administrative Officer assessing the Applicant's work as unsatisfactory. The Applicant discussed the contents of the said memorandum the same day with his supervisors.

14. By memorandum of 12 October 2006, the Chief Administrative Officer informed the Applicant that based on his performance, his contract would not be renewed beyond 31 October 2006. On the same day, the Applicant sent the Chief Administrative Officer his observations on the Chief Budget Officer's memorandum, requesting an investigation into his alleged discriminatory behaviour and a rebuttal process against the performance appraisal he had given.

15. On 16 October 2006, the Applicant complained to the Chief Administrative Officer about the shortness of the notice period to the end of his appointment, and asked for his contract to be extended by at least three months until the completion of the investigation and rebuttal process he had requested. He made a similar request to the UNAMI Chief of Staff.

16. In reply, the Applicant was informed on 17 October 2006 that the decision to refuse to renew his contract would not be modified.

17. On 23 October 2006, the Applicant made a request to the Secretary-General for review and suspension of the decision not to renew his contract.

18. On 25 October 2006, the Applicant sent an email to the Chief Administrative Officer, in which he alleged that his negative performance appraisal was a reprisal for his refusal to carry out orders given by his direct supervisor in contravention of the rules. In particular, he claimed to have refused, in June 2006, to transfer USD20,000 to the Chief Budget Officer's private account for the purchase of a building in his personal capacity.

19. On 26 October 2006, the Applicant filed a request with the New York Joint Appeals Board ("JAB") for the suspension of the contested decision, which request was rejected on the Secretary-General's behalf by letter of the Under-Secretary-General for Management on 31 October 2006.

20. On 1 December 2006, the Applicant referred the matter on the merits to the JAB. On 18 March 2008, the JAB submitted its report, in which it concluded

that the Respondent had violated Administrative Instruction ST/AI/2002/3 in failing to give the Applicant recourse to the rebuttal process against his last performance appraisals. The JAB recommended that the Applicant be paid the amount of one month's net base salary as compensation for this procedural flaw.

21. By letter of 26 June 2008, the Deputy Secretary-General informed the Applicant that the Secretary-General accepted the recommendations of the JAB.

22. Having been granted two extensions of time, the Applicant filed an application with the former UN Administrative Tribunal on 15 October 2008. The application was transferred to the United Nations Dispute Tribunal pursuant to General Assembly resolution 63/253.

23. In reply to a letter from this Tribunal, the parties gave their consent, on 25 November 2010 and 6 December 2010 respectively, to the case being decided without a hearing.

Parties' contentions

24. The Applicant's contentions are:

a. A decision based on a procedural irregularity must be rescinded and may merit compensation (former UN Administrative Tribunal Judgment No. 899, *Randall* (1998)). In the present case, the decision not to renew his contract is unlawful as it is expressly based on his performance, which was improperly evaluated;

b. The performance appraisal by the Chief Administrative Officer of 10 April 2005 is irregular because it violates the terms of Administrative Instruction ST/AI/2002/3 ("Performance Appraisal System"), in particular sections 6.1, 8.1 and 8.3, in that no work plan was drawn up and the Applicant was not informed that his work was unsatisfactory;

c. The FOPA performance appraisal by the Chief Administrative Officer on 21 June 2006 is also irregular and must be expunged from his personnel file. It violates sections 6.1, 8.1 and 8.3 of the above-mentioned administrative instruction;

d. The performance appraisal by the Chief Budget Officer dated 28 September 2006 is also irregular. The Chief Budget Officer failed to comply with section 8 of the above-mentioned administrative instruction by not conducting a mid-point performance review;

e. The contested decision is irregular, as it takes no account of the fact that the Applicant contested his FOPA under the rebuttal process;

f. The refusal of a rebuttal process is contrary to the recommendations of the rebuttal panel in the report of 31 October 2005, which implicitly called for a review. That refusal is also a violation of the administrative instruction on the Performance Appraisal System;

g. Where the Administration gives reasons for its decision not to renew a contract, the reasoning must be supported by facts. The decision not to renew the contract is irregular because it was officially based on the Applicant's performances, but in reality prompted by other considerations;

h. The indemnity he was granted, of an amount equal to one month's net base salary, does not compensate him for the loss of employment, the damage suffered as a result of the presence on his personnel file of negative performance appraisals, and the damage to his reputation;

i. The Applicant is entitled to the protection of contracts under the 100 series of the Staff Rules then in force, by virtue of General Assembly resolution 59/296 and of his express request to the Administration to change his status.

25. The Respondent's contentions are:

a. Under staff rule 304.4(a) in force at the time, the Applicant had no right to renewal of his contract. There is no automatic renewal of fixed-term contracts (former UN Administrative Tribunal Judgments No. 481, *El Shami* (1990), para. XIII; No. 422, *Shawney* (1988), para. X). A legitimate expectation of renewal must be based on a firm commitment by the Administration (former UN Administrative Tribunal Judgment No. 440, *Shankar* (1989));

- b. The decision not to renew the contract was based on the Applicant's unsatisfactory performance. The file reflects the fact that the Applicant's performance was far from satisfactory. The Applicant was informed of this on several occasions from February 2005 onwards;
- c. Even if the Respondent did not fully comply with Administrative Instruction ST/AI/2002/3, and the performance appraisals were not drawn up in compliance with the applicable provisions, this does not necessarily mean that the Applicant's contract would have been renewed;
- d. Compensation for a procedural irregularity must be proportionate to the harm suffered (former UN Administrative Tribunal Judgment No. 1237 (2005)). The amount claimed greatly exceeds the amounts previously awarded by the former UN Administrative Tribunal (Judgments No. 521, *Saeed* (1991), and No. 1399 (2008));
- e. The Applicant offers no evidence of the harassment he alleges, even though, according to the settled case law of the former UN Administrative Tribunal, he bears the burden of proof;
- f. The Applicant has not shown that there are any special circumstances that would justify awarding him costs.

Judgment

26. Having regard to the contents of the file, the Tribunal considers that it has sufficient information and that there is no need to request the Administration to produce documents other than those already filed.

27. The Applicant contests the decision of the Chief Administrative Officer of UNAMI of 12 October 2006 not to renew his contract beyond 31 October 2006.

28. While it is not disputed that the Applicant's contract fell under the 300 series of the Staff Rules in force at the time, he maintains that, by virtue of General Assembly resolution 59/296, he has since January 2005 been entitled to the broader protection available under the 100 series of the Staff Rules.

29. By paragraph 16 of the above-mentioned resolution, the General Assembly:

Authorizes the Secretary-General ... to reappoint under the 100 series of the Staff Rules those mission staff whose service under 300-series contracts has reached the four-year limit by 30 June 2006, provided their functions have been reviewed and found necessary and their performance has been confirmed as fully satisfactory ...

30. That resolution makes it clear that the reappointment of an official under the former 100 series was a matter for the discretionary powers of the Secretary-General, and that, therefore, the Applicant had no right to an appointment of that type. Moreover, that power is subject to certain conditions and the Applicant has not shown that he fulfilled those conditions. In the view of the Tribunal, therefore, the rules applicable in the present case are those of the 300 series of the Staff Rules, which were in force at the time.

31. Staff rule 304.4(a) in force at the date of the decision refusing to renew the Applicant's appointment and governing 300 series contracts provides:

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 ... carry no expectancy of renewal ...

32. Similarly, staff rule 309.5(a) provides:

Appointments under these Rules shall expire automatically and without prior notice on the expiration date of the period specified in the letter of appointment.

33. That said, as the United Nations Appeals Tribunal ruled in its Judgment in *Asaad* 2010-UNAT-21 of 30 March 2010:

[T]he Administration's discretionary authority is not unfettered. The ... Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration ... its decisions must not be based on erroneous, fallacious or improper motivation.

34. While the Administration is not bound to give reasons for its decision not to renew a contract, where the staff member contests that decision before the Tribunal, the Administration must inform the Judge of the grounds for that

decision. In the present case, the Administration gave a very clear statement of the reason for the non-renewal of the Applicant's appointment, namely his poor performance.

35. Where the Applicant contests his performance appraisal, the Tribunal must, first of all, examine whether his supervisors complied with the procedural rules in place for evaluating that staff member's performance.

36. The Applicant maintains that the Administration did not comply with the performance appraisal procedure laid down in ST/AI/2002/3.

37. Under staff rule 301.4 of the former 300 series:

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.

38. Section 1 of Administrative Instruction ST/AI/2002/3 provided:

... Staff employed under the ... 300 series of the Staff Rules ... may also be appraised under the provisions of the present instruction where appropriate, taking into consideration the nature and duration of the functions and the supervisory structure in place in the work unit.

39. The above provisions show that, while the Administration had a duty to evaluate the performance of staff members appointed under the 300 series of the former Staff Rules, it was under no obligation, in principle, to apply Administrative Instruction ST/AI/2002/3 on the performance appraisal system. But once the Administration chooses to follow a procedure, it is bound to comply with it (see *Applicant* UNDT/2010/211). The Tribunal must first, therefore, decide whether the Applicant's supervisors intended to follow that procedure when evaluating the Applicant's performance. To do so, it must separately examine each of the Applicant's three successive performance appraisals.

A) Performance appraisal of 10 April 2005 by the former Chief Administrative Officer in the form of a recommendation that the Applicant's

contract not be renewed covering the period from November 2004 to 31 March 2005

40. While, with respect to the period from the start of his appointment at UNAMI to 31 March 2005, the rebuttal panel stated in its conclusions that the 10 April 2005 performance appraisal had not been conducted in compliance with Administrative Instruction ST/AI/2002/3, there was no instrument requiring the Administration to follow that administrative instruction, nor is there any documentary evidence that the Applicant's supervisors intended to follow it. While the memorandum of the Chief Administrative Officer of 21 December 2005, addressed to the Applicant and entitled "Rebuttal of your performance appraisal", adopted the recommendations of the panel, the description of the action to be taken made no reference whatever to Administrative Instruction ST/AI/2002/3. Moreover, in the same memorandum the Chief Administrative Officer stated that the performance appraisal system set forth in the said administrative instruction would be introduced in April 2006 with the new performance appraisal period, and that, meanwhile, the FOPA would be used for contract renewals.

41. Furthermore, the mere fact that the Applicant was granted the rebuttal process that led to the report of 31 October 2005 is not enough to support a finding that his supervisors intended to apply the procedure set forth in Administrative Instruction ST/AI/2002/3.

42. In any event, the 10 April 2005 performance appraisal was set aside, following the conclusions of the rebuttal panel, although that panel omitted to indicate the rating to be given to the Applicant for the period concerned and merely made recommendations for a performance appraisal to the Administration, which was not bound to follow them.

B) Performance appraisal of 21 June 2006 by the new Chief Administrative Officer covering the period from 1 April 2005 to 31 March 2006 in the form of a Field Operation Performance Appraisal

43. The above-mentioned period, between the performance appraisal deemed unlawful by the rebuttal panel and the time the new Chief Budget Officer took up

his appointment, was dealt with using a FOPA form, the method generally used for staff appraisals at UNAMI prior to April 2006.

44. That form contained a note stating that the staff member could, within one month from receiving the report, submit a brief written explanation or rebuttal pursuant to Administrative Instruction ST/AI/240/Rev.2 (“Performance Evaluation Report System”) of 28 November 1984. The Administration thus clearly expressed its intention to comply with that instruction as regards the rebuttal process and was, therefore, bound by its terms for the purposes of that performance appraisal.

45. In the light of the foregoing, the Applicant cannot argue that the FOPA was not drawn up in accordance with Administrative Instruction ST/AI/2002/3, which did not apply in the present case.

46. The possibility of rebutting a performance appraisal is not only provided for in sections 10 *et seq.* of Administrative Instruction ST/AI/240/Rev.2, but, furthermore, is expressly set out in the performance appraisal form drawn up on 21 June 2006. Therefore, since the Administration refused to pursue the rebuttal process, though the Applicant had requested it within the permitted time limit, the Administration committed a procedural irregularity.

47. The question is therefore whether that performance appraisal, tainted by procedural irregularity, was the reason for the decision not to renew the Applicant’s appointment. The Tribunal finds that the said decision was taken following another negative evaluation of the official’s professional conduct, and that it was this latter performance appraisal to which the Chief Administrative Officer referred in his memorandum of 12 October 2006 in which he informed the Applicant that his contract would not be renewed. The Tribunal therefore considers that the irregular performance appraisal of 21 June 2006 was not the reason for the contested decision.

C) Performance appraisal of 28 September 2006 by the report of the new Chief Budget Officer covering the period from 1 April 2006 to the end of September 2006

48. That period covers the extension of the Applicant's appointment by six months with effect from the arrival of the new Chief Budget Officer. There is nothing in the file to indicate that the Administration intended to use the procedure laid down in Administrative Instruction ST/AI2002/3, or any procedure laid down by instrument. There is therefore no basis for the Applicant's contention that the performance appraisal for the said period was in breach of any instrument.

49. While the Administration, as was its right, did not follow the performance appraisal processes laid down in the administrative instructions on the subject, it was still bound, in accordance with staff rule 301.4 cited above, to carry out a performance appraisal of the Applicant before refusing to renew his appointment on the grounds of unsatisfactory performance.

50. The parties are in agreement that, on the same day that the Chief Budget Officer sent his performance appraisal report, the Applicant had a meeting with his supervisors during which he set out his reservations concerning that performance appraisal. The documents on the file show that, by memorandum of 12 October 2006, the Chief Administrative Officer informed the Applicant that, based on his performance, his contract would not be renewed beyond 31 October 2006 and that, on the same day, the Applicant sent the Chief Administrative Officer his observations on the Chief Budget Officer's memorandum.

51. The Tribunal therefore takes the view not only that the Applicant's performance was evaluated before the decision was taken not to renew his contract, but also that the staff member had an opportunity to make observations on his performance appraisal.

52. Thus, the Applicant has failed to establish that the last performance appraisal, which was used as the reason for the non-renewal of his contract, was irregular.

53. While the Applicant maintains that, contrary to the view taken by his supervisors, his performance was satisfactory, the Tribunal's review of whether or not a staff member's performance is satisfactory is limited to cases of manifest

error, as it is not for the Tribunal to substitute its discretion for that of the Administration.

54. The Applicant's performance was evaluated in the Chief Budget Officer's confidential memorandum of 28 September 2006. That memorandum, which is very detailed, sets out the duties assigned to the staff member and the shortcomings noted. From the file as a whole, it is clear that the Applicant's performance was assessed as unsatisfactory by a number of persons on a number of occasions, between April 2005 and September 2006. It cannot be argued, therefore, that the Administration committed a manifest error of discretion in finding the Applicant's performance unsatisfactory.

55. Lastly, while the Applicant contends that the decision was discriminatory in nature, in accordance with the case law as stated in the Judgment in *Asaad*, cited above, it is for the official contesting a decision to show that it was based on improper grounds. While the Applicant maintains that he was the victim of reprisals by the Chief Budget Officer for having refused to transfer money into his personal account, those allegations cannot be regarded as having been proved by the only exhibits produced, namely a copy of a handwritten paper bearing the full name of the Chief Budget Officer and a number which, according to the Applicant, was the Chief Budget Officer's account number.

56. It is clear from the foregoing that the Applicant has failed to show that the contested decision was unlawful.

Decision

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

The application is dismissed in its entirety.

(Signed)

Judge Jean-François Cousin

Dated this 13th day of January 2011

Translated from French

Case No. UNDT/GVA/2010/037

(UNAT 1642)

Judgment No. UNDT/2011/013

Entered in the Register on this 13th day of January 2011

(Signed)

Victor Rodríguez, Registrar, Geneva