UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2009/004/ JAB/2007/020
	Judgment No.:	UNDT/2011/100
	Date:	14 June 2011
	Original:	English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

DE CRUZE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant has two cases before the United Nations Dispute Tribunal: UNDT/NY/2010/017/UNAT/1615 (Case 1) and UNDT/NY/2009/044/JAB/2007/020 (Case 2). Case 1 (decided in Judgment UNDT/2011/099) concerned the Applicant's non-selection for the position at the P-4 level of Secretary of the United Nations Publications Board and Exhibits Committee ("the Post") within the Department of Public Information ("DPI") and Case 2, the present case, deals with the non-renewal of the Applicant's contract following his non-selection for the Post.

2. In its Judgment No. UNDT/2011/099, the Tribunal found that the Respondent did not properly exercise his discretion and follow proper procedures during the selection exercise for the Post. The Tribunal awarded the Applicant eight months' net base salary in effect in August 2004 as compensation for procedural violations under the head of loss of opportunity/loss of chance. The Tribunal did not make an award under the head of moral injury.

3. In the present case (Case 2), the Applicant challenges the non-renewal of his contract following his non-selection for the Post.

Issue

4. The substantive issue to be addressed by the Tribunal in the present case may be formulated as follows: was the administrative decision not to renew the Applicant's contract beyond 30 November 2006 proper?

Facts

5. The Tribunal notes that, in response to Order No. 225 (NY/2010) of 20 August 2010, the parties produced a jointly-signed submission dated

4 October 2010, in which they, *inter alia*, outlined a chronology of facts. Insofar as the parties have agreed to the facts in question, the following is primarily based on this chronology, which is, when necessary, supplemented with additional facts from the case record.

6. The Applicant entered service of the United Nations on 22 April 1997 with the Department of Peacekeeping Operations ("DPKO"), Field Administration and Logistics Division, as a P-3 Personnel Officer. The Applicant later served as Chief of Personnel, both with the United Nations Preventive Deployment Force in Macedonia and with the United Nations Mission in Kosovo ("UNMIK").

7. As of 5 July 2000, the Applicant held the P-4 position of Deputy Chief, Office of the Iraq Oil-for-Food Programme ("OIP").

8. By its resolution 1483 (2003) adopted on 2 May 2003, the Security Council determined that OIP would be ending as of 21 November 2003. As a result, on 18 August 2003, the Officer-in-Charge of the Office for Human Resources Management ("OHRM"), Mr. Denis Beissel, issued a memorandum stating (as quoted in a 3 November 2003 memorandum from the Assistant-Secretary-General ("ASG") of OHRM, Ms. Rosemary McCreery, to "All Heads of Department and Offices):

> …
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> 3. The Executive Director of the Programme and the Officer-in-charge of the Administrative Services of the Commission [the United Nations Monitoring, Verification and Inspection Commission ("UNMOVIC")], have requested that priority consideration be given to the staff who apply for posts (at the General Service and Professional levels), whenever possible, for upcoming vacancies in all Departments and Offices.
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> 4. Given the very special circumstances of this situation, it would be in the best interest of the Organization to make every effort to ensure that the placement of the OIP and UNMOVIC staff be undertaken promptly. To this end, it is proposed that recruitment of

> external candidates should be limited to the vacancies where no internal candidates possess requisite skills and competencies.
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> …

9. In October 2003, the Applicant applied for the Post under a temporary vacancy announcement.

10. On 7 October 2003, the Officer-in-Charge of the Executive Office ("EO"), DPI, Mr. Oleg Astapkov, requested the Applicant to be released from OIP to DPI, since he had been chosen for the Post on a temporary basis. As rationale for the decision, Mr. Astapkov stated that no suitable candidates from DPI had applied for the temporary vacancy and the Applicant had "the combination of skills and administrative expertise for this position".

11. On 20 October 2003, the Applicant was transferred to the Post in DPI, New York, on a 3-month fixed-term contract extending from 15 October 2003 through 31 December 2003, which was further extended on an occasional basis through 31 January 2006.

12. On 11 June 2004, a vacancy announcement for the Post was advertised on the online United Nations jobsite, Galaxy, as a regular position.

13. After competing in two selection exercises, on 31 January 2006, the Applicant was informed by Mr. Astapkov, then in the capacity of Executive Officer, DPI, that another candidate had been selected for the Post (this was the subject matter of Case 1 before the Tribunal) and that the Applicant's fixed-term contract would only be extended for one final month, to 28 February 2006.

14. On 15 February 2006, the Applicant filed a request for administrative review of the decision not to select him for the Post (Case 1) and of the decision not to renew his contract beyond 28 February 2006.

15. On the same day, the Applicant filed an application for suspension of action with the Joint Appeals Board ("JAB") in which he requested not to be separated since

he had not received any electronic performance appraisal system ("e-PAS") reports for October 2003–March 2005 and April 2005–January 2006.

16. In reply to the Applicant's 15 February 2006 application, the JAB recommended that the Applicant's contract be extended until 31 May 2006 to allow time for his missing e-PAS reports to be completed (the Tribunal notes that the JAB report has not been produced as evidence and, since the information has not otherwise been presented, the Tribunal is not aware of the date and number of this report). On 22 February 2006, the Under-Secretary-General ("USG") for Management, Mr. Christopher Burnham, accepted the JAB's recommendation.

17. In May 2006, the two e-PAS reports were completed. The Applicant filed rebuttals to both reports and rebuttal panels were set up to hear both his cases.

18. On 6 July 2006, the Applicant submitted a complaint to the Panel on Discrimination and Other Grievances ("PDOG"), with a request for an extension of contract to allow for the Panel to investigate the selection exercise for the Post.

19. In an interoffice memorandum dated 9 August 2006, Mr. Burnham "recommended" to Ms. Jan Beagle, Assistant Secretary-General for Human Resources Management, i.e. OHRM, to extend the Applicant's contract for additional three months through 30 November 2006, pending completion of the PDOG review of the Applicant's complaint.

20. By an email dated 17 August 2006 from Ms. Norma Castillo, Human Resources Officer, OHRM, to Mr. Louis Germain, Chief, Human Resources Unit, DPI Executive Office, the Applicant was informed that OHRM approved extension of his contract through 30 November 2006. In the same email, it was stated that, "In this connection, please note that OHRM has approved the extension beyond eleven months, for a total of 11 months, 27 days (approval forwarded to your office by fax today), so you may proceed with the corresponding personnel action". The Applicant submits that OHRM thereby waived the mandatory break-in-service requirement

(after 11 months continuous service) for the Applicant. With this action, the Applicant's contract was extended to 30 November 2006.

21. On 7 November 2006, Mr. Burnham "recommended" that the Applicant's contract be extended for an additional two months (i.e., two months beyond 30 November 2006) to allow for the completion of the PDOG's review of the Applicant's complaint.

22. On 29 November 2006, the rebuttal panels issued a joint report on the e-PAS reports.

23. On the same day, according to the Applicant, OHRM required him to take a mandatory break-in-service at the end of his contract on 30 November 2006 to allow for a further renewal of his contract. The Respondent denies this.

24. Later that day, the Applicant filed a request for a suspension of action of the decision to allow his appointment to expire on 30 November 2006 and the decision to require him to take a mandatory break-in-service at the expiration of his appointment on 30 November. The Applicant based his request on: (1) the 7 November 2006 recommendation by Mr. Burnham that the Applicant's contract be extended an additional two months pending the completion of the PDOG's investigation; (2) the fact that his e-PAS report for the period of February 2006 to November 2006 had not been completed; and (3) his contention that the entire issue of the mandatory break-in-service was moot due to OHRM's 17 August 2006 decision.

25. On 30 November 2006, the JAB considered the Applicant's suspension of action request and, in its Report No. 1843 (at para. 19), the panel found, *inter alia*, that Mr. Burnham' s recommendation of 7 November 2006

> … constituted an express promise to the [Applicant] of a further extension of his appointment and the OHRM's request of 29 November 2006 that the [Applicant] goes on mandatory break-in-service only re-enforced that promise since a break-in-service would

> make sense only if a re-appointment is contemplated after the break, which happened several times to the [Applicant] in the past.

26. In a memorandum of 30 November 2006 addressed to Mr. Warren Sach, acting USG for Management, Ms. Sandra Haji-Ahmed, Officer-in-Charge, OHRM, rejected Mr. Burnham's 7 November 2006 recommendation that the Applicant's contract be extended for two months pending the completion of the investigation by the PDOG. In rejecting Mr. Burnham's recommendation, Ms. Haji-Ahmed alleged that:

> DPI has informed OHRM that [the Applicant] has refused to do the work he was assigned since 1 February 2006, which has had a deleterious effect on staff morale, and has been a waste of the Department's resources. ...

27. On 30 November 2006, Mr. Sach informed the Applicant that the Secretary-General had "decided not to accept the JAB's recommendations" of Report No. 1843. In result, the Applicant was separated from service the same day.

28. On 4 December 2006, a separation report was placed on the Applicant's personnel file.

29. On 30 March 2007, the PDOG issued its report, concluding, *inter alia*:

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> 5. While at present [the Applicant] is no longer a UN staff member, the circumstances of this case should not affect the possibility of [the Applicant] to find a suitable position within the Organization and the Panel urges that some consideration be given by the Organization in his efforts to secure a post for which he may qualify.
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> …

30. On 28 July 2008, the Applicant filed an application with the former United Nations Administrative Tribunal. The Respondent's response and the Applicant's comments thereon were received in due course.

31. On 1 July 2009, the present case matter was transferred to the Dispute Tribunal, New York.

Applicant's contentions

32. The Applicant's primary contentions may be summarised as follows:

a. Where reasons are given for the non-renewal of a contract, then the reasons must find support in the facts and the decision cannot be in violation of the rights of the staff member concerned, including the right to due process;

b. A promise of renewal can create an expectation of renewal, in particular if the promise came from an authorised official;

c. In the Applicant's case, a promise of renewal existed and the ultimate decision not to renew the Applicant's appointment was one that reneged on the promise;

d. OHRM could have granted the Applicant yet another exception to the rule requiring a break-in-service after 11 months with the Organization, if such exception was to ensure that the Applicant's rights would not be infringed upon;

e. The claims that the Applicant had not been doing his work while on the Post was highly prejudicial, and constituted a *de facto* performance evaluation that was never shared with the Applicant before the decision that was based, in part, on this evaluation;

f. No evidence has been proffered that would substantiate that DPI depleted its funds to a level which would have prevented a further renewal of the Applicant's appointment for another two months (i.e., to 31 January 2007);

g. When OHRM asked the Applicant to take a mandatory break-in-service that would suggest that a further renewal of the Applicant's appointment would follow the break-in-service;

h. Once notified of Mr. Burnham's recommendation that the Applicant's contract should be extended, it was reasonable for the Applicant to assume that the appointment would, in fact, be renewed.

Respondent's contentions

33. The Respondent's primary contentions may be summarised as follows:

a. Mr. Burnham's recommendation to extend the Applicant's appointment for an additional period, pending completion of the PDOG investigation, was not permitted by ST/AI/308/Rev.1, which had superseded ST/AI/246; thus, the rules did not provide for a further extension of the Applicant's contract;

b. Former staff rule 112.2(b) provided that exceptions to the Staff Rules "may be made", but an exception to the Staff Rules could not be justified in the Applicant's case, because:

i. The Post that the Applicant's appointment was budgeted against had been filled;

ii. The Applicant was without assignment after 31 January 2006; and

iii. DPI did not have the resources to renew the Applicant's contract, and the Applicant would have been required to be placed on Special Leave Without Pay;

c. There is no expectancy of renewal of a fixed-term appointment, and no countervailing circumstances existed;

d. Mr. Burnham's memorandum of 7 November 2006 was merely a recommendation and not a promise of renewal;

e. The Respondent took exceptional measures to assist the Applicant in his efforts to find a position after the Applicant's term with OIP came to an end; there is no evidence that the Respondent was biased against the Applicant;

f. The reasons for non-renewal were substantiated, namely that, after the filing of the Post, there was no position readily available for the Applicant within DPI; from February through November 2006, the Applicant's contract was simply renewed so that the Applicant could rebut his e-PAS and engage in the PDOG process; the only reasonable course of action was not to renew the Applicant's contract;

g. After the Post had been filled, there was no funding to continue to employ the Applicant.

Consideration

34. In principle, fixed-term contracts, such as the Applicant's in the present case, do not carry an expectancy of renewal (see former staff rule 104.12(b)(ii)).

35. However, a decision not to renew a contract may not be tainted by ulterior motives or extraneous considerations and reasons must be properly be supported by facts (see, for instance, *Abdalla* UNDT/2010/140, as upheld by the United Nations Appeals Tribunal in its Judgment No. 2010-UNAT-091, as well as *Balestrieri* UNDT/2009/019, *Riquelme* UNDT/2010/091, *Eldam* UNDT/2010/133, *Dzintars* UNDT/2010/150 and *Applicant* UNDT/2010/211) or an expectancy of renewal may

be created through actions (or inactions) of the Respondent (see, for instance, *Syed* UNDT/2009/093). The Tribunal observes that the Applicant has not contended that he did not receive a timely and proper reason for the non-renewal decision, and the Tribunal will therefore not consider this issue as part of the case.

36. It follows from the jurisprudence of the Appeals and Dispute Tribunals that when an applicant alleges bias or any other improper motivation against her/him, the onus is on her/him to provide "sufficient evidence" to prove the contention (see *Parker* 2010-UNAT-012 and, e.g., also *Bye* UNDT/2009/083).

37. The Tribunal agrees with the Respondent's contention that, while former staff rule 112.2(b) provided that exceptions to the staff rules "may be made", an exception would not be justified in the Applicant's case, because the Post that the Applicant's appointment was budgeted against had been filled by another staff member on a regular contract (on this matter, see *DeCruze* UNDT/2011/099 regarding Case 1). Accordingly, with the Post no longer being vacant, the necessity to occupy it on a temporary basis with the Applicant became obsolete, and DPI therefore had neither the cause nor the resources to renew his contract.

38. The Tribunal finds that evidence has not been produced that would suggest that the Respondent was biased against the Applicant in the present case; on the contrary, the administrative decision to separate him appears to be reasonable and to be supported by facts.

39. The next question is whether the Respondent, nevertheless, had created a legal expectancy that he would have granted an extension beyond the Applicant's date of separation, as the JAB found in its Report No. 1843.

40. In this regard, the Tribunal primarily refers to ST/AI/308/Rev.1 (Establishment of Panels on Discrimination and Other Grievances), which superseded ST/AI/246 and which provides, in relevant part, as follows:

> 1. By administrative instruction ST/AI/246 of 28 July 1977, a Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat was established at Headquarters. ... [T]he Secretary-General has decided to reconstitute the panels by broadening their terms of reference to cover all types of staff grievances and to rename the panels accordingly as Panels on Discrimination and other Grievances. Administrative instruction ST/AI/308 of 6 July 1983 is hereby superseded.
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> …
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> 5. The panels shall investigate grievances submitted by staff members arising from their employment with the Organization. Such grievances may include, but are not necessarily limited to, allegations of discriminatory treatment in the United Nations Secretariat on grounds such as those referred to in article 2 of the Universal Declaration of Human Rights. ...
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> …
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> 15. The panel may, in exceptional cases, recommend to the Assistant Secretary-General for Personnel Services an extension of a staff member's fixed-term contract by not more than two months if the panel finds, on the basis of its preliminary investigation, that such extension is justified and necessary to enable it to complete the investigation.
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> …

41. Under this administrative instruction, it is clear that the PDOG was the only entity that could recommend "an" extension of "not more than two months" if "the panel finds, on the basis of its preliminary investigation, that such extension is justified and necessary to enable it to complete the investigation".

42. In this case, Mr. Burnham, on 9 August 2006, first recommended a three-month extension of the Applicant's contract pending completion of the PDOG review of the Applicant's complaint. On 7 November 2006, Mr. Burnham again recommended a two-month extension of the Applicant's contract (from 30 November 2006 through 31 January 2006), again pending completion of the PDOG review of the Applicant's complaint. Several difficulties exist with these extensions, which demonstrate that the extension of the Applicant's appointment was improper:

a. ST/AI/308/Rev. 1 only permits "an" extension of two months, and more than one such extension was given under the authority of this administrative instruction;

b. Mr. Burnham lacked the authority to grant the extension, which only could be given on the recommendation of the PDOG;

c. The extensions were not supported on the finding, based on a PDOG preliminary investigation, that such extension is justified.

43. The Applicant's contract was renewed from 28 February 2006 through 30 November 2006 only for the purpose of allowing the Applicant to rebut his e-PAS and to engage in the PDOG process.

44. Even if Mr. Burnham's memorandum of 7 November 2006 could be considered as a proper recommendation pursuant to the relevant United Nations legal instruments, the Tribunal finds that, as a "recommendation", it was simply non-binding advice of the USG for Management and not a promise of renewal, on which the Respondent reneged.

45. The Tribunal finds that the extensions of the Applicant's contract beyond 30 November 2006 were not authorised under ST/AI/308/Rev.1, that the rules did not provide for a further extension of the Applicant's contract, and that no reasonable expectation of renewal could have been created.

46. Having made the findings in paragraph 45 of this Judgment, a further discussion of the other arguments made by the Applicant (regarding the Applicant's forced break-in-service and his e-PAS evaluations) is therefore not necessary.

47. The Tribunal concludes that the administrative decision not to renew the Applicant's contract beyond 30 November 2006 was proper.

Conclusion

48. The application is rejected in its entirety.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 14th day of June 2011

Entered in the Register on this 14th day of June2011

(*Signed*)

Santiago Villalpando, Registrar, New York