



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/012/
UNAT/1599
Judgment No.: UNDT/2011/141
Date: 11 August 2011
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Santiago Villalpando

EHOUNOUBAKROHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Bernard Adams, Office of Staff Legal Assistance

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Background

1. This case concerns the non-renewal of a fixed-term appointment for a reason relating to performance, in that the Applicant had two consecutive performance ratings of “partially meets performance expectations”. Such a rating may lead to the non-renewal of a fixed-term contract under the performance appraisal system (“PAS”).

2. On 9 June 2008, the United Nations Administrative Tribunal received the Applicant’s appeal against the decision of the Secretary-General who had accepted the unanimous conclusions and recommendations of the Joint Appeals Board (“JAB”) report and findings against the Applicant’s appeal.

Facts

3. The Applicant joined the United Nations Economic and Social Commission for Asia and the Pacific (“ESCAP”) on 20 November 1999 as a statistician on a fixed-term contract at the P-3 level. After several renewals of his contract, his employment ceased on 31 December 2005, when the contract was not renewed.

4. In the period 6 November 1999 to 31 March 2003 the Applicant had received three consecutive performance evaluations in which he was rated as “fully meets performance expectations”. However, for the period 1 April 2003 to 31 March 2004 he received an overall rating of “partially meets performance expectations”. He submitted a formal rebuttal of this rating and this was considered by the Rebuttal Panel over six days. The first Rebuttal Panel unanimously found that “the staff member’s performance could be described as having met some goals but not all goals of the work plan, which must be translated to rating [partially meets performance expectations]”, and concluded that there were no grounds upon which to recommend a change in rating.

5. For the period 1 April 2004 to 31 March 2005 the Applicant again received a rating of “partially meets performance expectations”. He submitted a formal rebuttal and the majority in the (second) Rebuttal Panel concluded, following a detailed consideration lasting four days, that “the [staff member], despite trying hard ... was not able to fully achieve Goal 1 ... [and that the] original appraisal rating for [the Applicant] should be maintained as “partially meets performance expectations”.

6. On 17 June 2005, a memorandum to the Executive Secretary of ESCAP indicated that the Applicant’s first and second reporting officers did not wish to recommend a further extension of appointment but that there should be a final short extension of three months to allow for the rebuttal process to be completed.

7. On 21 December 2005, the Applicant submitted a request for administrative review against the decision not to grant him a further extension of appointment. His fixed-term contract expired without being renewed on 31 December 2005.

8. On 22 March 2006, the Applicant was informed that his request for administrative review was unsuccessful.

9. By a memorandum dated 23 May 2006, the Applicant submitted his statement of appeal to the JAB.

Contentions of the parties

10. The Applicant’s principal contention is that the non-renewal of his contract was “tainted by lack of due process and arbitrariness” in that he had good PAS ratings prior to June 2003, when a new supervisor arrived in the section. The Applicant attacked the new supervisor’s ratings as inaccurate and containing misrepresentations and false testimony. He also criticized the Rebuttal Panels’ conclusions, in reviewing the ratings, as inaccurate. It is clear from para. 2 of the executive summary to his appeal to the former United Nations Administrative Tribunal that it is a central platform of his case that the misrepresentation of facts to the Rebuttal Panels by people interviewed by the Panels during the rebuttal processes

constituted a denial of due process. Such a formulation of his case indicates a recognition on the Applicant's part that the JAB did not have jurisdiction to examine issues of substance which are matters for the PAS process and, absent a denial of due process, the JAB could not interfere by substituting its assessment of the Applicant's performance for the assessment of the Rebuttal Panels. He argued that the issues related to a lack of due process as well as the substance of the PAS ratings and that therefore, the JAB should have made a recommendation in his favour and the Secretary-General ought in consequence to have set aside the decision and should have directed that the Applicant be retroactively reinstated and be awarded two years' net base salary as compensation.

11. The Respondent's contentions are that the Applicant's appointment did not carry a legal expectancy of renewal and that his poor performance justified non-renewal. The Respondent added that it was not open to the JAB to review substantive questions regarding performance appraisal that had gone through a rebuttal process, and that the JAB may only consider whether or not the Applicant was accorded due process.

12. To this extent both sides are in agreement that the core issue is whether the Applicant was accorded his due process rights during the rebuttal process and whether, in consequence thereof, the decision not to renew his contract, based on erroneous and unfair performance ratings, was fundamentally flawed and in breach of his fundamental right to fair and unbiased treatment. It should be noted that any such treatment would be inconsistent with the principles enshrined in the Charter of the United Nations.

Outcome of JAB and appeal

13. In its Report No. 1895 the JAB Panel concluded that the Applicant had received the benefit of due process in his two rebuttal procedures and that there was insufficient evidence to conclude that the decision not to renew the Applicant's contract was arbitrary or that it violated his rights as a staff member. However, the

Panel recognized that, given his previous satisfactory performance ratings, the two most recent PAS reports did raise questions to be answered. Having considered this matter the JAB Panel concluded that, in the absence of any indication that the rebuttal process was tainted in some way, it could be assumed that both reporting officers examined his performance on merit, but that there was a valid difference of view on the part of the two supervisors in evaluating the Applicant's work. A question arose as to the procedure for the 2005–2006 PAS evaluation. However, since that aspect of the claim was not receivable the Panel decided that it was not appropriate to express a view on the disagreements surrounding that PAS evaluation. The Panel confined itself to considering the 2003–2004 and 2004–2005 PAS evaluations which were fundamental in the decision not to renew the Applicant's appointment. The JAB Panel concluded that there was adequate evidence which emerged in the course of the rebuttal processes to enable the Panel members to consider the question whether there was any material irregularity or lack of due process. The JAB Panel decided that the Applicant was accorded his rights to due process and therefore to make no recommendation in relation to his appeal to the JAB.

14. By a letter dated 20 August 2007, from the Under-Secretary-General, Department of Management, the Applicant was informed that the Secretary-General, having examined his case in the light of the JAB Report and all the circumstances of the case, and noting that his appointment did not carry any expectancy of renewal, and having noted the JAB's conclusions and recommendations, decided to take no further action in respect of the appeal.

15. On 9 June 2008, the Applicant filed his appeal before the former United Nations Administrative Tribunal. That Tribunal was unable to consider his appeal when it was abolished on 31 December 2009. On 1 January 2010 the case was transferred to the United Nations Dispute Tribunal in accordance with paragraph 45, of General Assembly resolution 63/253 (Administration of justice at the United Nations) of 24 December 2008, and section 4 of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice).

16. On 17 May 2010, in response to Order No. 77 (NY/2010), the parties indicated that they had no further material to put before the Dispute Tribunal and it was their view that the merits of the case could be determined by the Tribunal on the basis of the documents before it.

Applicable legal principles

17. Former staff rule 104.12(b)(ii) states, as can also be implied from former staff rule 109.7, that “[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”.

18. Section 15.4 of ST/AI/2002/3 (Performance Appraisal System) provides that “the rating resulting from an appraisal that has not been rebutted, or from the rebuttal process, shall not be subject to further appeal”.

19. The Dispute Tribunal has held that all decisions should be made after full and fair consideration and that an expectancy of renewal may be created by countervailing circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration. For example, in *Ahmed* UNDT/2010/161, the Tribunal held that:

8. Whether a decision not to renew a fixed-term appointment was motivated by extraneous factors, such as bad faith or retaliation, is to be decided under the relevant staff rules and regulations. Former staff rule staff rule 104.12(b)(ii) clearly stipulates, as can also be implied from former staff rule 109.7, that no extension of a fixed-term appointment can be expected beyond its set term.

9. The question has been considered in a number of appeals before the former Administrative Tribunal, whose decisions, even though they are not binding upon the Dispute Tribunal, are informative in establishing the consistent application of legal principles in the context of the Organization’s relationship with staff. Whilst a fixed-term appointment does not of itself carry any expectancy of renewal, the Administrative Tribunal has laid down the principle that it was an implied term in the conditions of employment of staff members that all decisions, including a decision not to renew an appointment, should be given full and fair consideration. The former Administrative Tribunal

has also upheld the principle that an expectancy of renewal may be created by countervailing circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration. These principles have subsequently been affirmed by the Dispute Tribunal in a number of cases.

20. The Dispute Tribunal has, in a number of cases, applied the principle as stated by the former UN Administrative Tribunal, that when the Administration chooses to give reasons for its decision not to renew a fixed-term contract, the validity and acceptability of these reasons are subject to judicial review (see for example *Abdallah* UNDT/2010/049 and *Larkin* UNDT/2010/108, referring to Judgment No. 1191 *Aertgeerts* (2004) and Judgment No. 1003, *Shasha'a* (2001)).

Consideration

21. The questions to be considered in this case are:

a. Whether there is a sufficiency of evidence to show that there was a material irregularity in the proceedings, or irrationality in the conclusions, of the two Rebuttal Panels which considered the Applicant's appeal against the adverse performance ratings, and the proceedings before the JAB Panel; and

b. Was the Secretary-General justified in his decision to take no action on receipt of the Report of the JAB Panel which concluded unanimously that the Applicant "received the benefit of due process in his two rebuttals, and that therefore there was insufficient evidence on which to conclude that the decision not to renew his appointment was arbitrary or violated his rights".

22. The Applicant bears the burden of showing, on the balance of probabilities, that the proceedings before the Rebuttal Panels and the JAB Panel were tainted by material irregularities, bias, prejudice or other impermissible considerations, including the question whether the conclusions reached by the Panels are, or reasonably appear to be, irrational. It should be observed that the Applicant was given a full opportunity of putting forward any evidence or argument before the Rebuttal

Panels and the JAB Panel. The jurisprudence of the former UN Administrative Tribunal and several judgments of UNDT and UNAT have affirmed the well established principle that it is not the function of the Tribunal to substitute its judgment for that of a properly constituted assessment panel, including on issues concerning the performance of staff members. The internal mechanisms are designed to perform that review function. However, it is right and proper for the Tribunal to intervene if it considers that there was a lack of due process in the manner in which the internal processes operated, including, as noted above, the question of the apparent irrationality of the conclusions reached.

23. Having examined the documents and submissions of the parties the Tribunal finds that there is no evidence to show that there was a material irregularity in the proceedings before either Rebuttal Panel or the JAB. The Applicant was given the opportunity to put his contentions in writing and to be heard before the Panels to explain his arguments regarding why the performance ratings were not warranted. The Rebuttal Panels also met with other witnesses and reviewed documentation relevant to the PAS evaluations, in accordance with sec. 15 of ST/AI/2002/3. The fact that the Rebuttal Panels, and, ultimately the JAB, found that the evidence given to justify the management decisions, which was contrary to the Applicant's, as more persuasive than his, is not of itself an indication of irregularity.

24. The Tribunal is also not convinced by the Applicant's arguments that the conclusions of the Rebuttal Panels or the JAB were manifestly unreasonable or irrational. The first Rebuttal Panel's report indicates that the Panel took into account the Applicant's goals and found that there was "no hard evidence" of the performance of certain actions required of the Applicant. The second Rebuttal Panel's report also indicates that it took the Applicant's goals into account, but found that the success criteria of a certain task in one of the Applicant's goals were not met. The Applicant disagrees with both of these conclusions, but has not been able to define to the Tribunal how these conclusions were irrational, such that no reasonable Rebuttal

Panel could have come to such conclusions. The same applies as regards the conclusion contained in the JAB Report.

25. As the initial decision not to renew the Applicant's appointment was made on 17 June 2005, one and a half months after the end of the 2004–2005 PAS evaluation cycle, the Tribunal does not consider that it is relevant to examine the Applicant's contentions regarding the finalization of the 2005–2006 PAS, in the context of the non-renewal decision.

26. The Applicant has not discharged the burden of proof showing that his rights to due process had been breached. Therefore, the Secretary-General acted properly within his broad discretion in deciding to take no action in relation to the Applicant's appeal against the non-renewal of his fixed-term appointment.

Conclusion

27. The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 11th day of August 2011

Entered in the Register on this 11th day of August 2011

(Signed)

Santiago Villalpando, Registrar, New York