



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/014

Judgment No.: UNDT/2011/150

Date: 25 August 2011

Original: English

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**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

GEHR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Ingeborg Daamen, UNOV/UNODC

## **Introduction**

1. The Applicant challenges the decision to limit the length of his contract extension to less than a year.
2. He asks the Tribunal to order the rescission of the contested decision and claims compensation for the violation of his due process rights and the moral injury he suffered as a result of retaliation on the part of his supervisors. He also claims compensation for the failure to protect him against the “unfair implementation of [the] [S]taff [R]ules and [R]egulations against [him]”.

## **Facts**

3. The Applicant joined the United Nations Office on Drugs and Crime (“UNODC”) in 2002. With effect from 1 November 2007, he was appointed under a fixed-term appointment, under the 100 series of the Staff Rules, to the post of Senior Terrorism Prevention Officer, at level P-5, in the Terrorism Prevention Branch (“TPB”), within the Division of Treaty Affairs (“DTA”).
4. By two “Messages of the Day” respectively dated 1 April and 18 August 2008, the Chief of the Human Resources Management Service (“HRMS”) informed UNODC staff of the decision of the Director of the Division for Management to implement changes in policies relating to appointment extensions. Those changes included the alignment of the expiry dates of fixed-term appointments with the last day of the calendar year (“alignment policy”), and the issuance of letters of appointments only for initial appointments, each subsequent extension being reflected solely through a personnel action form (“personnel action policy”).
5. With effect from 1 November 2008, the Applicant’s appointment was extended for a year until 31 October 2009. It was subsequently extended for three months until 31 January 2010.
6. With effect from 1 February 2010, the Applicant’s appointment was extended for a year, until 31 January 2011.

7. On 21 December 2010, the Chief of TPB wrote to the Applicant, stating her intention to further extend his appointment, though she explained that she could not at that stage confirm the duration of the proposed extension.

8. By an email of 12 January 2011 from the Officer-in-Charge of DTA, the Applicant was informed that his appointment would be extended for 11 months, until 31 December 2011, “to bring its time frame into alignment with UNODC’s policy that contracts should normally expire at the end of the calendar year”.

9. On 18 January 2011, the Applicant sent an email to the Officer-in-Charge of DTA, asking for an extension of his appointment until at least 31 January 2012.

10. On 25 January 2011, he submitted a request for management evaluation of the decision to renew his fixed-term appointment for only 11 months.

11. By a letter dated 11 March 2011, the Applicant was notified of the Secretary-General’s decision to uphold the decision to renew his appointment until 31 December 2011.

12. On 12 March 2011, the Applicant filed his application with the Tribunal, challenging the decision “[t]o renew [his] appointment for only 11 months”.

13. An oral hearing was held on 12 May 2011, to which the Applicant and Counsel for the Respondent attended by videoconference.

#### **Parties’ contentions**

14. The Applicant’s principal contentions are:

a. Staff rule 4.13 provides that a fixed-term appointment may be granted for a period of one year or more. This is so irrespective of the fact that the appointment is an initial one or is a renewal;

b. The alignment policy was not properly issued and implemented. The “Messages of the Day” of 1 April and 18 August 2008 do not qualify as formal “instructions issued by the Secretary-General” within the meaning of provisional staff rule 1.2(a). According to the Secretary-General’s

bulletin ST/SGB/1997/1 (Procedures for the promulgation of administrative issuances), Staff Regulations and Rules should be implemented through the promulgation of administrative instructions, not “Messages of the Day”. Further, the “Guidelines on the distribution of information in the United Nations Office at Vienna and the United Nations Office on Drugs and Crime” issued on 14 December 2004 only regulate the electronic distribution of messages. Additionally, the “Messages of the Day” of 1 April and 18 August 2008 reflect decisions made by the Director of the Division for Management, who had no authority to shorten the duration of fixed-term appointments to less than 12 months or to issue the alignment policy. Section 8.2 of the Secretary-General’s bulletin ST/SGB/2004/6 (Organization of the United Nations Office on Drugs and Crime) does not provide for any delegation of authority but simply describes the core functions of the Division for Management. Moreover, the “Messages of the Day” erroneously refer to “appointment extensions” whereas, in the Staff Rules, the term “extension” is mentioned only in relation to temporary appointments and the term “renewal” is used in connection with fixed-term appointments. Any ambiguity in the use of these terms in the Staff Rules should be construed against the Administration. Unlike for the renewal, the extension of an appointment does not create a new appointment. Lastly, the fact that the “Messages of the Day” reflect decisions taken on the basis of the former Staff Rules, which have been abolished with effect from 1 July 2009, creates legal uncertainty;

c. The alignment policy was not applied to the Applicant’s previous appointments whereas the personnel action policy has been applied to him since October 2009. This demonstrates a “capricious” implementation by the Administration of its own rules;

d. The Chief of TPB and the Officer-in-Charge of DTA did not consult the Applicant concerning the alignment of his appointment;

e. The decision to extend the Applicant's appointment for only 11 months is based on improper motives and tainted with arbitrariness. The "Messages of the day" do not require contracts to be shortened to less than 12 months. The main reason for the shortening of his appointment is retaliation for his having filed two applications with the Tribunal and reported misconduct of the UNODC Executive Director. Furthermore, in his email of 12 January 2011, the Officer-in-Charge of DTA made remarks about the Applicant's purported unsatisfactory performance, which shows that he in fact based the contested decision on his performance although the latter had not then been properly assessed for the period from 1 April 2010 until 31 March 2011;

f. The decision to extend the Applicant's appointment for only 11 months is also discriminatory. Other UNODC staff members had their appointments extended for more than a year on the basis of the alignment policy.

15. The Respondent's principal contentions are:

a. The decision to renew the Applicant's appointment for 11 months was lawful and constituted a proper exercise of discretion. Staff rule 4.13(a) refers to the granting of initial fixed-term appointments and staff rule 4.13(b) clearly states that such appointments may be renewed for any period up to five years. Accordingly, staff members have no right to have their appointment renewed for not less than 12 months and there is no requirement that they should give their approval prior to such renewal ;

b. The terms "extension" and "renewal" have been used interchangeably by the Administration. This is evidenced by the fact that electronic workflow applications and the management information system used by UNODC solely refer to "extensions";

c. The contested decision was not improperly motivated. It was taken in light of the alignment policy established by the then Director of the Division for Management on the basis of the authority conferred on him

by ST/SGB/2004/6. The policy aimed particularly at simplifying procedures related to appointments of staff recruited under the former Staff Rules. It was conveyed to staff by means of the “Messages of the Day” of 1 April and 18 August 2008, in line with the “Guidelines on the distribution of information in the United Nations Office at Vienna and the United Nations Office on Drugs and Crime”;

d. The decision to renew the Applicant’s appointment for 11 months was not based on unsatisfactory performance. On the contrary, a renewal was recommended for the maximum time allowed in spite of occasional problems with his performance;

e. The decision was not motivated by retaliation; it was taken pursuant to the established policy and based on the availability of funds. Further, the Applicant availed himself of the existing procedures for reporting retaliation;

f. The Applicant’s appointment for the period from 1 November 2007 to 31 October 2008 was funded through general purpose funds. The alignment policy could not be applied to the Applicant when that appointment came to its expiry as it would have either entailed an extension for two months until 31 December 2008, which would have been at odds with the spirit of the change in policy, or for 14 months until 31 December 2009, which was impossible because the funding was available for 12 months only;

g. As of 1 January 2009, the Applicant’s post was funded by an extra-budgetary source associated with a specific project and was thus dependent on the duration of the project and the availability of funds. Subsequently, he received a three-month appointment until 31 January 2010 only due to the precarious financial situation of TPB. He was then given a one-year renewal until 31 January 2011 and the alignment policy was not applied to him in order to provide him with a “sufficient platform to plan and carry” specific tasks;

h. A renewal of the Applicant's appointment until 31 December 2012 was not possible because, unlike other UNODC staff members, the funding of his post originated from an extra-budgetary source, whose availability was only confirmed until 31 December 2011. Besides, out of the ten fixed-term appointments funded through extra-budgetary sources, seven will expire on 31 December 2011, including the Applicant's, and three will expire on 31 March 2012, which coincides with the end of the financial year and the deadline for the implementation of some TPB donors' projects;

i. Pursuant to the policy set out in the "Message of the Day" of 1 April 2008, a personnel action form was issued in respect of the Applicant's extension covering the period from 1 November 2008 to 31 October 2009. With a view to ensuring that each staff member would hold a valid contract under the new Staff Rules, with effect from 1 July 2009 it was decided that staff members had to sign a letter of appointment for their next extension. In line with this new policy, the Applicant was issued a letter of appointment covering the period from 1 November 2009 to 31 January 2010, while, at the same time, a personnel action form was issued to record the extension of his appointment. His subsequent contract extensions were processed through personnel action forms.

### **Issues**

16. At the outset, it is important to clarify the issues that are in contention in this matter. Firstly, there is the issue of whether fixed-term appointments should be renewed for at least one year. Secondly, there is the matter of whether the alignment policy was properly issued and, if so, whether it had been fairly implemented with respect to the Applicant. The Tribunal will address these issues in turn.

## **Consideration**

### *Length of fixed-term appointments*

17. At the time when the impugned decision was taken, fixed-term appointments were governed in particular by staff rule 4.13(a) and (b) (ST/SGB/2011/1), which provided:

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time...

(b) A fixed-term appointment may be renewed for any period up to five years at a time.

18. The Tribunal considers that the wording of staff rule 4.13(b) makes it clear that the renewal of a fixed-term appointment may be granted for any period deemed appropriate, provided that each renewal does not exceed five years. It was thus open to the Administration to extend the Applicant's appointment for less than a year.

19. The Applicant submits that the wording of the Staff Rules suggests that a distinction should be drawn between the terms "extension" and "renewal".

20. It is true that staff rule 4.13(b) refers to the "renewal" of fixed-term appointments whereas staff rule 4.12(b), which deals with temporary appointments, refers to their "extension". However, the Tribunal notes that staff rule 4.12(c) also uses the term "renewal" in relation to temporary appointments ("A temporary appointment does not carry any expectancy, legal or otherwise, of renewal"). This, in the view of the Tribunal, shows an undifferentiated use of the terms "renewal" and "extension" in the Staff Rules. Therefore, the wording of the relevant provisions does not support the Applicant's contention.

### *Issuance of the alignment policy*

21. Concerning the Applicant's contention that the Director of the Division for Management did not have the authority to issue the alignment policy, the Tribunal recalls that a delegation should not be guessed at or presumed (see *Amar* UNDT/2011/040).



22. It further notes that sections 2.5 and 8.2 of the Secretary-General's bulletin ST/SGB/2004/6 of 15 March 2004 (Organization of the United Nations Office on Drugs and Crime) state:

2.5. The Office is headed by an Executive Director, at the Under-Secretary-General level, who also serves as the Director-General of the United Nations Office at Vienna. The Executive Director and the officials in charge of each organizational unit, in addition to the specific functions set out in the present bulletin, perform the general functions applicable to their positions, as set out in Secretary-General's bulletin ST/SGB/1997/5.

...

8.2 The core functions of the Division [for Management] are as follows:

...

(d) Developing and overseeing the implementation of human resources policies and managing the human resources of the United Nations Secretariat entities in Vienna, including policy direction, guidance, supervision and implementation of personnel policies;

23. In addition, the Secretary-General's bulletin ST/SGB/1997/5 of 12 September 1997 (Organization of the Secretariat of the United Nations), to which section 2.5 of ST/SGB/2004/6 refers, states:

#### Section 5

##### Heads of departments/offices

The functions of a head of department/office or other major organizational unit are as follows:

...

(e) Carrying out management activities or making managerial decisions to ensure the effective, efficient and economic operation of the programme concerned, including appropriate arrangements for programme performance monitoring and for evaluation;

...

#### Section 7

##### Executive offices/administrative units

An executive office/administrative unit assists the head of the department/office, and programme managers and staff members, in carrying out the financial, personnel and general administrative responsibilities delegated by the Under-Secretary-General for Management, including the following:

...

(c) Providing the support needed by the head of department/office and programme managers in carrying out their responsibilities under the Staff Regulations and Rules and related administrative instructions in filling vacancies, promoting staff and other staff functions;

...

(g) Carrying out other official administrative duties as assigned by the head of the department/office.

24. It results from the foregoing that, as part of his mandate as set out in sections 7 of ST/SGB/1997/5 and 8.2 of ST/SGB/2004/6, the Director of the UNODC Division for Management did have the authority to decide and adopt the alignment policy, for the purpose of “managing the human resources of the United Nations Secretariat entities in Vienna”.

25. The purpose of the alignment policy, as reflected in the “Message of the day” of 1 April 2008, is to “streamline contractual arrangements and related administrative processing”. In particular, the policy intends to:

... simplify the handling of the key personnel actions related to staff appointments, reassignments, contract extensions and separations, and allow HRMS to ensure a more effective delivery of services. [It] will also facilitate the overall approach to maintenance of the HR databases, (Integrated Management Information System and other decentralized databases), ensure that funding arrangements that affect staff contracts are assured on a timely basis, and personnel-related decisions and actions on contract extensions are taken in good time.

26. It is the view of this Tribunal that the alignment policy constitutes an organizational measure aimed at simplifying administrative procedures in relation to staff appointments. As a result of the Secretary-General’s broad discretion in relation to decisions on internal management, this measure is subject to limited review by the Tribunal.

27. Insofar as the Applicant submits that there is legal uncertainty because the decisions reflected in the “Messages of the Day” were taken on the basis of the former Staff Rules which have been abolished with effect from 1 July 2009, his plea must also fail.

28. The Tribunal observes in this respect that none of the successive sets of Staff Rules which had governed the Applicant's appointments since the adoption of the alignment policy prevented the renewal of fixed-term appointments for a period of less than a year. In the Secretary-General's bulletin ST/SGB/2002/1 of 1 January 2002, staff rule 104.12(b)(i) stated that a fixed-term appointment could be granted "for a period not exceeding five years to persons recruited for service of a prescribed duration" while provisional staff rule 4.13(a) and (b) as set out in the Secretary-General's bulletin ST/SGB/2009/7 of 16 June 2009 provided that a fixed-term appointment could be granted "for a period of one year or more, up to five years at a time" and that such appointment could be "renewed for any period up to five years at a time". Thus, none of these provisions imposed a minimum duration for the renewal of fixed-term appointments or created legal uncertainty as to the validity of an extension of less than a year.

29. Lastly, while the Tribunal observes that section 1.2 of the Secretary-General's bulletin ST/SGB/1997/1 (Procedures for the promulgation of administrative issuances) provides that "policies ... intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative instructions", it stresses that the alignment policy was decided and adopted by the Director of the Division for Management under delegated authority, and that it was not intended for application throughout the United Nations Secretariat and only concerned the UNODC staff.

30. The Tribunal further observes that the "Guidelines on the distribution of information in the United Nations Office at Vienna and the United Nations Office on Drugs and Crime" issued by the Division for Management on 14 December 2004 state:

Messages of the day ... will be used to convey information that is intended for all, or large groups of ...UNODC staff...

31. Therefore, the Director of the Division for Management could very well issue the alignment policy by way of "Messages of the day" in line with the above provisions.

*Implementation of the alignment policy*

32. The Applicant submits that the alignment policy was applied in an inconsistent, arbitrary and discriminatory manner. In so doing, he contests the decision to renew his appointment for 11 months only which was taken on the basis of the alignment policy.

33. The “Message of the day” of 1 April 2008 states:

[T]he Director, Division for Management, has decided to establish the following new procedures for appointments administered by HRMS:

- Alignment of all contract expiry dates to 31 December for staff members recruited under the 100 series of the Staff Rules.

...

- Discontinuation of Letters of Appointment for contract extensions under the 100 and 200 series of the Staff Rules.

...

HRMS will implement the above changes effective Tuesday, 1 April 2008, i.e. all requests related to appointments and extensions received from that date onwards will be subject to the above.

**1. Application of alignment of contract expiry dates under 100 series ... appointments:**

All contract end dates under the 100 series of [the] Staff Rules, will be aligned to expire on 31 December of a particular year. Some examples of how this would work are provided below:

...

**Appointment extensions:**

- Appointments extensions, funded by Regular Budget or General Purpose Funds, under the 100 series of the Staff Rules approved for two-years will be issued for 2 years + through to 31 December. For example, a two-year extension effective Tuesday, 1 April 2008 will be for duration of 2 years 9 months through to 31 December 2010. If the extension is approved for one year, the duration will be for 1 year 9 months until 31 December 2009, as indicated above.

Duration of extension of appointments under the 200 series of the Staff Rules will be subject to availability of funds and the requirements of the project. However, as far as possible, extensions should be through to 31 December.

34. In addition, the “Message of the day” issued on 18 August 2008, whose purpose is “to clarify the decision of the Director, Division for Management, regarding the alignment of contract dates to 31 December, and the duration of contract extensions”, provides:

Fixed-term appointments ... expiring after Friday, 31 October 2008 may be recommended for renewals through to Friday, 31 December 2010. Please note that both are maximal rather than normal extensions and subject to funding availability and satisfactory performance.

35. The Applicant’s initial fixed-term appointment under the 100 series of the Staff Rules expired on 31 October 2008 and was extended for one year, from 1 November 2008 to 31 October 2009. It was then extended twice, for three months from 1 November 2009, and for further 12 months from 1 February 2010. With effect from 1 February 2011, the Applicant’s appointment was extended for 11 months.

36. It follows from the “Messages of the day” that the Applicant’s appointment extension should have been subject to the alignment policy as early as 1 November 2008, unless the funding of his post did not allow so. The Respondent contends that, because there was a change in the funding source of the Applicant’s post, the alignment policy could not then be applied to him.

37. Even assuming that the Applicant could have benefited from the application of the alignment policy as from 1 November 2008, he did not challenge the decision not to apply such policy to his contract extension at the time and cannot dispute it in the framework of this application. Further, the fact that the Administration could have mistakenly granted him an extension which contravened the alignment policy does not give him any right to have his contract subsequently extended in further breach of the policy (see, to this effect, *Eid* UNDT/2010/106).

38. As to his allegation of unequal treatment, the Respondent has explained that, out of the ten fixed-term appointments funded through extra-budgetary resources, only three would expire on 31 March 2012 to coincide with the end of the financial year and the deadline for TPB donors’ projects.

39. The Tribunal endorses the view that “[t]he principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike” (see, *inter alia*, Judgment of the former Administrative Tribunal No. 268, *Mendez* (1981)). In the instant case, the Tribunal finds that the Respondent provided sufficient reasons to explain the differences in contractual situations and the Applicant has failed to show that the application of the alignment policy to his case was unfair compared to other staff members who also received a contract extension until 31 December 2011. Consequently, he has failed to show that the decision to extend his appointment for 11 months in accordance with the alignment policy was tainted by improper motives.

### **Conclusion**

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

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 25<sup>th</sup> day of August 2011

Entered in the Register on this 25<sup>th</sup> day of August 2011

*(Signed)*

Víctor Rodríguez, Registrar, Geneva