



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/045/
UNAT/1716
Judgment No.: UNDT/2011/164
Date: 22 September 2011
Original: English

Before: Judge Coral Shaw
Registry: New York
Registrar: Santiago Villalpando

AMIT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bernard Adams, OSLA

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. The Applicant appeals against the decision of the Respondent not to renew his fixed-term contract when it expired on 30 September 2006. He alleges that he was discriminated against and suffered retaliation because he had been a whistleblower. The Respondent says that the reason for the non-renewal of the Applicant's contract was his poor performance.

2. The Applicant appealed the decision to the Joint Appeals Board ("JAB") which found by a majority decision that because of procedural defects in the assessment of his performance he should be compensated in the amount of one month's net base salary at the time of separation. This recommendation was accepted by the Secretary-General. The Applicant appealed to the former United Nations Administrative Tribunal against this decision, seeking reinstatement to the post he previously occupied, six months' net base salary compensation for denial of due process and one year's net base salary as compensation for the denial of due process and unfair treatment.

3. The Applicant's case was transferred from the former United Nations Administrative Tribunal to the Dispute Tribunal on 1 January 2010.

4. The parties have agreed to adopt the facts as recorded in the JAB report and that there are no further facts to be established or issues to be brought to the attention of the Tribunal. They did not wish to have an oral hearing of the case and it is thus decided on the papers.

Issues

5. The principle issue is whether the administrative decision not to renew the Applicant's fixed-term appointment was lawful. The lawfulness of the decision has been challenged by the Applicant on a number of grounds. To decide the lawfulness of the decision it is necessary to consider the following:

- a. Was the Applicant discriminated against?; and
- b. Did the Respondent evaluate the performance of the Applicant in a fair and lawful manner?

6. The Applicant has raised two further issues in this appeal: the method of his recruitment to his fixed-term contract and the procedure adopted by the Respondent when it changed the functions of his post.

7. These latter issues cannot be considered by the Tribunal as substantive claims as they are outside the ambit of the Applicant's original appeal. He neither sought administrative review of the recruitment process nor of the changes to his functions. Under former staff rule 111.2(a), a staff member wishing to appeal an administrative decision should, as a first step, request an administrative review of the decision. Similarly, under article 8 of the Tribunal's Statute, an application is only receivable if the applicant has previously submitted the contested administrative decision to management evaluation, where required. The recruitment process to a consultancy position is, in any event, not within the jurisdiction of the Dispute Tribunal.

Facts

8. As agreed by the parties, these facts are almost exclusively taken from the JAB report.

9. The Applicant initially provided the Tribunal with a document entitled United Nations Population Fund ("UNFPA") Performance Appraisal and Development ("PAD") system which was applicable as of 24 January 2008. This document post-dates the period of employment of the Applicant which ended in 2006. The Tribunal sought and obtained from the Respondent a copy of the UNFPA Policies and Procedures of the Policies and Procedures Manual: Human Resources, dated May 2005 ("UNFPA Personnel Policy"), which applied for the PAD cycle for 2004. Any differences between the two documents are irrelevant for the purposes of this decision and do not affect the outcome.

10. In November 2004, UNFPA advertised a post locally. Following the withdrawal of the successful applicant for the post, the Applicant was considered for and accepted the functions of the post on a Special Service Agreement (“SSA”) from April to September 2005. On 1 October 2005, he was appointed on a fixed-term, 100-series contract for one year in the National Officer (“NO”) category, NO-B/I (ICS-9) level.

11. The Applicant alleges that the SSA post was originally advertised with a vacancy number with the intent to hire someone on a fixed-term contract. It is not necessary for the Tribunal to evaluate this aspect of the Applicant’s claim as he accepted the offer and worked, apparently without complaint, for several months. Even if the recruitment process for the SSA post had been discriminatory against him as he has alleged (and there are no facts before the Tribunal to substantiate this claim), this was mitigated when he was offered and accepted the fixed-term contract.

12. In the course of the Applicant’s employment on the fixed-term contract, the Respondent took measures to assess his performance starting as early as 21 December 2005, when the Assistant Representative, UNFPA Bangladesh, generated a note for the record regarding the Applicant’s performance.

13. On 13 February 2006, the Assistant Representative wrote to the Applicant signalling concerns with his performance and personality. He gave some specific examples and set out four specific milestones to be achieved by the Applicant before 31 March 2006. The Respondent established what he termed a Review Committee comprising the Deputy Representative, the Assistant Representative and the Operations Manager of UNFPA Bangladesh to monitor the Applicant’s achievement of those milestones.

14. By 4 April 2006 the Review Committee reported to the Representative. It recommended that the Applicant’s probation (presumably imposed by the 13 February letter) be removed from 1 April 2006. It reported that the Applicant “has the potentials in delivering good results and should not only improve his work but

also his relations with his office colleagues and the stakeholders as well". The Applicant was notified of this review on 22 April 2006. In March 2006, the Applicant and his supervisors finalised a performance plan in a formal PAD format. He received an update on 22 May 2006.

15. On 27 September 2006, the members of the Review Committee were in attendance when the Applicant was informed that he had not achieved the requisites expected of him and that his contract would not be extended. A formal written performance evaluation of the Applicant was not completed at that stage.

16. The JAB did not narrate the circumstances of the Applicant's final days at work but two letters appended to the Applicant's appeal provide a record of what occurred.

17. On 28 September 2006, the Operations Manager wrote to the Applicant. Her letter recorded the discussion with him and his supervisor on 27 September 2006 at which he was verbally informed that his contract would not be extended beyond 30 September 2006.

18. A further letter dated 5 October 2006 from the interim Representative of UNFPA Bangladesh to the Applicant recorded that he and the Head of Human Resources had had a discussion with the Applicant and a member of the Ethics Committee on 4 October 2006. In that letter the Applicant was asked to hand over any pending work, all relevant documents and/or files and UNFPA properties to his supervisor by close of business on 5 October 2006.

19. In considering the Applicant's claim that he suffered retaliation because he was a whistleblower, the JAB panel considered tape recordings of conversations between the Applicant and others about allegations of financial fraud and other matters including the suggestion that an employee had been asked to make a complaint about the Applicant. The JAB panel noted that, apart from difficulties in establishing the authenticity of these recordings, they were made on 5 October 2006, i.e. after his contract had ended. There was no evidence that the Applicant had

reported misconduct prior to the end of his contract. No letters of complaint from colleagues against him had been sent to his supervisors. The Tribunal draws the inference from this evidence that any allegations of a whistleblowing nature made by the Applicant could not have influenced the Respondent's decisions about his performance as these predated the allegations. The Respondent could not have been influenced against the Applicant by improper complaints against him because no such complaints were received by the Respondent.

Applicant's submissions

20. In summary, the Applicant submits that the series of events by the Administration referred to above constituted irregular treatment and discrimination against him.

21. In addition, the Applicant alleges that the Respondent failed to comply with his legal obligations during the recruitment to the SSA and by denying him due process when the functions of his post were changed in an irregular manner. The Applicant alleges that his job functions were taken away from him without reclassification of the post and outside of the legal performance evaluation procedures for poor performance. He alleges that the performance evaluation process applied to him was irregular and, in particular, that he did not have recourse to rebuttal.

22. The Applicant submits that a strong indicator of discrimination is the timing of the discontinuation of this contract. His contract expired on 30 September 2006 and 1 October 2006 was the biggest religious day of the Hindu religious festival Durga Puja. He said that because of his situation he was unable to go to his home village for the festival. He was asked to leave his office immediately and not allowed to clean out his desk.

23. As an additional plea, the Applicant submits that the Respondent attempted to change the record during the JAB process by arguing that a letter sent to him on

23 January 2007 after his termination letter cured the departure from UNFPA procedure by omitting any reference to the non-renewal.

Respondent's submissions

24. The Respondent does not deny changing the Applicant's job functions but says this was done as part of the monitoring of his performance.

25. The Respondent alleges that the non-renewal of the Applicant's fixed-term appointment on the grounds of performance was justified on the facts and that the Applicant has been adequately and sufficiently compensated by payment of one month's salary by the Respondent after the JAB process for the Respondent's procedural errors in relation to the Applicant's performance evaluation. The failure to provide the Applicant with a formal rebuttal panel did not cause the Applicant to suffer financial loss.

26. The Respondent denies the non-renewal of the fixed-term contract was motivated by discrimination and says that the Applicant has failed to sustain the burden on him to prove such allegation. The Respondent also denies that other instances of alleged discrimination, such as the timing of the receipt of the non-renewal letter, the alleged request for submission of a complaint against the Applicant, the alleged changes to the functions of the Applicant's post and the alleged irregularities in the offer of consultancy rather than a fixed-term appointment, provide a foundation for allegations of discrimination.

27. The Respondent notes that the pleas in relation to the Applicant's application as an external candidate for a fixed-term position and his consultancy are not receivable because they are time-barred. Finally, the Respondent argues that the allegation about the Respondent's alleged attempt to change the record before the JAB is not receivable as this has not been previously submitted to a JAB (under the former system of internal justice) and, in any event, that the Respondent's actions were dealt with by the JAB and the Applicant suffered no unfairness or compensable loss.

Consideration

Discrimination

28. It is for the staff member who alleges discrimination to prove the allegation. The Applicant has failed to do this.

29. Before being advised of the non-renewal of his contract, the Applicant did not raise with the Respondent any issues that he now says amount to cumulative acts of discrimination. Even if the Applicant did make allegations of a whistleblowing nature, these were after the decision not to renew his contract and could not have influenced the Respondent's decisions about his performance as these predated the allegations.

30. The Respondent could not have been prejudiced against the Applicant by improper complaints against him because no such complaints were received by the Administration.

31. The facts about the changes to the Applicant's job functions were very sparse. The Applicant does not say when these occurred and there is no evidence that he requested a review of these changes.

32. The reasons given by the Respondent for changing the Applicant's job function are, in the context of ongoing performance management, a proper motivation and consistent with the efforts made to assess and improve the perceived weaknesses of the Applicant while he was employed. The changes to the Applicant's job functions were not discriminatory.

33. The fact that the non-renewal of the Applicant's contract occurred at the time of an important religious festival seems to have caused him extra distress but the event was coincidental with the expiry date of the contract and not the fault of the Respondent. The Applicant does not explain why the end of his contract prevented him from returning home. This was not a discriminatory act.

Performance evaluation

33. While the terms of fixed contracts give staff members no expectancy of renewal, where reasons are given for the non-renewal such as non-performance, these reasons may be reviewed and if found to have been flawed can affect the legitimacy of the non-renewal.

34. The Tribunal accepts that the Respondent took proactive steps to manage an employee whose performance was perceived to be deficient. However, the question for the Tribunal is whether those steps met the Respondent's obligations to the Applicant as the holder of a 100-series contract. These obligations were set out in the UNFPA Personnel Policy, as is the procedure on rebuttal and related remedies regarding PAD.

34. The UNFPA Personnel Policy provided a tool for staff development and performance appraisal as well as a rebuttal process. There were three parts to the policy:

- a. Before the session of the Management Review Group ("MRG") there was a phase designed to "engage staff and supervisors in a process of performance planning and development, feed back and appraisal". During this phase, a staff member who did not agree with rating or comments made about his or her performance could: firstly, raise these issues during a discussion about these matters; secondly, raise them with a higher-level supervisor and request assistance from the Learning and Career Management Branch of the Department of Human Resources; and lastly, record his or her disagreement in the comment section of the end of year appraisal form;
- b. Oversight by the MRG which would pay special attention to the staff member's comments on the performance appraisal form. Should the

staff member be dissatisfied with the MRG's comments, she or he could seek an explanation as to the grounds and determinations made by the MRG and, if necessary, submit a statement to his or her Head of Office;

- c. Should the staff member still be in disagreement, he or she could submit a written rebuttal statement within 30 days. If the rebuttal were found to be receivable it would be reviewed by a headquarters-based rebuttal panel. This panel had three months within which to complete the report. The report of the rebuttal panel would constitute the final decision on the case.

35. The Respondent followed this process to the stage of having a review of the appraisal by the MRG. On the facts available to the Tribunal, this review by what was referred to as the Review Committee appears to have been in compliance with the MRG part of the policy. The Review Committee made at least two reviews of the Applicant's performance. The first set out milestones and noted areas that needed improvement. The Applicant did not formally register disagreement with that and did not seek rebuttal of that determination.

36. The second review was conducted when the Applicant's contract renewal was in jeopardy and concluded only three days before the end of his contract. In breach of the UNFPA policy requirements, there was insufficient time for the Applicant to submit a written statement of agreement to be submitted to the Head of Office, wait for a reply and then, if in disagreement, submit a written rebuttal to be dealt with by a rebuttal panel.

37. The failure of the Respondent to give a written performance appraisal deprived the Applicant of the opportunity to have his disagreement with the evaluation to be considered by the Head of Office and, if necessary, a rebuttal panel. This is not a mere technicality. The failure is one of due process. UNFPA had adopted a procedure which was designed to allow a staff member dissatisfied by a

performance evaluation to take his or her disagreement to a higher authority where the matter could be considered by persons not directly involved in the day-to-day management of the staff member. It mandated a right to a fair and impartial consideration of adverse material against a staff member but this was not accorded to the Applicant.

Compensation

38. If the proper procedure had been followed by the Respondent, the Applicant would have had 30 days in which to have submitted a rebuttal of the performance appraisal. The rebuttal panel was required under the policy then in force to complete its review within three months after the referral. Until that four-month process had been completed the Respondent had no lawful basis not to renew the Applicant's fixed-term contract for reasons of performance.

39. Pursuant to art. 10.5(b) of the Tribunal's Statute, compensation is set at four months' net base salary less the one month's salary the Applicant has already received in line with the recommendation of the JAB.

Conclusion

40. The Tribunal finds that the Respondent did not discriminate against the Applicant when he decided not to renew his fixed-term contract.

41. The Tribunal further finds that the Respondent did not follow his own process and therefore did not evaluate the performance of the Applicant in a fair and lawful manner.

42. The Applicant is entitled to compensation.

The Tribunal therefore ORDERS

43. The Respondent is to pay the Applicant compensation equivalent to three months' net base salary as at the date of his separation.

44. This payment should be made within sixty calendar days of the date this judgment becomes executable, failing which interest is to accrue to the date of payment at the US Prime Rate applicable as at the date of expiry of this period. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until date of payment.

45. All other pleas are rejected.

(signed)

Judge Coral Shaw

Dated this 22nd day of September 2011

Entered in the Register on this 22nd day of September 2011

(signed)

Santiago Villalpando, Registrar, New York