



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/001/
UNAT/1563
Judgment No.: UNDT/2011/210
Date: 9 December 2011
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

PHILIPPI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Natalie Boucly, UNDP

Introduction

1. On 11 September 2007, the former United Nations Administrative Tribunal received Ms. Philippi's application appealing against the decision by the United Nations Development Program ("UNDP") not to renew her fixed-term appointment as the Resident Representative in Chile.

2. In presenting her application, the Applicant raised a preliminary issue, requesting the Tribunal to order the production of two documents. The first document was a three-page summary from Ms. Françoise Noquet, the then Senior Legal Adviser, Office of Legal and Procurement Support, UNDP. The second document was an e-mail from Mr. Brian Gleeson, the then Director, Office of Human Resources, UNDP. These documents were sent to the Applicant unsolicited and without an explanation. The Applicant had previously sent these documents to the Joint Appeals Board ("JAB"). The Respondent objected to the production of these documents on the grounds that they were a confidential, attorney-client work product to which privilege was attached. The JAB refused to admit those documents into evidence.

3. The former United Nations Administrative Tribunal did not consider this case before its abolition on 30 June 2009. The case was transferred to the Dispute Tribunal on 1 January 2010. These documents were the subject of a renewed application by the Applicant. By Order No. 224 (NY/2011) of 27 September 2011, the Tribunal ruled against admitting these documents and issued administrative instructions to ensure that the contents of the document would not be seen or considered in determining the substantive issues in the case. The Applicant asked the Tribunal to reconsider its ruling. The Tribunal did so and confirmed its earlier decision, reminding the Applicant that the reasons for ruling against the admissibility of those documents were fully explained at the case management hearing and subsequently in Order number No. 224 (NY/2011).

The claim

4. The principal claim of the Applicant is that the decision of the Respondent not to renew her appointment after a single term of two years was unlawful. She requested an order for reinstatement, retroactive to 5 January 2006, either in Chile or another duty station with payment of full salary, allowances and benefits for the five-year period which she was initially offered, less any emoluments received in that period. She also requested that any damaging material in her personnel file should be expunged.

Issues

5. The legal issues in this case are:
- a. Did the Applicant have a legally enforceable expectation of renewal of her fixed-term appointment?
 - b. If she did, would that expectation extend to a further period of one or more years, and if so, how many?
 - c. Was the decision not to renew the Applicant's contract arrived at as a result of a denial of due process?
 - d. If the application succeeds, what is the appropriate compensation to be awarded to the Applicant?

Law

6. It is settled law that the terms and conditions of employment of the staff member are not limited to those set out in writing. They may be expressed or implied, and may be gathered from correspondence and surrounding facts and circumstances, see the former United Nations Administrative Tribunal Judgment No. 142, *Bhattacharyya* (1971).

7. Fixed-term appointments do not carry any automatic right of renewal. However, the specific facts and circumstances of a case may create a legal expectancy of renewal, producing rights for the staff member concerned. Staff members serving under fixed-term contracts have no contractual right to renewal of their contracts and their employment ceases automatically without prior notice on the date of expiry of the fixed-term contract unless, of course, there are, in the circumstances of the particular case, what have been described as “countervailing circumstances”. Such circumstances may include an abuse of management discretion or an express promise by the administration, thereby creating a legal expectancy that the appointment will be extended (see former United Nations Administrative Tribunal Judgment No. 885, *Handelsman* (1998) and Judgment No. 1170, *Lejeune* (2004)).

8. With respect to the allegation that the decision was arbitrary, or that there were extraneous motives, the jurisprudence of the former United Nations Administrative Tribunal and of the current United Nations Appeals Tribunal have affirmed the principle that the burden of proof of arbitrariness, prejudice or other improper motive rests with the Applicant.

9. In an appropriate case, the Tribunal will be required to consider the principles governing the precise means by which this burden is to be satisfied, bearing in mind that it is the decision-maker who is best placed to know the true reason for the decision and whether this reason is innocent of extraneous factors.

Facts

10. The Tribunal finds the following facts proven on a balance of probabilities, having regard to the oral evidence and the documents, including the JAB Report No. 1883 for Case No. 2005-080.

11. The Applicant joined UNDP on 5 January 2004 as the Resident Representative in Santiago, Chile at the D-1 level. This was a fixed-term

appointment, which was to expire on 4 January 2006. It is the circumstances in which the decisions were made, both in respect of the duration of the appointment and its non-renewal, which are central issues in this case.

12. By letter dated 27 November 2003, Ms. Torres, Business Advisor, UNDP, offered the Applicant “a 5 years Fixed Term Appointment as Resident Representative in Santiago at the D-1 level, step 5”. An annex attached to the letter informed the Applicant that her appointment was for an initial period of four years, “[a]ny extension, if applicable is subject to satisfactory performance and availability of funds”.

13. On 5 December 2003, the Applicant accepted the offer in writing. However, the formal letter of appointment, which the Applicant signed on or about 14 January 2004 stated that the appointment was for a fixed-term of two years with effect from 1 January 2004. The letter stated that the appointment did not carry any expectancy of renewal or of conversion to any other type of appointment. The Respondent relies on the fact that the Applicant signed this letter in the full knowledge that it was for a fixed term of two years and did not carry any expectancy of renewal.

14. The issue, however, is not so straightforward since there had been an exchange of correspondence prior to 14 January 2004 between the Applicant, Ms. Torres and Ms. Calderon (title not specified). From the context, the JAB found that these e-mails were sent before 8 December 2003. The e-mail from Ms. Calderon stated that

[w]ith reference to [Ms. Torres’] letter of 27 November 2003 she mentioned that she had explained to you the fixed term appointment, subject to approval by the Appointment & Promotion Board [(“APB”)], is for two years instead of five years. Kindly confirm your understanding and acceptance of this offer at the D-1/Step 5 level.

15. Ms. Torres sent an e-mail to the Applicant indicating that she wished to clarify the last paragraph of Ms. Calderon's email stating:

The offer of appointment I gave you mentioned a Fixed Term Appointment (FTA) for 5 years subject to APB clearance. This is an incorrect wording of what the offer entails. It should have been that the expected duration of your assignment in Chile is of approximately 5 years. It is the practice that the APB gives an initial 2 years appointment for RR/RC's [Resident Representatives/Resident Coordinators]. Contract extensions beyond the second year approved through the RCA [(Results and Competency Assessment)] annual review and endorsed by the Senior CRG [(Career Review Group)] headed by the Administrator. Consequently, your initial FTA once cleared by the APB would be of 2 years.

16. In a subsequent e-mail dated 8 December 2003 to the Applicant, Ms. Torres stated:

My last message regarding the period of your FTA will remain a valid clarification, that is, the expected duration of your assignment in Chile is of 4 years plus 1, total 5 years, and the APB would clear your appointment for 2 years initially, and after that every extension will take place during the Senior CRG.

17. During the period of her employment, the Applicant had the only RCA covering the period 1 February 2004 to 31 January 2005. Her supervisor, Ms. Martinez, assessed her performance as successful in all but one where she was rated "exceeded expectations". She was highly complimented for creating a new role for UNDP as a bridge between civil society, the private sector and government. The various scores on her RCA indicated that her supervisor considered her to have performed fully successfully. This report was signed by the then UNDP Administrator, Mr. Mark Malloch-Brown.

18. On 19 May 2005, the Applicant had a career planning meeting with Mr. Gleeson, who gave no indication of dissatisfaction with her work. However, three months later, on 11 August 2005, she was summoned to head office to be informed

by Mr. Gleeson, that her contract would not be renewed. On 11 August 2005, Mr. Malloch-Brown sent written confirmation to that effect.

19. Nothing further would appear to have been either discussed or clarified regarding the terms or duration of the Applicant's appointment prior to the receipt of the letter from Mr. Malloch-Brown, informing her that her contract would not be renewed beyond its expiry by letter dated of 4 January 2006.

20. The Applicant submitted a request for administrative review in accordance with the applicable procedures at the time. Following a hearing on 23 September 2005, the JAB considered that, notwithstanding the fact that the Applicant had signed a two-year contract, the surrounding circumstances had led her, as a reasonable person, to expect that she would receive a two-year extension of the fixed-term appointment in January 2006, but that there would be no guarantee of another extension beyond 4 January 2008. The JAB recommended that the contested decision be suspended until the merits of the appeal were reviewed by the JAB.

21. After considering the merits of the Applicant's appeal, the JAB found that the parties had agreed to terms binding them for two years provided that certain conditions were met. However, the JAB concluded that the surrounding facts and circumstances at the time the Applicant was recruited created an expectancy that the contract would be renewed. The unanimous recommendation of the panel was that she be compensated in the sum of six months' net base salary at the time of separation. This sum was paid to the Applicant in recognition of the fact that there was confusion surrounding her appointment.

The defamatory article in *El Mercurio*

22. Approximately 19 months after the Applicant left the UNDP office in Chile, a highly critical article appeared in a local newspaper, *El Mercurio*. It featured a

photograph of the Applicant over the caption “The Questioned One”. The article included the comment:

a worse than terrible evaluation conducted in New York, of the internal management and the exterior positioning of the local UNDP office in Chile, decided the exit of the representative of the United Nations Development Program, UNDP, the Argentine economist, Irene Philippi

Under a picture of the Applicant was the caption “the case of the missing millions”. The Applicant was extremely distressed by the publicity, which appeared the day before she was due to have a final meeting with the French company *Sodexo*, which was at the point of offering her a job. The Applicant alleged that as a result of the adverse publicity she lost the opportunity of being employed by *Sodexo*. It is not surprising that the Applicant was distressed by this article and furthermore, that she believed that the article caused damage in terms of loss of reputation, and most significantly, loss of the opportunity of being employed by *Sodexo*. However, the issue for the Tribunal is whether it would be correct in law to allow the Applicant to add this allegation to the existing claim, bearing in mind that under the procedures at the time the Applicant, who had appealed unsuccessfully to the JAB, could have, if she so wished, lodged a separate appeal to the former Administrative Tribunal. She did not do so.

23. In a joint submission of the parties in response to Order No. 75 (NY/2010), the Applicant indicated that she wished to add to the existing claim the failure on the part of the Respondent to correct the defamatory article that appeared in *El Mercurio*. This issue had been the subject of proceedings before the JAB in Case No. 2005-61, in which the Applicant alleged that the Respondent’s failure to correct the defamatory article caused further loss and damage. The Respondent did not consider that this issue was an integral part of the case and objected to the Applicant’s attempt to introduce this additional matter.

24. The Tribunal refuses the application to add this issue to the existing claim on the basis that, although the Applicant had filed proceedings with the JAB on 15 January 2008, she did not make a further application to the former Administrative Tribunal. On receipt of the JAB report on 28 May 2009, it was open to the Applicant to file a separate appeal, which may or may not have been consolidated with the current appeal, or to have made an application, on receipt of the JAB Report, to add this new cause of action to the existing claim. Whether the latter course of action would have been approved or not, there is no doubt that had the Applicant lodged a separate appeal to the former Administrative Tribunal, it would have been transferred to the Dispute Tribunal on 1 January 2010. It is highly likely that, if she had done so, this Dispute Tribunal would have agreed to make an order for combined proceedings.

25. It is clear that the original claim relating to the non-renewal of her fixed-term contract to which she had a reasonable and legitimate legal expectancy of renewal, the damaging publication by *El Mercurio* and the failure by UNDP to take appropriate action to put the record straight are entirely separate matters. The *El Mercurio* article cannot, by any stretch of the imagination, be considered as being raised, however tenuously or delicately, in the appeal that was received by the former Administrative Tribunal on 11 September 2007. Put simply, it just did not exist as a separate cause of action at the time.

26. Notwithstanding the fact that the Tribunal refuses the application for leave to add this distinctly separate cause of action onto the existing claim, the Tribunal would be willing, in the event of the application succeeding, to consider whether the failure on the part of UNDP to write to the editor of the newspaper setting the record straight is a legitimate basis for ordering compensation to the Applicant. Both parties are aware of the difficulties of proof in relation to this matter, but it is by no means a contention that can be regarded, without further examination, as misconceived.

Informal resolution

27. In their joint statement responding to Order No. 75 (NY/2010), the parties indicated that they were willing to consider an informal resolution of the dispute, possibly through mediation. At the case management hearing on 23 September 2011 and the hearings on the merits that took place on 5 October 2011 and 21 October 2011, the Tribunal provided the parties with the opportunity to have further discussions with a view to resolving their differences. Regrettably, they have not been able to do so. However, their joint endeavors in this regard are commendable, and entirely in line with the underlying purpose behind the resolutions of the General Assembly in establishing the formal system of administration of justice.

Consideration

28. The Respondent's primary contention is that the Applicant had no legal expectancy of renewal of the appointment. Furthermore, the decision not to renew her contract was not vitiated by prejudice, improper motive or other extraneous factors and that there was no denial of the right to due process. They made the point that the burden of establishing an improper motive rested with the Applicant and they relied on the fact that the JAB did not express any findings to the effect that her due process rights had been breached. They reject any speculation on the part of the Applicant as to the reasons why the Administrator of UNDP decided not to renew the appointment. The Respondent submits that there is no obligation to provide a reason for not renewing a fixed-term contract. The Respondent denies that the Applicant suffered any material or professional injury, and asserts that the payment of six months' net base salary was in recognition of the confusion that surrounded the offer of an appointment to the Applicant and not to be taken as indicating that the Respondent agreed that this confusion gave rise to a legitimate expectancy on the part of the Applicant that her appointment would be renewed.

29. Not surprisingly, the Applicant strongly asserts that she had a reasonable and legitimate expectancy of renewal based on the representations that were made to her both orally and in writing. In particular, the Applicant relies on the initial offer of a five-year appointment which she had accepted in writing. The Applicant further relies on the fact that it was made clear to her that, although the initial appointment was for two years, the assignment itself was subject to renewal, based on satisfactory performance and the availability of funds, and that the only assessment of her performance rated her as being successful and was, in fact, signed by the UNDP Administrator. She considered that the Administrator's decision, shortly after having approved her performance appraisal, is indicative of the existence of some ulterior motive behind the decision. The Applicant is seeking compensation for all losses attributable to what she considers to be the unlawful decision not to grant her a further extension of appointment. However, the Applicant has produced no evidence that even begins to get this contention off the ground. Suspicion alone is not enough.

30. Although the Tribunal gave the parties the opportunity to reach agreement on the formula for calculating any losses and had agreed to hear from the Applicant's witness, Mr. Hirmas, regarding her application for an appointment with *Sodexo*, it was evident to the Tribunal that the Applicant was raising several grounds for compensation, and that the complexity being introduced by the Applicant would make it impossible for the Tribunal to arrive at any sensible calculation of loss. Unfortunately, the Applicant persisted in overwhelming the Tribunal with several documents and submissions on compensation. These issues are not relevant to the primary purpose of determining liability and will not be dealt with.

31. Thus, whilst it was the Tribunal's original intention to deal with both liability and compensation in the present Judgment, in light of the various communications from the Applicant, it would be unwise to do so. The Tribunal has therefore decided to issue a judgment on liability and to give the parties sufficient time to settle remedy.

32. The Tribunal has no hesitation in agreeing with the analysis and assessments of the JAB. There was undoubtedly confusion regarding the duration of the Applicant's appointment. However, the Tribunal finds it surprising that given the number of similar appointments which UNDP must have made over the years, in several different countries, there could have been such lack of clarity over the matter regarding the duration of the Applicant's appointment. Whether this shortcoming arose from confusion on the part of the individuals responsible for the appointment or a wider systemic issue is not a matter on which the Tribunal has any evidence upon which to express a view. However, the clear fact remains that there was an absence of clarity. The combined effect of the various communications between those responsible for the appointment and the Applicant could not but have given to any staff member a reasonable and legitimate expectancy of renewal of a fixed-term appointment. The JAB fully explored the evidence and the respective arguments put forward by the parties in the conclusion, at paragraph 28. They correctly commented that the surrounding circumstances in the Applicant's case could give rise to the understanding that the contract would be renewed beyond two years provided certain conditions were met. It will be recalled that the initial offer was accompanied by an attachment, indicating a four-year appointment, but was subject to satisfactory performance and availability of funds.

33. The Tribunal agrees with the JAB's assessment that these factors created the reasonable impression that the Applicant's employment would be continued after two years in the absence of any indication of unsatisfactory performance. It has not been contended on the part of the Respondent that the Applicant's performance was unsatisfactory. On the contrary, she received a favorable performance report a matter of weeks before being informed of the non-renewal of the contract. If the Respondent had a reasonable and rational basis for not renewing the Applicant's contract in the context of the mixed messages that she had been receiving, they have not produced any such evidence. It is not sufficient for the Respondent, in the circumstances of this case, to resort to the defence that the Applicant had a fixed-term

contract, which ended at the end of its term and that, therefore, reasons were not required. It is noted that the grounds for renewal were specified as being satisfactory performance and the availability of funding. In the circumstances, absent these grounds, the Respondent is under an obligation to provide a reason for non-renewal, which it did not do.

Conclusion

34. The Tribunal finds that the circumstances appertaining at the time of recruitment of the Applicant created a legal expectancy of renewal.

35. The decision not to renew the Applicant's contract was arrived at in breach of her rights to due process.

36. The Applicant is entitled to compensation for losses incurred as a direct consequence of the non-renewal of the contract subject to the duty to mitigate.

37. The Tribunal will hear any further argument and submissions in relation to the Applicant's contention that her loss of the opportunity of employment with *Sodexo* is either directly or indirectly attributable to any act or omission of the Respondent.

38. The Tribunal is hopeful that the parties will wish to explore a mutually acceptable compromise agreement in relation to compensation in order to bring this long-running saga to a close. A period of four weeks is granted to this end. The Tribunal indicates that, on the basis of current information and submissions, it does not appear that this is an appropriate case for exceeding the limit of two years' net base salary as compensation. The Applicant will be expected to give credit for the sum of money already received. The Applicant is entitled to an award for anxiety and distress

39. The Tribunal wishes to make it clear that these comments are offered as guidance to the parties for the sole purpose of being helpful to them in any

discussions they may decide to have and not to be regarded as expressing a concluded view.

40. The parties are to notify the Tribunal within four weeks of the date of this Judgment if they have reached agreement to settle remedy failing which the Tribunal will decide on what further Orders, if any, to issue to dispose of this case.

(Signed)

Judge Goolam Meeran

Dated this 9th day of December 2011

Entered in the Register on this 9th day of December 2011

(Signed)

Hafida Lahiouel, Registrar, New York