



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/039/
UNAT/1701
Judgment No.: UNDT/2012/009
Date: 17 January 2012
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

CHECA-MEEDAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Anita Saran, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decision not to renew her temporary appointment with the United Nations Conference on Trade and Development (“UNCTAD”). She requests the Dispute Tribunal to grant equitable relief as well as monetary compensation.

Procedural matters

Assignment of the case

2. This case was originally filed with the former United Nations Administrative Tribunal and transferred to the Dispute Tribunal on 1 January 2010, after the abolishment of the Administrative Tribunal.

3. This case was initially assigned to the undersigned Judge but reassigned to her Honour Judge Marilyn Kaman on her appointment on 1 July 2010 (in accordance with the mandate for *ad litem* judges). Although Judge Kaman had issued several case management orders dealing with preliminary issues, the matter was not heard by expiry of her term as an *ad litem* judge on 30 June 2011. There being no replacement of the *ad litem* judge in New York since July 2011, the case remained open pending reassignment.

4. As no findings were made by Judge Kaman on the merits or on any of the preliminary applications, and there being no certainty about the filling of the *ad litem* judge’s position in New York in the near future, the parties were informed on 20 December 2011 that the case had been reassigned to me in order to expedite its disposal.

Parties' agreement to proceed on the papers filed and without a hearing

5. In her submission dated 6 August 2010, filed in response to Order No. 152 (NY/2010), dated 16 June 2010, the Applicant stated that “[t]he Applicant and the Respondent jointly submit that a full contested hearing with witnesses is not necessary in this case”, that “[t]he matter can be determined on the papers”, but that “both parties also respectfully request a short hearing to enable counsel to make oral submissions on the facts and evidence, as presented in the case papers”.

6. By Order No. 303 (NY/2010), dated 15 November 2010, the parties were directed, in view of their request not to have a hearing on the merits, to provide further particulars regarding the proposed “oral submissions on the facts and evidence”.

7. In response, on 6 December 2010, the Applicant filed a submission stating that “[h]aving further considered the matter, the Applicant respectfully submits that an oral hearing is not necessary”. On 20 December 2010, the Respondent filed a submission agreeing that this matter should be considered on the papers.

8. The parties having agreed that the matter be considered on the papers, by Order No. 56 (NY/2011), dated 24 February 2011, the Tribunal directed, in view of the parties' submissions, that the case could be determined on the papers.

9. On 20 December 2011, the parties were informed by the New York Registry that the case had been reassigned to me; that “in view of the extensive case management orders and submissions filed by the parties, no further documents are required from them”; and that “[t]he parties having agreed that the matter is to be considered on the papers, the Tribunal will proceed to rendering its decision”. Neither party sought to file any objection or additional submissions and the Tribunal proceeded to rendering its decision.

Facts

Preliminary remarks

10. The following facts are based on the submissions of the parties, as well as the documents in the case record, including those filed before the Joint Appeals Board (“JAB”), which the Respondent submitted to the Tribunal on 21 December 2010.

11. Although the Respondent submitted the JAB file after pleadings were closed and without prior leave of the Tribunal, the Applicant did not object to that submission. By Order No. 56 (NY/2011), Judge Kaman directed that the Respondent explain the relevance of the JAB file. On 2 March 2011, the Respondent filed a submission explaining that Counsel had relied on the JAB file when preparing the reply to the present application and that several documents relevant to the issues in this case were contained therein. However, no finding was made regarding the admissibility of the file by the time the matter came before me.

12. The Tribunal would not ordinarily allow the late submission of documents without a party first requesting leave to do so and providing an acceptable explanation why the documents were not submitted at an earlier stage of the proceedings. Considering that the Applicant did not object to the admission of the JAB file, the Tribunal is satisfied, after careful consideration of the Respondent’s submission, that it is in the interests of justice to admit the documents tendered by the Respondent.

Relevant facts

13. The Applicant joined the United Nations at the G-1 level in 1990 and served on a number of appointments. From 30 July 1999 until 30 October 2002, the Applicant served as a clerk at the G-4 level on a mission replacement post in the Travel and Vendors Claims Unit, Accounts Division, Office of Programme Planning, Budget and Accounts (“OPPBA”), Department of Management. During that period,

the Applicant identified some irregularities in payments of daily subsistence allowance, lump sum payments, taxi fares, and some vendor-related payments, and brought them to the attention of her supervisors.

14. Subsequently, the Applicant worked in different departments of the United Nations Secretariat, including: the Department of Public Information, until September 2004; the Office for the Coordination of Humanitarian Affairs (“OCHA”), until September 2005; and the Department of Political Affairs, until June 2006. She joined UNCTAD on 1 July 2006, on a three-month contract, which was extended for one additional month, until 31 October 2006. She was thereafter separated from the Organization.

15. On 17 May 2006, the Administrative Assistant, UNCTAD, sent an email to the Office of Human Resources Management (“OHRM”), with a copy to the Chief, UNCTAD New York Office, discussing arrangements for “finding a temporary secretary”. She also noted that the recruitment would be on “a month to month basis at the G-4 or G-5 level”.

16. On 22 May 2006, the Applicant went to the Ethics Office, on referral by the Under-Secretary-General for Administration and Management, enquiring as to whether she was eligible for protection in connection with her reporting of payment issues in 2002. The Applicant’s contract at the time was set to expire on 24 May 2006.

17. By email sent the following day, 23 May 2006, the Ethics Office informed the Under-Secretary-General for Administration and Management that in view of the imminent expiry of the Applicant’s contract, the Ethics Office conducted a preliminary review of the matter. The Ethics Office stated that, based on its preliminary review, there was no connection between the expiry of the Applicant’s appointment and her reporting of certain payment irregularities in 2002. The Ethics Office therefore did not find a *prima facie* case of retaliation.

18. On 24 May 2006, the Chief, UNCTAD New York Office, sent an email to the Chief, Resources Management Service, UNCTAD, stating that a staff member of the New York Office had been on sick leave since January and UNCTAD needed a replacement “until she returns to work or her situation is otherwise resolved”.

19. By email dated 27 June 2006, the Administrative Assistant, UNCTAD, confirmed that the Chief, UNCTAD New York Office, had “decided to take [the Applicant] as a temporary secretary from 1 July for three months at her present grade and level”. In a subsequent email exchange of the same day, on which several UNCTAD and OHRM staff members were copied, it was confirmed that the Applicant would be advised that “she has been selected for this three month appointment with UNCTAD effective 1 July [2006]”.

20. By email of 28 June 2006, the Administrative Assistant, UNCTAD, confirmed to OHRM that “[w]e are recruiting [the Applicant] ... with effect from 1 July 2006 for a period of three months as a temporary secretary, pending the process of filling the post vacated as a consequence of the resignation of [the staff member who was on sick leave]”.

21. There is no evidence that, at the time, the Applicant was in receipt of the above email correspondence of 27–28 June 2006.

22. On 1 July 2006, the Applicant commenced her temporary appointment with UNCTAD.

23. In the ensuing period, UNCTAD, DPA, and OHRM had extensive correspondence and discussions about the administrative arrangements for the Applicant’s appointment for the temporary position with UNCTAD. The uncertainty and confusion about her contractual circumstances prompted the Applicant to send an email to OHRM on 22 August 2006, almost two months into her assignment, expressing her frustration about not having been provided with a contract and requesting assistance with her situation.

24. In response, by email of 24 August 2006, Human Resources Assistant, Overseas Offices Section (“OOS”), Operational Services Division, OHRM, replied that she “was not able to provide [the Applicant] with the answers to [her] inquiries” and provided names of other officials who may be able to assist the Applicant.

25. By email of 31 August 2006, the Applicant again enquired from OHRM about “any progress regarding [her] request”.

26. The Applicant sent another email to the Chief, OOS, OHRM, on 12 September 2006, requesting an “update regarding [her] contractual situation” as well as a salary advance.

27. By email of the same date, the Chief, OOS, OHRM, informed the Applicant that “[we] will have to ask for another salary advance, while my colleagues are working out a solution. We have brought your position again to their attention with the request for a decision. I am sorry that it takes this long”.

28. By email of 26 September 2006, entitled “Extension of your temporary assignment to UNCTAD”, the Chief, UNCTAD New York Office, informed the Applicant as follows:

I refer to our discussion last week in which you raised the matter of the extension of your present temporary assignment to UNCTAD, which expires on 30 September 2006. You also informed me that UNCTAD should have give[n] you 30 days’ written notice if your assignment would not be renewed. In the light of your request, UNCTAD will therefore extend your temporary assignment for one more month, through 31 October 2006. However, please note that we will not be able to extend you beyond 31 October 2006.

29. By email of 27 September 2006, the Applicant replied to the Chief, UNCTAD New York Office, referring to the extension of her appointment until the end of October 2006. The Applicant stated:

Thank you very much for extending my contract up until the end of October. At the same time, let me just point out that on

31 August 2006 was the first time that I approached you to inquire about the extension of my contract. In that opportunity [sic] we talk[ed] about the need of the one month notice for which you indicated to me that not to worry [and] that you always give a one-month notice. That is why I am more grateful to you, because having you [sic] the opportunity in 31 August or before, to indicate to me that my contract will not be extended beyond 30 September, you have given me an additional one-month extension.

30. On 2 November 2006, the Applicant was provided with a copy of her separation personnel action form, for separation effective 31 October 2006.

31. On 28 November 2006, the Applicant requested administrative review of the administrative decision “conveyed to [her] on 2 November 2006 ... that [she] was separated from the Organization”.

32. After approximately one year of separation, the Applicant again joined the Organization in November or December 2007 (the parties differ as to the exact date of her appointment). The Applicant initially received a six-month fixed-term contract with OCHA, but her appointment was subsequently extended. At the time of her appointment in November or December 2007, OCHA requested that the Applicant be reinstated in accordance with former staff rule 104.3, which provided that a former staff member who is re-employed within 12 months of separation may be reinstated, in which case her or his services are considered as having been continuous and the period of separation would be charged to annual leave or special leave without pay. This request for reinstatement of the Applicant was denied by OHRM. The Applicant’s appointment was thereafter extended for various periods of time and she appears still to be in the Organization’s employ.

33. The JAB adopted its report on 15 December 2008. The JAB found that it was not in a position to make any recommendation in support of the Applicant’s pleas as she was unable to prove that she had been harassed or discriminated against, including for reporting payment issues in 2002. However, the JAB was puzzled “why a staff member who had served some 18 years in a variety of functions and offices

where she had evidently performed in a dependable and careful manner had been unable in the course of long service to obtain a secure contractual footing in the Organization". The Panel regarded this as "anomalous" and found that the Applicant's "wide experience and conscientious working methods should have made her an especially valuable staff member", yet throughout her employment she was on short-term contracts and was even separated from the Organization for approximately one year (i.e., prior to November or December 2007) before receiving a new appointment.

34. By letter dated 26 February 2009, the Deputy Secretary-General informed the Applicant that, having examined her case and the JAB report, the Secretary-General agreed with the findings and conclusions of the JAB and decided not to take any further action in this matter.

Parties' submissions

35. By Order No. 56 (NY/2011), the parties were ordered to file their closing submissions, including "*all* contentions" they wish to advance (emphasis in original). This order was duly complied with by both parties, and the submissions of the parties are summarised below.

Applicant's submissions

36. The Applicant's principal contentions may be summarised as follows:

- a. The Applicant was effectively a "whistleblower" during the period 30 July 1999 and 30 October 2002 when she worked at OPPBA. Her discovery of payment irregularities in 2002 resulted in her being considered as a "troublemaker" and she was seen as a liability. The Applicant's "whistleblowing" in 2002 caused her to endure a series of temporary appointments and not secure an "established" post (i.e., a post filled through a regular recruitment process) despite her positive performance appraisals. The

non-renewal of her contract beyond 31 October 2006 was “unfairly influenced by the Applicant’s uncovering of payment irregularities in the past”;

b. The preliminary review conducted by the Ethics Office concerning her report of irregularities in OPPBA was inadequate and deficient and the Applicant was not afforded due process;

c. The Under-Secretary-General for Administration and Management promised the Applicant in May 2006 that she would be given a six-month extension of her contract;

d. When UNCTAD recruited the Applicant on 1 July 2006, she was not aware that she would only be serving for a three-month period. She was promised that her contract would be extended and that she would be secure in her post until it was advertised or, alternatively, that she would be placed on special leave without pay. The Applicant would not have accepted the contract if she did not believe that it would lead to an “established” post;

e. Whilst at UNCTAD, the Applicant was made to work without a properly issued contract, without full benefits, and without regular full salary, as she received salary advances instead;

f. In October 2007, OCHA made a formal request to reinstate her, which was denied by OHRM. This refusal was another attempt in the continued effort by the Administration to ensure that she would not secure an “established” post;

g. The Applicant falls within the criteria for the one-time review for consideration for a permanent appointment.

Respondent's submissions

37. The Respondent's principal contentions may be summarised as follows:
- a. The Applicant has failed to establish a nexus between her discovery of payment irregularities in 2002, while she was at the Accounts Division, OPPBA, and her subsequent non-renewal at UNCTAD in 2006;
 - b. The non-renewal of the Applicant's post was a natural consequence of the temporary and short-term nature of her assignment. The Applicant's numerous claims that she was misled or otherwise given false expectations are unsupported by evidence;
 - c. The Applicant neither had the right nor the expectancy of continued employment or of placement on special leave upon the end of her temporary assignment. Her ancillary claims are neither receivable nor established.

Consideration

Receivability and scope of the case

38. Pursuant to art. 2.1(a) of its Statute, the Dispute Tribunal is competent to adjudicate applications against administrative decisions "alleged to be in non-compliance with the terms of appointment or the contract of employment".

39. In the Applicant's request for administrative review, dated 28 November 2006, she contested the administrative decision "conveyed to [her] on 2 November 2006 ... that [she] was separated from the Organization". This decision related to the expiry and non-renewal of her three-month contract with UNCTAD. This same decision was contested by the Applicant before the JAB and in the present application.

40. Further, by Order No. 303 (NY/2010), dated 15 November 2010, the Tribunal identified the contested administrative decision as that of UNCTAD not renewing her contract beyond 31 October 2006 (see also Order No. 56 (NY/2011)). The Applicant confirmed in her submission dated 3 December 2010, as well as in her closing submission of 16 March 2011, that Order No. 303 (NY/2010) correctly identified the contested decision. The Respondent confirmed the same understanding of the scope of the case in his closing submission filed on 30 March 2011.

41. In her closing submission, dated 16 March 2011, the Applicant referred to a number of other alleged administrative decisions:

- a. The non-renewal of her contract with OPPBA beyond 30 October 2002;
- b. The non-selection of the Applicant for an “established” post;
- c. The Ethics Office’s failure to afford her Applicant due process and its inadequate and deficient preliminary review of the Applicant’s whistleblower case;
- d. The promises of further employment, made by the Under-Secretary-General for Administration and Management in May 2006;
- e. UNCTAD’s failure to process a proper contract for the Applicant while she worked there;
- f. OHRM refusal to grant OCHA’s formal request, made on 26 October 2007, to reinstate the Applicant in service in accordance with former staff rule 104.3. According to the Applicant, this refusal had the effect of denying the Applicant the opportunity to acquire a permanent contract.

42. Each of the matters listed in the Applicant’s closing submission is a separate administrative decision (either explicit or implied) that should have been contested

properly and timeously, starting with a request for administrative review (under the former system) or management evaluation (under the current system) (see, e.g., the United Nations Appeals Tribunal's ("UNAT") rulings in *Syed* 2010-UNAT-061, *Appellant* 2011-UNAT-143, *Kapsou* 2011-UNAT-170, *O'Neill* 2011-UNAT-182).

43. The Applicant did not request an administrative review of any of these alleged administrative decisions. Therefore, the Tribunal does not have jurisdiction to review them. These alleged administrative decisions also go well beyond the scope of the case as agreed by the parties and identified by the Tribunal. They may be considered, however, as part of the factual background of the present case insofar as the Tribunal deems that they are relevant for adjudicating the actual issues before it.

44. Accordingly, the Tribunal finds that the scope of the case before the Tribunal is limited to the non-renewal of the Applicant's contract after its expiration on 31 October 2006.

Applicant's request for disclosure of Ethics Office's documents

45. At this juncture, the Tribunal finds it appropriate to deal with the Applicant's request for disclosure of any notes taken by the Ethics Office regarding its review of 23 May 2006. The Respondent submitted on 30 July and 20 December 2010 that there were no notes available and that, in any event, the Applicant's request pertained to a matter that was outside the scope of this case.

46. As stated above, the scope of the present case is limited to the non-renewal of the Applicant's contract after its expiration on 31 October 2006. The Applicant's claims with respect to the adequacy and procedural correctness of the review conducted by the Ethics Office in May 2006 are not properly before the Tribunal. Therefore, the records pertaining to these claims are not relevant to the issue of non-renewal and the Applicant's request is denied.

Reasons for the temporary nature of the Applicant's appointment

47. The Applicant contends that her contract with UNCTAD was not renewed based on improper reasons, resulting in her separation. She links this to her failed whistleblower case before the Ethics Office, and also to several other alleged administrative decisions referred to in her closing submission, as recited in para. 41 above.

48. The onus is on the Applicant to provide sufficient evidence of improper motivation against her (see *Parker* 2010-UNAT-012, *Hepworth* 2011-UNAT-178, *Jennings* 2011-UNAT-184).

49. A careful review of the case file, particularly the correspondence relating to the Applicant's appointment for the post in UNCTAD, demonstrates that the Applicant's employment was intended only for a temporary period of three months to fill in for a sick colleague and until further administrative arrangements could be put in place. This follows from the following emails, among other communications on file (emphasis added):

- a. By email of 17 May 2006, the Administrative Assistant, UNCTAD, discussed arrangements for "finding a *temporary* secretary";
- b. By email of 24 May 2006, the Chief, UNCTAD New York Office, indicated to the Chief, Resources Management Service, UNCTAD, that his office was in need of "a *temporary* replacement for [the staff member on sick leave] until she returns to work or her situation is otherwise resolved";
- c. By email of 27 June 2006, the Administrative Assistant, UNCTAD, confirmed that the Chief, UNCTAD New York Office, had "decided to take [the Applicant] as a *temporary* secretary ... *for three months*";
- d. In a subsequent email exchange of 27 June 2006, copied to several UNCTAD and OHRM staff members, it was confirmed that the Applicant

would be advised that “she has been selected for this *three month appointment* with UNCTAD effective 1 July [2006]”;

e. By email of 28 June 2006, the Administrative Assistant, UNCTAD, confirmed to OHRM that the Applicant would be recruited “for a period of *three months* as a *temporary* secretary, pending the process of filling the post vacated as a consequence of the resignation of [the staff member who was on sick leave]”.

50. The Tribunal accepts the Respondent’s explanation for the non-renewal of the Applicant’s contract, as evidenced by these emails, which show the reasons for the temporary nature of the Applicant’s appointment. The Applicant was employed as a temporary replacement for a staff member who was on sick leave and who subsequently resigned. It was the Administration’s intention to employ the Applicant for a temporary period only. The one-month extension of the Applicant’s appointment until 31 October 2006 was only due to her request, agreed to by UNCTAD, to give her a one-month notice.

51. Other than the unusual factual background of her temporary short-term contracts over such a long period of time with the Organization thus giving rise to implication or speculation, nothing before the Tribunal indicates any sort of connection between the non-renewal of the Applicant’s contract after 31 October 2006 and her reporting of payment irregularities in 2002. This factual background and the nature of her employment history have been explained above.

52. The Applicant did not seek to call any witnesses and, in fact, submitted to the Tribunal that this case should be considered on the papers before it. In the words of the Dispute Tribunal in *Philippi* UNDT/2011/210, although the Applicant asserts that the non-renewal of her contract in October 2006 was connected to her reporting of payment irregularities in 2002, she “produced no evidence that even begins to get this contention off the ground. Suspicion alone is not enough”.

53. The Tribunal also notes, in this regard, that there was a four-year gap between the Applicant's reporting of payment issues in 2002 and the non-renewal of her contract beyond 31 October 2006, during which time the Applicant was successfully employed in various offices and departments and was highly thought of. Further, the Applicant was re-employed by the Organization in November or December 2007.

54. The Applicant was understandably frustrated with the delays and confusion in the processing of the documents relating to her appointment commencing July 2006. The responsible officials did not diligently undertake their duties to provide her with such properly processed documentation in due time. However, these delays and confusion, although regrettable, do not render the decision not to renew her contract unlawful.

55. The Tribunal finds that the Applicant has failed to establish to the Tribunal's satisfaction that the decision not to renew her temporary appointment with UNCTAD beyond 31 October 2006 was tainted by improper motives.

Legitimate expectation of renewal

56. In *Sina* UNDT/2010/060, para. 35 (affirmed by the Appeals Tribunal in *Sina* 2010-UNAT-094 as to the liability findings), the notion of "legitimate expectation" giving rise to legal rights is defined as follows:

A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way, by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and that the other party does so.

57. In *Zuñiga Rojas* UNDT/2010/218, the Tribunal also held that whether a staff member has a legitimate expectation of renewal will depend on whether it can be established that anything said or done by the Administration amounted to a firm commitment to renew the contract so that in spite of the wording of her or his contract a staff member could reasonably have expected a renewal.

58. The Applicant contends that she relied on assurances made by management that her contract would continue, that she would be placed against a regularised post, or that she would be placed on special leave without pay at the expiry of her contract.

59. Generally, it is for the party who asserts a fact to prove it (see, for instance, *Azzouni* 2010-UNAT-081 and *Hepworth* 2011-UNAT-178). The Applicant did not produce any documentary evidence regarding the alleged assurances on the part of management or seek to introduce oral evidence on this point, submitting instead that “an oral hearing is not necessary, and that the matter can be determined on the papers” (see paras. 5–9 above). As the record stands, the Applicant has failed to provide any evidence that may lead the Tribunal to conclude that the Respondent gave her any direct or implicit promises justifying any such expectations.

60. The Applicant states that she would not have accepted the three-month contract with UNCTAD had she known that it would not lead to an “established” post. However, contemporaneous records demonstrate that the Applicant was aware on 27 September 2006, at the latest, that her appointment was of temporary nature and would not be renewed beyond 31 October 2006. When she responded to the email of 26 September 2006 from the Chief, UNCTAD New York Office, in which he informed her that her contract would not be renewed beyond 31 October 2006, the Applicant explicitly stated that she herself had approached him to enquire about a possible extension of her contract and even thanked him for granting her an additional month. It is instructive that the Applicant made no reference in her email of 27 September 2006 to any promise of a longer contract or an “established” post or of being placed on special leave without pay at the expiry of her contract.

61. The Tribunal finds that the Applicant has failed to establish a factual basis for her alleged expectation that her contract would be renewed beyond 31 October 2006, that she would be given an “established” post, or that she would be placed on special leave without pay at the expiry of her contract.

62. The Tribunal therefore finds that the decision not to renew the Applicant's temporary appointment beyond 31 October 2006 was not unlawful.

Conclusion

63. The application is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 17th day of January 2012

Entered in the Register on this 17th day of January 2012

(Signed)

Hafida Lahiouel, Registrar, New York