



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/081

Judgment No.: UNDT/2012/060

Date: 1 May 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

McCLUSKEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Esther Shamash, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), contests and requests the rescission of the decision not to extend his fixed-term appointment beyond 30 September 2011.

Facts

2. The Applicant joined UNHCR on 1 November 2006 on a three-month fixed-term appointment at level P-4 in the Division of Information Systems and Telecommunications (“DIST” or “the Division”). This initial appointment, which was not awarded through a competitive selection process and thus not endorsed by the Appointments, Postings and Promotions Committee, was followed by several extensions of less than a year until 30 September 2011, when the Applicant was separated.

3. At the end of April 2010, all DIST staff members were formally notified of the restructuring of the Division and the reorganization process.

4. By an Inter-Office Memorandum/Field Office Memorandum (“IOM/FOM”) No. 039/2010 dated 7 July 2010, the Deputy High Commissioner informed UNHCR staff of the special measures that would be taken to mitigate the impact of the restructuring of DIST on staff affected by a change in the status of their positions. One of those measures consisted in extending until 30 June 2011, with the agreement of the staff members concerned, the fixed-term appointments due to expire on or before 31 December 2010.

5. By email dated 9 July 2010, the Director of DIST asked all DIST staff, including the Applicant, whether they agreed to the extension of their fixed-term appointments until 30 June 2011.

6. The Applicant replied on 13 July 2010 that he was agreeable to such a contract extension. On the same day, the Director of DIST responded that:

As you are a [Temporary Appointee] on a contract of a different nature, we will have to review your position outside of this ruling.

7. Nevertheless, the Applicant's fixed-term appointment, which was due to expire on 31 December 2010, was subsequently extended for six months, through 30 June 2011.

8. By email dated 19 January 2011, the Director of DIST forwarded to the staff of the Division a message from the Director of the Division of Human Resources Management ("DHRM") stating that there had been delays in the restructuring of DIST and that all DIST staff on fixed-term appointments would be extended from 1 July through 30 September 2011.

9. By IOM/016-FOM/017/2011 dated 1 March 2011, entitled "Reorganization of [DIST] – Additional mitigating measures", the Director of DHRM advised DIST staff of, among other things, an enhanced separation package being offered to mitigate the impact of the restructuring of DIST.

10. By email dated 5 May 2011 addressed to the Director of DIST, the Applicant requested that his contract, which was due to expire on 30 June 2011, be extended until 30 September 2011 as per the message sent on 19 January.

11. On or around 26 May 2011, the Applicant met with the Director of DHRM to discuss his situation.

12. Further to that meeting, by email dated 29 May 2011, the Director of DHRM acknowledged that his message of 19 January 2011 "could have given [the Applicant] the impression that, even though [he had] been renewed on short fixed-term appointments of less than one year (i.e. [he was] not appointed through the [Appointments, Postings, and Promotions Committee]), [his] contract would be extended like other fixed-term appointments from 1 July to 30 September 2011". Therefore, to "avoid ... a dispute", he offered the Applicant two options: (a) either a three-month extension of his contract from 1 July to 30 September 2011 albeit on special leave with full pay as there was no assignment available for

him, or (ii) “an agreed separation effective 30 June with associated indemnities equal to what [he] would have otherwise received for the period 1 July to 30 September”.

13. By email dated 1 June 2011, the Applicant requested that his contract be extended until 30 September 2011. He also asked for “equality and alignment with the rest of the DIST [holders of fixed-term appointments] who have had their contracts already extended to end September 2011”.

14. On 6 June 2011, the Director of DHRM informed the Applicant that his contract would be extended until 30 September 2011 and added:

The extension to end September is made with no expectation of subsequent renewal or conversion. At the time of writing, there is no position to charge your salary against in DIST or elsewhere, so for administrative purposes you will be considered on Special Leave with Full Pay as of 1 July. In the meanwhile, a career management officer from CMSS will work with you to try to identify an assignment for the period up to end September. Your contract will only be extended beyond 30 September if there is a position against which to charge your salary.

15. On 21 June 2011, at the Applicant’s request, DHRM sent him calculations in relation to an “enhanced separation package” for a separation effective 30 June 2011.

16. On 27 June 2011, the Applicant signed a letter of appointment for the period from 1 July to 30 September 2011 and effective 1 July 2011, he was placed on special leave with full pay.

17. By memorandum dated 22 September 2011, entitled “Expiration of your Fixed-Term Appointment” and transmitted to the Applicant on 23 September, the Director of DHRM informed him that, as no assignment had been identified for him and he had not been selected for a new position, he would be separated at the expiration of his fixed-term appointment on 30 September 2011. He also informed the Applicant that in recognition of his length of service, he had agreed exceptionally to provide him with a separation payment to be calculated on the basis of the indemnities payable in the event of a termination.

18. According to the Applicant, four more DIST staff members were notified of the same decision on the same day.

19. By email dated 27 September 2011, the Applicant enquired with DHRM “what steps need to be taken to secure the enhanced separation package already quoted and offered” to him on 21 June 2011. Several emails ensued between the Applicant and DHRM, in which DHRM reiterated on 27 and 29 September 2011 that since the Applicant had not accepted the offer for an agreed separation effective 30 June 2011, he would only be entitled to the termination indemnities exceptionally approved by the Director of DHRM in his memorandum of 22 September.

20. On 27 September 2011, the Applicant requested a management evaluation of the decision not to extend his fixed-term appointment beyond 30 September 2011 and on 28 September 2011, he filed an application for suspension of action, pending management evaluation, of this decision.

21. By letter dated 29 September 2011, the Deputy High Commissioner informed the Applicant of the outcome of the management evaluation, to wit, that the contested decision would stand. On the same day, the Dispute Tribunal rejected the application for suspension of action as moot.

22. Also on 29 September 2011, according to the Applicant, the four staff members who like him had been notified of the non-extension of their appointments beyond 30 September were offered contract extensions until 30 November 2011.

23. The Applicant was separated on 30 September 2011.

24. By email dated 3 October 2011, the Applicant asked the Director of DHRM to reconsider the decision related to the payment of an enhanced separation package. The Director of DHRM responded on 11 October, stating *inter alia* that the offer in question was based on a separation effective 30 June 2011 and that it was the Applicant who had chosen not to accept it.

25. On 16 November 2011, the Applicant filed the present application, in which he contested the decision of 22 September 2011 not to extend his fixed-term appointment and the “decision to retract the offer of an enhanced separation package ... made ... on 29 September 2011”.

26. On 17 November 2011, the Tribunal transmitted the application to the Respondent and requested the Applicant to clarify whether he had requested a management evaluation of the decision related to the separation package and if so, to provide a copy of such request.

27. On 21 November 2011, the Applicant informed the Tribunal that he withdrew his pleas insofar as they related to “the decision dated 29 September 2011 concerning the separation package”, as he had not requested a management evaluation of that decision.

28. The Respondent filed his reply to the application on 19 December 2011.

29. On 17 April 2012, the Tribunal held a substantive hearing which the Applicant and Counsel for the Respondent attended in person and Counsel for the Applicant by videoconference.

Parties’ submissions

30. The Applicant’s principal contentions are:

- a. He was never on a temporary appointment but on fixed-term appointments;
- b. The decision not to extend his contract while four of his colleagues were extended until 30 November 2011 breached his right to equal treatment;
- c. Since there was no valid basis for the decision not to extend his contract while his colleagues’ contracts were extended, the contested decision can only be described as arbitrary.

31. The Respondent's principal contentions are:

a. Pursuant to staff regulation 4.5 and staff rule 4.13(c), a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. This is reflected in the contract the Applicant signed on 27 June 2011. Furthermore, staff rule 9.4 provides that a fixed-term appointment shall expire automatically and without prior notice on the expiration date;

b. There was no statement or action on the part of the Administration which could have raised any reasonable expectation of renewal on the Applicant's part. The message from the Director of DHRM to the Applicant on 6 June 2011 was very clear in this respect;

c. The Applicant's claim related to an alleged breach of his right to equal treatment is without merit. The Applicant was not in a similar situation to that of the four staff members he refers to. His contractual status was different as he held a fixed-term appointment of short duration awarded outside the competitive selection process and thus not endorsed by an Appointments, Postings and Promotions body, whereas the four staff members concerned had been recruited through such a body and thus held fixed-term appointments of long duration;

d. Furthermore, the four staff members in question were not on special leave with full pay, like the Applicant, but charged against their respective positions. There was no possibility of a temporary assignment identified for the Applicant.

Consideration

32. At the outset, it has to be clarified that this Judgment deals only with the decision not to extend the Applicant's fixed-term appointment beyond 30 September 2011. In his initial application, the Applicant also contested the "decision to retract the offer of an enhanced separation package". On 21 November 2011, however, he withdrew his pleas insofar as they related to that

decision, as he had not requested a management evaluation. The Tribunal therefore need not rule on this aspect of the case, which incidentally is now the subject-matter of a separate application.

33. As regards the decision not to extend the Applicant's fixed-term appointment, some of the relevant legal provisions are contained in staff regulation 4.5(c) and staff rule 9.4, which provide respectively:

A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.

and

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

34. In *Ahmed* 2011-UNAT-153, the Appeals Tribunal held that “unless the Administration has made an ‘express promise ... that gives a staff member an expectancy that his or her appointment will be extended’, or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member's fixed-term appointment is not unlawful” (see also *Frechon* 2011-UNAT-132, *Abdalla* 2011-UNAT-138).

35. That being said, the Applicant does not claim that he had a legitimate expectancy of renewal, and indeed, the facts of the case as described above would not support any such claim (see in particular the email dated 6 June 2011 from the Director of DHRM to the Applicant).

36. At the hearing, Counsel for the Applicant reaffirmed that “the application is about equal treatment, not about expectancy of renewal, it's about [the Applicant's] right to be treated like his colleagues”. More specifically, she argued that the distinction made by UNHCR between fixed-term appointments of long duration—i.e., fixed-term appointments of one year or more granted further to a competitive selection process, based on the advice of an Appointments, Postings and Promotions body—and fixed-term appointments of short duration—i.e.,

fixed-term appointments of less than a year granted without a competitive selection process and not endorsed by an Appointments, Postings and Promotions body—is unlawful and that the decision not to extend the Applicant’s fixed-term appointment of short duration beyond 30 September 2011 breached his right to equal treatment since four of his colleagues, who held fixed-term appointments of long duration, were extended until 30 November 2011.

37. In *Tabari* 2011-UNAT-177, the Appeals Tribunal held that “[s]ince Aristotle, the principle of equality means equal treatment of equals; it also means unequal treatment of unequals”.

38. The former UN Administrative Tribunal also frequently stated that “the 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 Judgment No. 268, *Mendez* (1981); Judgment No. 1221, *Sharma* (2004); Judgment No. 1375 (2008); and Judgment No. 1450 (2009)).

39. It is an undisputed fact that the Applicant, unlike the four colleagues he refers to, was recruited by UNHCR without going through a competitive selection process and held fixed-term appointments of less than a year not endorsed by an Appointments, Postings and Promotions body.

40. Staff regulation 4.3 stipulates that “[s]o far as practicable, selection shall be made on a competitive basis”.

41. Furthermore, staff rule 4.15 applicable since 1 July 2009 provides that “[c]entral review bodies shall be established by the Secretary-General to review and provide advice on recommendations for selection ... on all appointments of one year or longer”. Previously, former staff rule 104.14, applicable at the time when the Applicant was appointed, stipulated that “[a]n Appointment and Promotion Board shall be established by the Secretary-General to give advice on the appointment ... of staff ... except those specifically recruited for service with any programme, fund or subsidiary organ of the United Nations to which the Secretary-General has delegated appointment and promotion functions” and that “[t]he function of the Appointment and Promotion Board shall be to make

recommendations to the Secretary-General in respect of ... proposed appointments of a probable duration of one year or more”.

42. In UNHCR, the role of the central review bodies under current staff rule 4.15 and of the previous Appointment and Promotion Board under former staff rule 104.14 has been assigned to the Appointments, Postings and Promotions bodies, and more specifically for staff in the Professional category, to the Appointments, Postings and Promotions Committee.

43. The distinction made by UNHCR between fixed-term appointments of long duration and fixed-term appointments of short duration has its legal foundation in the above-quoted staff regulation and staff rules.

44. There is thus a factual *and* legal difference between the contractual situation of the Applicant and that of his four colleagues whose appointments, unlike his, were extended beyond 30 September 2011.

45. In addition, the different treatment of staff members who underwent a competitive selection process and those who did not is not arbitrary, and with regard to the extension of contracts, it falls within the discretionary authority of the Organization to distinguish between these two categories of staff.

46. Upon the promulgation of the new Staff Regulations and Rules in July 2009, UNHCR could have chosen to let fixed-term appointments of short duration expire and to reappoint the affected staff members under temporary appointments, which carry significantly less benefits. Instead, it opted as a transitional measure to retain such staff members under fixed-term appointments.

47. At the hearing, the Applicant’s Counsel argued that in keeping the Applicant on a fixed-term appointment instead of reappointing him under a temporary appointment, UNHCR failed to put him on notice that he was in a different situation from his colleagues and led him to believe that he had the same rights. The Tribunal fails to see merit in this contention. While the Applicant may have believed in good faith, yet mistakenly, that there was no difference between his fixed-term appointment and that of some of his colleagues, there is no

evidence before the Tribunal that the transitional measure resulted in any prejudice to the Applicant. On the contrary, for over two years, he continued to enjoy the rights and entitlements attached to a fixed-term appointment; had his appointment been converted to a less beneficial temporary appointment, he would not only have lost out on a number of benefits and entitlements, but he might also have been separated from service at an earlier date given the strict duration limitations attached to temporary appointments.

48. The Applicant's Counsel did claim at the hearing that, had the Applicant been put on notice that he was in a different situation from his colleagues, he could have applied to other jobs. The Tribunal notes however that the Applicant had been put on notice as early as July 2010 at least, through IOM/FOM No. 039/2010, that in view of the restructuring of the Division, DIST staff might need to reapply and be selected in order to have their contracts extended. Furthermore, in March 2011, through IOM/016-FOM/017/2011, DIST staff including the Applicant were specifically informed that those who had "been working with UNHCR since before 30 June 2009 on short fixed-term appointments ... will be considered eligible internal applicants for vacancies advertised on or before 31 December 2011. This exceptional measure will give these staff an opportunity to accede to a regular fixed-term appointment before their extended short-term appointments are no longer renewed". Subsequently, the specificity of the Applicant's situation was further well explained to him, in particular in the emails dated 29 May and 6 June 2011 from the Director of DHRM. Regardless of their contractual status, any reasonable staff member in this situation would have started applying for jobs and as a matter of fact, in his application, the Applicant states that he applied to five positions in May 2011.

49. The difference in contractual status is not the only difference between the Applicant and the four colleagues he refers to. In his written and oral pleadings, the Respondent also explained, and the Applicant did not contest that, while the Applicant had to be put on special leave without pay from July to September 2011 because there was no position against which to charge his salary and no assignment had been identified for him, his four colleagues remained charged against their respective positions.

50. It results from the above that the Applicant and the other staff members he refers to were not in an equal position. Accordingly, his claim of a breach of the principle of equal treatment is unfounded.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 1st day of May 2012

Entered in the Register on this 1st day of May 2012

(Signed)

René M. Vargas M., Registrar, Geneva