



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/19/
UNAT/1632
Judgment No.: UNDT/2012/192
Date: 6 December 2012
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

GAKUMBA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Segun Jegede

Counsel for the Respondent:
Thomas Elftmann, UNDP

Introduction

1. The Applicant joined the United Nations on 22 July 2002 for a probationary period of three months as a Programme Analyst in the United Nations Development Programme (UNDP) in Kigali, Rwanda. This probationary period was extended on 22 October 2002 for two months through to 31 December 2002.

2. On 1 January 2003, his contract was converted to a fixed-term appointment and extended through to 31 December 2003. At the expiration of Applicant's contract in December 2003, he was offered a fixed-term contract to run from 1 January 2004 to 31 December 2004.

3. In a letter to the Applicant and to all UNDP Rwanda staff members dated 21 May 2004, Mr. Macharia Kamau, the UNDP Resident Representative (RR), terminated the Applicant's employment effective immediately. From that date the Applicant was not allowed to access the UNDP Rwanda offices but he continued to receive his salary and entitlements until the expiry of his contract on 31 December 2004. The Applicant is challenging the decision not to renew his appointment which he argues legally amounts to a termination of contract.

Facts

4. Sometime in 2003, the UNDP Rwanda Kigali office supported the Applicant's participation in UNDP's Virtual Development Academy course for 2003 which he completed successfully. The Applicant was also elected President of the Staff Association in December 2003.

5. In April 2003, UNDP's Career Review Group (CRG), concluded the Applicant's Results and Competency Assessment (RCA) for 2002 with a recommendation of "partially met expectations".

6. In early 2004, Mr. Kamau informed UNDP staff that the involvement of the Staff Association in the CRG would be discontinued. On 28 February 2004, the Applicant wrote to Mr. Kamau, on behalf of the Staff Association, disputing this decision.

7. In May 2004, the Applicant's immediate supervisor, Mr. Gana Fofang, Deputy Resident Representative (DRR), assessed the Applicant's performance as "fully met expectations" for the period from 1 February 2003 through 31 January 2004. Thereafter, Mr. Fofang proceeded on a new assignment in Mozambique. On 17 May 2004, the CRG, under the chairmanship of Mr. Kamau, disagreed with the views of the Applicant's immediate supervisor and assessed the Applicant's performance for the period as "unsatisfactory".

8. By email dated 19 May 2004, addressed to Mr. Kamau and copied, *inter alia*, to all the UNDP Rwanda Staff, the Applicant contested the CRG's findings and conclusions and alleged that Mr. Kamau had "manipulated" the CRG.

9. On 21 May 2004, Mr. Kamau addressed an email to all UNDP Rwanda staff in which he informed them that the Applicant's contract had been terminated effective immediately because his performance had not demonstrated any positive change or growth in the year following an appraised performance below a fully satisfactory level. Mr. Kamau stated that the Applicant would be relieved of all responsibilities to allow him time to seek alternate employment. Mr. Kamau further stated that the Applicant's contract was terminated that very day in accordance with guideline number 54 of the 2003-2004 RCA Guidelines.

10. On 24 May 2004, the Applicant denounced Mr. Kamau's decision to terminate his contract as being contrary to arts. 1 through 68 of the RCA 2003-2004 Guidelines. The Applicant also alleged that his election as President of the Staff Association in 2003 had upset the UNDP Rwanda management as he did not take their side on issues. The Applicant requested that Mr. Kamau review the contested decision.

11. On 8 June 2004 the Applicant filed a rebuttal to the RCA Rebuttal Panel wherein he disputed the downward revision of his rating by the CRG from “fully met expectations” to “unsatisfactory”. He alleged that he had been denied due process and that Mr. Kamau had violated numerous articles of the 2004 RCA Guidelines and of the UNDP Staff Association Constitution.

12. By email dated 9 June 2004, to Mr. Fofang, Ms. Yewande Odia, Legal Advisor, Office of Legal and Procurement Support, UNDP, sought his opinion regarding the Applicant’s performance in light of the CRG’s rating.

13. On 9 June 2004, Mr. Fofang responded stating that he was neither privy to the CRG rating nor the justification offered and that he first learned of the issue from Ms. Odia’s email. Mr. Fofang declared that he stood by his assessment of the Applicant’s performance.

14. On 10 June 2004, Ms. Odia, also sought Mr. Fofang’s opinion regarding Mr. Kamau’s claims that he (Mr. Fofang) was frustrated over the Applicant’s poor performance and misbehaviour. On 13 June 2004, Mr. Fofang denied the statements attributed to him by Mr. Kamau. Mr. Fofang explained that,

I expressed equal frustration with [the Applicant] and others periodically as performance and deadline pressures occasioned and not as stated and I know of no aggressive behaviour what ever that means.

15. On 21 August 2004, Ms. Odette Murat, Deputy Resident Representative, UNDP, Kigali, Rwanda notified the Applicant that the UNDP Management had received, on 20 August 2004, two official complaints against him from two former consultants who claimed, inter alia, that he had threatened and intimidated his colleagues at UNDP, Rwanda. Copies of the complaints were attached for the Appellant’s review and comments.

16. On 23 August 2004, the Applicant refuted the allegations. He stated that his election as President of the Staff Association attested to the trust and

confidence that staff had put in him, especially in promoting their interests which was disturbing to the senior management because he did not allow management to manipulate him. The Applicant stated that he was not aware of any written or signed memorandum addressed to him regarding these allegations of misbehaviour as was required by the United Nations Regulations and Rules. He rejected the allegations as unfounded.

17. On 9 December 2004, the RCA Rebuttal Panel submitted its report concluding, inter alia, that:

- a. the CRG did not provide adequate justification for its decision to downgrade the Applicant's RCA rating by two levels from "fully met expectations" to "unsatisfactory";
- b. the Applicant's performance review lacked due process in terms of lack of documentary evidence and feedback on the Applicant's performance and "substantially different" assessments of the Applicant's performance by Mr. Kamau and Mr. Fofang and the non-participation of Mr. Fofang in the CRG meeting even though he was willing to participate via telephone;
- c. the Applicant's behavioural issues had a negative impact on his performance which was documented by the CRG;
- d. given the severity of the CRG comments, the Panel was concerned that management did not take timely and appropriate steps to address the Applicant's alleged behavioural issues;
- e. there was insufficient evidence to justify the final RCA/CRG rating of "unsatisfactory"; and
- f. the Panel recommended that the Applicant's CRG rating be changed to "partially met expectations" having taken into account Mr.

Kamau's information on behavioural issues.

18. On 9 December 2004, the RCA Rebuttal Panel forwarded its report to Mr. Brian Gleeson, Director, Office of Human Resources/Bureau of Management, UNDP.

19. On 15 December 2004, Mr. Kamau informed the Applicant, who was still not allowed into the UN premises, that the RCA Rebuttal Panel's recommendation to upgrade his overall rating did not change the basis on which the decision to terminate his contract was made and that his contract would therefore expire on 31 December 2004 as he had previously been informed.

Joint Appeals Board (JAB) Review

20. By email dated 20 December 2004, addressed to Mr. Mark Malloch Brown, then Administrator, UNDP, the Applicant sought administrative review of the decision to allow his appointment to expire on 31 December 2004.

21. On 27 January 2005, Mr. Jan Mattsson, Assistant Administrator and Director, Bureau of Management, UNDP, informed the Applicant that UNDP had undertaken the request for administrative review focusing only on the decision to allow his appointment to expire at its term in view of his unsatisfactory performance. Mr. Mattsson reiterated that the Applicant's performance was not satisfactory for the entire period of his employment with UNDP; that his performance had not demonstrated any positive change or growth in the year following an appraised performance below a fully satisfactory level and that he was encouraged to seek alternative employment opportunities with the view to separation from UNDP.

22. On 10 March 2005, the Applicant filed his Statement of Appeal with the JAB and on 19 April 2005, the Respondent filed a Reply. Following a further exchange of pleadings, the JAB panel transmitted its report to the Administrator, UNDP, on 5 February 2007. The panel unanimously concluded that the

Respondent had put forth a reasonable basis for the decision not to renew the Applicant's fixed-term appointment and that there had been no due process failures in the making of that decision.

23. On 17 May 2007, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to accept the recommendation of the JAB. The Applicant was also informed that he could appeal the decision directly to the former UN Administrative Tribunal.

24. On 4 September 2008, the Applicant submitted the present Application to the former UN Administrative Tribunal while the Respondent filed his Reply on 11 March 2009. The case was subsequently transferred to this Tribunal in January 2010 in accordance with the transitional measures related to the introduction of the new system of administration of justice in the United Nations.

25. The Tribunal heard the case on 16 and 18 May 2011 and from 8 to 9 November 2011. During the hearings, the Tribunal received live evidence from the following witnesses for the Applicant:

- a. The Applicant;
- b. Mrs. Faby Ngeruka;
- c. Mrs. Donnah Kamashazi;
- d. Mr. Gana Fofang and
- e. Mr. Francis Gatare.

26. Ms. Faby Ngeruka's evidence is summarized below.

27. She was employed as a Gender Specialist for six months in UNDP's Rwanda office in 2002. She knew the Applicant when she worked in Rwanda in his capacity as the President of the Staff Association. She had served as a Vice

President of the Staff Association. She knew the Applicant as a frank, honest and straight-talking person.

28. She noticed that the Applicant and Mr. Kamau had problems getting along and that the Applicant's role in the Staff Association caused him problems with Mr. Kamau. She formed these impressions as a result of email exchanges between Mr. Kamau and the Applicant which were copied to other members of the Staff Association. Mr. Kamau had also informed the Staff Association that the Applicant's behaviour was unacceptable.

29. The Applicant's relationship with his colleagues was good and he was voted by all staff in the UN Agencies in UNDP Rwanda to be the President.

30. Ms. Donnah Kamashazi's evidence is summarized as follows:

31. She has worked as a Consultant and as a Senior Programme Officer with UN Women (which was then referred to as the United Nations Development Fund for Women) in Rwanda since 2003. Her office is located in the UNDP premises in Kigali.

32. She knew the Applicant when he was a staff member of UNDP in Kigali until he separated from service. She thought that the Applicant was well versed in staff representation matters and she also found him hardworking and knew him as someone who defended staff interests.

33. She knew the Applicant in his capacity as the President of the Staff Association where she found his work to be very good. She recalled that the Applicant was separated from service as a result of disagreements with Mr. Kamau.

34. She recalled the day when staff members returned to the UN premises in Kigali from lunch and the Applicant was barred from accessing the premises. A

memorandum was thereafter sent out by Mr. Kamau to all staff members informing them that the Applicant was not allowed to access the premises.

35. Mr. Gana Fofang's evidence is summarized below.

36. He has been a UNDP staff member for the past 20 years and was a Resident Coordinator for seven years.

37. He was the Applicant's immediate supervisor. He found the Applicant to be forthright in implementing his tasks and very reliable. He could not recall anything disagreeable in his working relationship with the Applicant. He knew the Applicant to be dedicated to the issues he handled.

38. He knew Mr. Kamau and had acted as the Resident Representative in Rwanda before his arrival. Mr. Kamau was not the Applicant's first reporting officer.

39. The procedure for completing a staff member's RCA was as follows. The staff member was given their job performance, the supervisor then provided comments and the report was thereafter sent to CRG Committee which is chaired by the head of office. The head of office is also the Resident Representative. The Committee could revise the comments of the supervisor. The staff member could request a rebuttal if he did not agree with the final report from the CRG Committee.

40. He had appraised the Applicant's performance as "fully met expectations". He noted in his appraisal that the Applicant had made progress in the 2002/2003 cycle. His assessment of the Applicant was altered by the CRG. He was not present at the time and was not contacted about it. He had informed UNDP management of his contact details before his departure to a new posting so that he could participate in CRG meetings where staff who had been under his supervision were concerned. This was the standard practice. He only learnt later

that his appraisal of the Applicant's performance had been changed without reference to him.

41. When contacted by UNDP's New York office about his views on the Applicant's performance, he stated that his views remained unchanged.

42. A summary of Mr. Francis Gatare's evidence is as follows:

43. He used to be a staff member of UNDP, Kigali office where he headed the Strategy and Economic Policy Unit. He had also served as the President of the Staff Association of UNDP and associated agencies. The Applicant was elected to succeed him as President of the Staff Association in December 2003.

44. The criteria for becoming President of the Staff Association included that the individual concerned be mature, intelligent and with a strong personality and that he/she could represent staff interests before management. The Applicant was persuaded to stand for President and was supported greatly by staff members.

45. The Applicant used to relate well with Mr. Kamau but when he became President of the Staff Association, this relationship deteriorated because the Applicant always stood up for staff interests whereas Mr. Kamau preferred staff to be fragmented and not working together for a common interest.

46. During his tenure as President of the Staff Association, he had sat on the CRG Committee with Mr. Kamau but when the Applicant became President, Mr. Kamau refused that the Applicant sit on the Committee. He recalled an email which had been sent out after this refusal.

47. He recalled a memorandum sent to all staff members by Mr. Kamau instructing them to desist from associating with the Applicant. There was even an attempt to forcefully remove the Applicant's personal belongings from the office premises.

Applicant's Case

48. A summary of the Applicant's case as stated in his testimony and pleadings is as follows:

49. In 2003, he was nominated by other staff members as a candidate for the Presidency of the Staff Association (SA) but he informed them that he could only accept the mandate after July 2003.

50. When the UNDP RR, Mr. Kamau was informed by some staff members that the Applicant might be the new candidate for Presidency of the Staff Association, he threatened him verbally with the termination of his fixed-term contract if he was elected President. This was because the UNDP RR preferred another candidate.

51. This situation resulted in the RR unsuccessfully pressuring the Deputy, UNDP Resident Representative (the Applicant's supervisor and former Acting Head of Unit) to evaluate the Applicant and terminate him during the January-February 2002-2003 RCA/CRG exercise.

52. An acting Head of Unit (who resigned few weeks later) was manipulated by the UNDP RR into evaluating the Applicant instead of his Supervisor.

53. When the Applicant refused to sign the 2002-2003 UNDP-RCA/CRG, the RR verbally informed him that the CRG had decided to upgrade his rating and invited the Applicant to lobby for his preferred candidate Mr. Eugene Nkubito, to be elected President of the Staff Association. He told the UNDP RR that it was up to all UN staff to make their own choice for their future President.

54. Mr. Kamau was dissatisfied when the Applicant eventually became President of the Staff Association and affiliated agencies based in Rwanda in December 2003.

55. After his election, Mr. Kamau started undermining him and verbally threatened to terminate his fixed-term appointment. He was not happy with the Applicant because as President of the Staff Association, he would not take the side of management as represented by the RR himself on issues.

56. Mr. Kamau unsuccessfully attempted to gain the Applicant's support in the inappropriate and illegal recruitment of a number of Mr. Kamau's female friends. He then threatened that they would meet again during the next 2003-2004 UNDP-RCA/CRG exercise.

57. Mr. Kamau arbitrarily and against established practice, removed the President of the Staff Association from the Committee in charge of recruitments and also from the CRG Committee in order to effectively manipulate the Committee for his own benefit and to end the Applicant's employment.

58. He then recruited his Ugandan girl friend who was living in Rwanda without advertising the post or conducting an interview. During the same period, the RR impregnated a Rwandese National. This case was reported to the Executive Director of UNICEF, Ms. Ann Venneman, former Representative of UNICEF Rwanda, Ms. Bintou Keita, Mr. James Lee, then Ombudsman, to the Panel of Counsel Office through Ms. Vijaya Claxton, to Mr. Françoise Nocquet, to the then Acting President of the UNDP Staff Association in Rwanda and some Senior staff at UN HQ.

59. During the 2003 RCA exercise, the Applicant's immediate supervisor had rated him as "fully met expectations", following which the UNDP RR downgraded his rating to "unsatisfactory" providing a basis for the latter's decision to terminate his appointment on 21 May 2004, one day after a General Assembly meeting of the Staff Association of UNDP Rwanda and all its sub-agencies. The UNDP RR had acted in retaliation as he was worried about strong recommendations and resolutions taken by the Staff Association at that meeting.

60. Mr. Kamau had waited for a few weeks to ensure that the Applicant's

immediate supervisor had left to assume his new posting in Mozambique and that the Associate Human Resources Officer, Ms. Beatrice Uwimbabazi, was away in a meeting held in Brazzaville/Congo, to effect the downgrading of his performance.

61. The Applicant had made an official request for rebuttal of his RCA rating which resulted in the rating being changed from “unsatisfactory” to “partially met expectations”. After receiving the findings and recommendations of the Rebuttal Panel, Mr. Kamau sent him a letter informing him of the non-renewal of his contract beyond 31 December 2004.

62. Between 2003 and 2004, he had communicated through an exchange of emails with the Staff Council in New York and informed them that Mr. Kamau was undermining, violating and manipulating the UN staff in Rwanda, notwithstanding persisting sensitivities there following the 1994 Genocide. When the President of the New York Staff Council came to Rwanda on official mission of UNOPS, he requested the Applicant to convene a General Staff Association Meeting where he requested the UN Staff to avoid manipulation by the senior management.

63. Mr. Kamau had threatened him verbally after being informed that the President of the New York Staff Council intended to request the Ombudsman, Mr. James Lee, to go to UNDP/Rwanda to hear, resolve and, hopefully, find a solution reconciling UN Staff in Rwanda with Mr. Kamau.

64. The allegations made by Mr. Kamau regarding the Applicant’s behavior were related to complaints from two Canadian consultants with the Rwandan Commission for Human Rights and the Rwandan Commission for Unity and Reconciliation and these were sent to him on 20 August 2004, three months after the purported termination of his contract. The complaint letters were received by Mr. Kamau on the 23 December 2003 when he had rebutted his false CRG rating.

65. During the tenure of his fixed-term appointment, he never received any

official warning letter from Mr. Kamau or from his immediate supervisor, informing or warning him of any alleged bad behaviour.

66. Mr. Kamau's decision to terminate his fixed-term appointment was motivated by factors entirely extraneous to the appraisal process. These factors constituted Mr. Kamau's "hidden agenda" to terminate his appointment during the following 2003-2004 appraisal year, just as he had threatened the Applicant at the beginning of his fixed-term contract in 2002-2003. After the purported termination of his fixed term-appointment, Mr. Kamau recruited another staff member to replace him in the UNDP Justice Unit whilst the Applicant's rebuttal process was ongoing.

67. The Applicant was embarrassed by being illegally barred from entering the workplace on the instructions of the Resident Representative from 21 May 2004 until his contract ended on 31 December 2004.

68. The Applicant's sole selection, from other UNDP staff, to participate in the Virtual Development Academy program during the 2003-2004 academic year, coupled with the distinction he earned in most of his courses, only served to once again manifest the recognition by UNDP management of his potential in helping to realize the UNDP program approach.

69. The Applicant was a hard working and conscientious officer whose only crime was that he headed the Staff Association and refused to be compromised by management.

70. There are several due process violations in evaluating the Applicant's performance.

71. It is the Applicant's position that his case is one of termination of appointment and not of non-renewal of appointment as is being touted by the Respondent for the following reasons:

- a. When Mr. Kamau communicated the email dated 21 May 2004 to the Applicant and the entire UNDP Rwanda staff, he clearly intended to bring the Applicant's fixed-term contract which still had over six months to run, to an immediate end.
 - b. The Applicant was locked out of UNDP premises from 21 May 2004 up until the end of his contract on 31 December 2004.
72. The actions of the Resident Representative against the Applicant amounted to abuse of authority.
73. The Applicant requested the Tribunal to order:
- a. his reinstatement/redeployment to another UNDP Country office or another UN Agency of his choice;
 - b. compensation for lost earnings, including salaries and all entitlements applicable to UN Staff members, from 21 May 2004 until judgment, and interest at the rate of 8 per centum per annum until the compensation is paid;
 - c. compensation for the professional, moral and material damages suffered as a result of the malicious and arbitrary decisions which resulted in the termination of his fixed-term appointment;
 - d. compensation for the indignity and trauma suffered when he was locked out of UNDP premises on 21 May 2004.

Respondent's Case

74. A summary of the Respondent's case is as follows:
75. A purported termination of the Applicant's contract conveyed in the letter dated 21 May 2004 was never implemented and the Applicant continued to receive his salaries and other entitlements until 31 December 2004.

76. The Applicant's case is not a termination but a non-renewal of his fixed term appointment. This was contained in a letter to the Applicant on 15 December 2004 and was based on unsatisfactory performance in two consecutive performance review cycles.

77. If the Applicant's appointment was effectively terminated by Mr. Kamau's letter of 21 May 2004, it cannot be entertained by the Tribunal as the alleged administrative decision was not submitted for administrative review.

78. In view of two consecutive non-satisfactory performance evaluations, the Respondent legitimately exercised his discretion not to renew the Applicant's contract in accordance with the applicable UNDP policies.

79. Fixed-term contracts carry no right or expectancy of renewal or conversion to any other type of contract. A legal expectancy of renewal cannot be created by efficient or even outstanding performance.

80. In taking the contested decision, the Applicant's performance was given full and fair consideration. The decision not to extend the Applicant's contract for underperformance was supported by the facts.

81. The Respondent, therefore, requests the Tribunal to dismiss each and all of the Applicant's pleas and to dismiss the Application in its entirety.

Considerations

82. Having reviewed the entire case record, the Tribunal finds that the following legal issues arise for consideration in this case:

- a. Whether the Resident Representative's termination of the Applicant's contract in May 2004 was proper;
- b. Whether the non-renewal of the Applicant's contract after 31 December 2004 had sufficient basis under the Staff Rules and Regulation;

- c. Whether there were any due process violations in evaluating the Applicant's performance;
- d. Whether the UNDP Resident Representative abused his authority in any way.

Was the Resident Representative's termination of the Applicant's contract in May 2004 proper?

83. The undisputed evidence before the Tribunal indicates that in an email dated 21 May 2004 addressed to all UNDP Rwanda staff, Mr. Kamau informed them that the Applicant's contract had been terminated effective immediately since his performance had not demonstrated any positive change or growth in the year following an appraised performance below a fully satisfactory level. Mr. Kamau stated that the Applicant would be relieved of all responsibilities to allow him time to seek alternate employment. Mr. Kamau further stated that the Applicant's contract was terminated that very day in accordance with guideline number 54 of the 2003-2004 RCA Guidelines. The Applicant was subsequently locked out of UNDP premises from 21 May 2004 but he continued to receive his salary and other entitlements until 31 December 2004 when his contract expired.

84. The Respondent's argument is that Mr. Kamau's termination letter of 21 May 2004 was never implemented and that even if the Applicant's appointment had been terminated as a result of Mr. Kamau's letter of 21 May 2004, such action and any related claim would be outside the scope of this case, as the purported decision was not submitted for an administrative review.

85. Having reviewed the situation the Applicant found himself in, that is, receiving his salary and entitlements whilst being barred from accessing his office or undertaking any of his employment responsibilities, the Tribunal finds that the effect of Mr. Kamau's action was to effectively place the Applicant on Special Leave With Full Pay (SLWFP) from 21 May 2004 to 31 December 2004. In view of the above, the Tribunal finds that the events leading up to the Applicant's

separation from service do not amount to a termination. This, however, raises the question whether it was lawful to place the Applicant on SLWFP for the said period.

86. The then applicable staff regulation 5.2 of ST/SGB/2003/5, “Staff Regulations”, provided that SLWFP could be authorized by the Secretary-General in exceptional cases. Further, then applicable staff rule 105.2 stated that special leave was normally without pay. In exceptional circumstances, special leave with full or partial pay could be granted.

87. In light of all the facts of the case, Mr. Kamau’s email of 21 May 2004 purported to place the Applicant on SLWFP as a result of unsatisfactory performance. UNDP guidelines on RCA do not confer any power on the Resident Representative to place a staff member on special leave without pay for unsatisfactory performance! This does not constitute an “exceptional circumstance” as described by the then applicable staff rule. That decision was a breach of staff rule 105.2.

88. The clear answer is that the Resident Representative, Mr. Kamau had acted illegally in so doing since the placement of a staff member on SLWFP is properly provided for under the afore-mentioned staff rules. None of the conditions of these staff rules had been satisfied and the RR had acted outside the scope of his authority in barring the Applicant from entering the office premises or carrying out his duties whilst placing him on full pay at the expense of the Organization.

89 Not only were the actions of the RR illegal, they were a disguised disciplinary measure designed to humiliate and embarrass the Applicant to the greatest extent possible. What was the need to copy all UNDP Rwanda staff members in the email transmitting this decision? Why was the Applicant barred from reporting to work during this period? It was poor managerial practice in the

extreme and an irresponsible and blatant waste of the Organization's resources to place a staff member on full pay for seven months for doing nothing.

Did the non-renewal of the Applicant's contract after 31 December 2004 have sufficient basis under the applicable UNDP legislation or case law?

90. The Respondent had submitted that in the letter of 15 December 2004, the RR had informed the Applicant that his contract would not be renewed beyond 31 December 2004 due to his unsatisfactory performance in two consecutive performance review cycles. He additionally submitted that it was a legitimate exercise of discretion on the part of the Respondent.

91. It was also the Respondent's case that fixed-term contracts do not carry any right or expectancy of renewal or conversion to any other type of contract. Employment with the Organization ceases automatically on the expiration date of a fixed-term appointment and a legal expectancy of renewal would not be created by efficient and even outstanding performance.

92. The Respondent further submitted that there was no proof of improper motivation and abuse of authority on the part of the RR and that the allegations on this score were without merit and ought therefore to fail.

93. The Applicant's case is that his performance rating for the 2002/2003 period by the CRG was manipulated by the RR. Mr. Gana Fofang who was the Applicant's immediate Supervisor had given unchallenged testimony before the Tribunal that he rated the Applicant as "fully met expectations." This assessment was altered by the CRG chaired by the RR in the absence of and without reference to Mr. Fofang. When contacted by officers in the UNDP headquarter offices in New York on the matter, Mr. Fofang stood by his assessment of the Applicant.

94. There is also evidence tendered that Mr Kamau had gone the extra mile of unilaterally removing the President of the Staff Association from membership of

the CRG during the tenure of the Applicant against the established practice. In the same vein, he was alleged to have removed the Staff Association President from the recruitment committee also against the usual practice. These pieces of evidence are unchallenged.

95. Facts pleaded by the Applicant and evidence given by him point to the RR not being happy about the Applicant's refusal in his capacity as SA President to yield to management pressures as represented by the RR himself. This piece of evidence has not been refuted or rebutted, instead the Respondent has chosen to rely on the legal non-expectancy of renewal in fixed-term contracts.

96. The non-expectancy of renewal inherent in fixed-term contracts does not provide a blanket cover or an all-purpose weapon in law for a mischievous manager to axe a staff member for other personal or extraneous reasons. In order to determine the lawfulness of the non-renewal decision, the Tribunal must determine, *inter alia*, whether the Administration has made an express promise that gives a staff member an expectancy that his or her appointment will be extended, whether it abused its discretion, or whether it was motivated by discriminatory or improper grounds in not extending the appointment.¹

97. The Applicant had pleaded that while the rebuttal process in his non-renewal case was still on-going, the RR had recruited a replacement for his post. This piece of evidence was not challenged. It was properly to be expected that the Respondent would provide a rebuttal or an explanation for this state of affairs. This is simply because the evidence tends to show that there was *animus* on the part of the RR against the Applicant and that the RR had used his position to manipulate the CRG for purposes of rating the Applicant.

98. There is no reason for the Tribunal not to conclude that Mr. Kamau had exhibited some *animus* against the Applicant which clouded his better judgment and attested to his poor sense of judgment.

¹ See for example, *Abdalla* 2011-UNAT-138.

Were there any due process violations in the Applicant's performance evaluations?

99. Having found that Mr. Kamau exhibited *animus* against the Applicant, his involvement in the latter's performance evaluation could no longer be considered objective. The undisputed facts of the case show that Mr. Kamau abused his position as Chairman of the CRG to downgrade the Applicant's performance evaluation from "fully met expectations" to "unsatisfactory" as evidenced by the following:

- a. The Tribunal received unchallenged evidence that on 28 February 2004, the Applicant wrote to Mr. Kamau disputing his decision to discontinue the involvement of the Staff Association in the CRG. The Applicant publically challenged this position. These provide motive on the part of Mr. Kamau to get back at the Applicant.
- b. Mr. Kamau was not in a position to directly assess the Applicant's performance. He, nevertheless, chaired the CRG committee meeting to discuss the Applicant's performance evaluation in the absence of the Applicant's immediate supervisor.
- c. Mr. Fofang, the Applicant's immediate supervisor, had the responsibility to directly assess the Applicant's performance. The RR, Mr. Kamau disregarded the CRG guidelines by denying Mr. Fofang participation in the CRG committee that downgraded the Applicant's performance evaluation despite the latter's request to participate even via telephone or video conference.
- d. The Applicant and several witnesses all gave evidence that Mr. Kamau had problems with the Applicant in his capacity as President of the Staff Association. This claim about problems between the Applicant and the RR based on the fact that they found themselves representing management and staff remained unchallenged.

100. There is no gain-saying that the CRG did not provide adequate justification for its decision to downgrade the Applicant's RCA rating by two levels from "fully met expectations" to "unsatisfactory." To its part, the RCA Panel provided no basis for asserting that the Applicant had "behavioral issues" which negatively impacted on his performance. These alleged behavioral issues were basically Mr. Kamau's biased opinions about the Applicant which Mr. Fofang and other witnesses rebutted in evidence.

101. The RCA Panel erred when it uncritically took into account certain allegations made by Mr. Kamau during the CRG committee meeting on the Applicant's performance. Mr Kamau had alleged that Mr. Fofang's assessment of the Applicant "ran diametrically contrary to continued comments made about the staff member during weekly management meetings where according to the Resident Representative, the supervisor had shared his frustration and resignation at the staff member's poor performance and behavior".

102 In his evidence before the Tribunal Mr. Fofang stated that he found the Applicant to be forthright in implementing his tasks and very reliable. Further, he could not recall anything disagreeable in his working relationship with the Applicant and that he knew the Applicant to be dedicated to the issues he handled.

103. Again, according to the RCA report, Mr Kamau had claimed that the Applicant had "threatening and aggressive conduct within the office environment". Mr. Kamau had also claimed that,

He had given the S/M [Applicant] repeated verbal reminders that his behavior was not meeting his expectations and was having a negative influence on his interpersonal relationships, but this did not stop the S/M from developing disruptive behavior in the workplace. This behavior became more acute, according to the Resident Representative, when the S/M became president of the staff association. The Resident Representative cited an instance in which the S/M intimidated job applicants by asking sensitive questions with reference to the genocide.

104. The RCA Panel also took into account information about the Applicant's "behavioral issues" from what they described as "other credible sources". These "credible sources" were not named and the information obtained from them was not disclosed. The RCA Panel therefore erred in taking them into account resulting in its decision to downgrade the Applicant's performance evaluation to "partially met expectations" which subsequently justified the decision to not renew his fixed-term appointment.

105. The witnesses who appeared before the Tribunal gave evidence that is at odds with Mr. Kamau's allegations. Was it probable that or credible that an individual with poor interpersonal relationships was elected President of the Staff Association by all the staff of UNDP and its affiliated agencies? The live testimony received by the Tribunal paints a different, more positive picture of the Applicant as opposed to that described by Mr. Kamau. The Respondent failed to call evidence to prove any of Mr. Kamau's allegations.

106. UNDP rules provide clear procedures which must be adhered to in determining the veracity of any allegations of misconduct made against a staff member. Where these procedures have not been complied with, there can be no basis for concluding that such allegations have been substantiated.

107. The Tribunal finds that there were due process and procedural violations in the Applicant's performance evaluations leading up to the decisions to downgrade his performance evaluation from "fully met expectations" to "unsatisfactory" and in the RCA Panel's decision to give the Applicant a rating of "partially met expectations" which provided the basis for not renewing his appointment.

Did the UNDP Resident Representative abuse his authority in any way?

108. The Tribunal could not find any Administrative issuances which defined "abuse of authority" in UNDP during the times material to this Application.

UNDP's Policy on Workplace Harassment, Sexual Harassment and Abuse of Authority dated 2005 defines abuse of authority as follows:

The abuse of authority is the improper use of a position of influence, power or authority by a staff member or non-staff personnel against another staff member or non-staff personnel or a group thereof. This is particularly serious when the person in question uses his or her influence, power or authority to arbitrarily influence the career or employment conditions (including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion) of another staff member or non-staff personnel.

109. In view of its previous considerations, and in view of the elements that constitute abuse of authority stipulated above, the Tribunal is convinced that Mr. Kamau abused his authority in two instances. The first is where he purported to terminate the Applicant's fixed-term appointment and actively barred him from entering UNDP premises. The second is his role in manipulating the CRG and arbitrarily influencing the non-renewal of the Applicant's fixed-term appointment.

Findings

110. The following are the Tribunal's findings:

- a. The events leading up to the Applicant's separation from service do not amount to a termination. The Applicant was in fact wrongly placed on Special Leave With Full Pay from 21 May 2004 to 31 December 2004.
- b. UNDP guidelines on RCA do not confer any power on the Resident Representative to place a staff member on special leave with full pay for unsatisfactory performance as was done by the RR in this case.
- c. Not only was the decision to place the Applicant on SLWFP illegal, it was a disguised disciplinary measure designed to humiliate and embarrass the Applicant to the greatest extent possible.

d. The Applicant failed to challenge the decision purportedly terminating him and barring him from access to his workplace. The application based on termination is therefore not receivable. The Tribunal's findings on this score, however, will assist in establishing the true reasons underlying the decision not to renew the Applicant's fixed-term appointment.

e. Mr. Kamau abused his position as Chairman of the CRG to downgrade the Applicant's performance evaluation from "fully met expectations" to "unsatisfactory".

f. The RCA Panel erred in taking into account certain vague and unsubstantiated allegations made against the Applicant by the RR as the basis for downgrading his performance evaluation to "partially met expectations".

g. The RCA Panel also took into account information about the Applicant's "behavioral issues" from what they described as "other credible sources". These sources are unnamed and the information provided by them not disclosed in the RCA report. The RCA Panel erred in taking them into account in its decision to downgrade the Applicant's performance evaluation to "partially met expectations"

h. UNDP rules provide clear procedures which must be adhered to in determining the veracity of any allegations of misconduct made against a staff member. Where these procedures have not been complied with, there can be no basis for concluding that such allegations have been substantiated.

i. The Tribunal finds that there were due process and procedural violations in the Applicant's performance evaluations leading up to the decisions to downgrade his performance evaluation from "fully met expectations" to "unsatisfactory" and in the RCA Panel's decision to give

the Applicant a rating of “partially met expectations” which provided the basis for not renewing his appointment.

j. Mr. Kamau abused his authority to arbitrarily influence the non-renewal of the Applicant’s fixed-term appointment.

Judgment

111. In view of its findings, the Tribunal:

a. Rescinds the decision not to renew the Applicant’s fixed-term appointment and holds that until the date of this judgment the Applicant remains lawfully in the service of UNDP;

b. Orders the Respondent to reinstate the Applicant in service of UNDP;

c. In the event that reinstatement of the Applicant is not feasible, the Respondent to pay the Applicant as an alternative compensation in lieu of reinstatement of two years’ net base salary; and

d. In view of the fact that the Applicant suffered several procedural and due process violations, humiliation and embarrassment from the point of the CRG committee’s review of his evaluation, to the 21 May 2004 letter from Mr. Kamau placing him unlawfully on special leave with full pay, to the flawed RCA Panel evaluation in the course of the performance evaluation and leading up to the non-renewal of his fixed-term appointment on 31 December 2004, the Tribunal awards compensation to him in the amount of seven months’ net base salary.

112. All the above compensation shall be computed at the Applicant’s category and level of employment at the time of the contested decision.

113. The Applicant is entitled to the payment of interest on the awards from the date this Judgment is executable at the US Prime Rate until payment is made. If payment is not made within 60 days of the date that this Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 6th day of December 2012

Entered in the Register on this 6th day of December 2012

(Signed)

Jean-Pele Fomété, Registrar, Nairobi