Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MILICH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stéphanie Cochard, Human Resources Management Service, UNOG
Inbegorg Daamen-Mayerl, UNOV/UNODC

Introduction

1. By application filed on 20 July 2012 and completed on 30 July 2012, the Applicant contests the decision not to renew his fixed-term appointment with the United Nations Office on Drugs and Crime ("UNODC") beyond 29 February 2012.

2. The Applicant submits that his contract was not renewed despite alleged assurances of renewal. He states that he received a notification of his non-renewal a "mere three weeks" before the expiration of the contract and that he was told that he would be brought back for short-term consultancies, but "[s]ubsequently, even this was formally denied". The Applicant states that, as a result of the non-renewal, he was not provided with home leave, which negatively affected him as he had expected to complete some medical check ups. He seeks two months' salary in lieu of proper notice, reimbursement of medical check-up costs that he had to pay for personally as a result of the expiration of his medical insurance, as well as reimbursement of "any subsequent treatment". The Applicant does not provide any particulars with respect to his medical insurance and "subsequent treatment" claims.

3. The Respondent submits that the application is not receivable as the Applicant has failed to request a management evaluation of the contested decision. The Respondent further submits that the application is without merit as the renewal of the Applicant's contract was contingent upon availability of funding, of which he was made aware when he applied for the position and also during his employment. The Respondent states that, although the Organization is under no obligation to notify staff members of the non-renewal of fixed-term appointments, it did so in this case, giving the Applicant three weeks' notice. The Respondent submits that the Applicant's claims of "repeated assurances" of renewal are without basis as there is no evidence of any such assurances having been given by a UNODC official with proper authority.

4. Following the filing of the application and reply, neither party sought leave to file any further submissions or requested a hearing. In view of the receivability issues raised, the Tribunal found it appropriate to consider the present case on the papers before it.

Facts

5. The Applicant joined UNODC on a fixed-term appointment on 1 March 2011 and held a project position as Expert (Alternative Livelihoods), P-4, in Herat, Afghanistan. The vacancy announcement for the Applicant's position stated that "[a]ny extension will be subject to availability of funding".

6. On 8 February 2012, the Applicant was informed that his contract would not be extended beyond 29 February 2012. In his application the Applicant refers to an email he received on 8 February 2012 from the Senior Advisor, Counter Narcotics Programme, UNDOC, which stated:

> Your contract will end, so you should start to make arrangements to head home. I am sorry for the short notice as I had initially wanted to extend your contract.
>
> There are two factors.
>
> The primary one is that the nature of our assistance is changing. We [were asked] to get a balance between staff and programme costs. It makes it hard in the early phases of the project to justify the second international post. Rather than have two internationals here full time, the consensus is to bring people in when and as needed.
>
> If possible (and if you are still interested), I would like to bring you in from time to time on consultancies for specific design work and assessments.
>
> The second factor, and I will be frank, is that you have stepped on a few too many toes! You are very strong technically in the [Alternative Livelihoods] field and write well. Both Jean-Luc and I admire and respect you, but you seem to have a penchant for upsetting people. There have just been a few too many complaints and some feel you are a liability to UNODC. In the current climate, I had to make a very strong argument to keep you here, and this has run against it. Anyway,

> I am really sorry to bring this bad news. On the positive side, I guess, it means time with family. And I, personally, would like to bring you back in if I can (the way we employ Fabrice) on a regular basis, again if you don't quickly move on to bigger and better things.

7. The Applicant was separated from service upon the expiry of his contract on 29 February 2012.

8. On 2 July 2012, the Senior Adviser, Counter Narcotics Programme, informed the Applicant by email that no consultancy services would be required by the Programme "in the near term", although "this doesn't completely rule out consultancies in the future".

9. On 12 July 2012, the Applicant sent an email to the Chief, Human Resources Management Service ("HRMS"), Division of Management, United Nations Offices in Vienna ("UNOV"), stating that he had not made "any noise about [his non-renewal] previously" as he had received "messages" that his contract would be extended. (The Tribunal notes that the Applicant did not identify in his application or any of the supporting documents the individuals who had allegedly given him these messages.) In this email the Applicant enquired about "a fair separation package", suggesting two months' salary, stating also that, if necessary, he would appeal to the Administrative Tribunal of the International Labour Organization ("ILO"):

> I was rather hoping that you might pick up the ball and run with it re the 3-weeks notice issue.
>
> The reason I had not made any noise about this previously is that while the "don't worry, your contract will be extended" messages came to naught, an additional offer was made to me before I left Kabul—"don't worry, we'll have you back here as a consultant within a few weeks".
>
> Well, as [the Senior Adviser's message] indicates, that's not coming to pass either.
>
> So what is UNODC's position on a fair separation package? I would suggest 2 month[s'] salary, one for the year I worked, the other for the 51 weeks it took for UNODC to bring me on-board after I applied for the post—time I did not use to search for other work, since I was

> expecting at any moment to be called to Afghanistan. (That expectation was fulfilled—after 51 weeks, I was offered a flight that departed 7 hours after I received the email message—needless to say, I asked for a delay of a day.)
>
> I am not in any way suggesting anything but an amicable settlement … . I do know, however, that if necessary I can appeal to the ILO.

10. On 16 July 2012, the Officer-in-Charge, HRMS, replied to the Applicant stating, *inter alia*, that, although fixed-term appointments expire without notice, the Organization had provided him with notice. The Applicant was further informed that, "taking into account the summer holiday period", the hiring procedures leading to his March 2011 appointment were "duly and timely followed". He was further informed that staff members were entitled to termination indemnities only upon termination of their contracts prior to their expiration, whereas in his case his contract expired on its own terms.

11. The Applicant replied on 17 July 2012, raising various grievances and requests and stating that he would take his case to the Administrative Tribunal of the ILO. More specifically, he stated:

> "[T]aking into account the summer holiday period." That's risible and derisory. Do you mean to tell me that there's nobody in the office to whom the hiring process can be seconded when a staff member is on leave? Is this why country offices pay Vienna its demanded pound of flesh, the 13% overhead? We in the field often commented that we could not see the utility of Vienna-based staff (with exceptions, of course). … Oh, and in case you thought we didn't notice, we observed that 48 of the 50 confirmed continuing contracts last awarded were for Vienna-based staff - an insult to those of us struggling to do well, and keep things going in the field. It was quite clear to us where Vienna's priorities lie.
>
> … Summer or not, I asked the Representative in October [2010] what he was able to tell me. He responded that as far as he knew, I was the selected candidate for the post. Now, let's count, hmmm? October [2010] = 1, November [2010] = 2, December [2010] = 3 ... oh wait, December; sorry, I imagine that Vienna staff were on leave again for Christmas, so perhaps I shouldn't count December? Well, too bad, I

> shall. January [2011] = 4, February [2011] = 5. So 5 months after I asked, I was brought on line. Yes, there were some days of medical exams to take care of, UNLP to arrive, visa to acquire—but we're in the realm of days here, not months. So now what would you do in my place, understanding that while nothing with regard to the UN is certain until confirmed, that you have secured a position? Search for a job elsewhere, or wait patiently expecting to be informed in a TIMELY manner that you either had, or hadn't, the job?
>
> My point, by the way, about the 7 hours notice was simply to say that after all the time YOU wasted in Vienna, that YOUR expectation was that I should depart for the airport with 7 hours warning. That's typical of how you deal with people? If so, I would say that it's lucky you have sinecures in the UN, because if you tried that kind of nonsense in a commercial environment, you'd pretty quickly find yourselves out of a job.
>
> Speaking of being out of a job: yes, I understand the terms inherent in a "fixed term contract." Under different circumstances—that is, had I not have heard from several sources over some months that I had no need to be concerned because my contract was sure to be extended—I would accept that the contract ends, period. The fact is, these assurances came to nothing. But again I ask, what would you do in these circumstances? Assume that such assurances are meaningless and apply for other jobs months before the end of the contract? Or assume that there is veracity underpinning the "don't worry" statements and wait for confirmation?
>
> I'm happy you clarified the home leave rule. Perhaps instead of 2 months pay in lieu of notice, I shall demand 3—then I would be entitled to the lost home leave, presumably.
>
> I'm content to have you deny my claim. If I do not hear from you one way or the other within a week, I will assume you have denied it. I will then, rest assured, take my case to the ILO. I don't know how it has worked for [UNODC] as defendant in such cases before the ILO, but I am aware from casual conversations with a country rep from a sister agency that plaintiffs against that organization have won 100% of the time. I'm confident I shall prevail, in view of my fine performance as certified in my [performance appraisal reports].

12. On 18 July 2012, the Officer-in-Charge, HRMS, sent the Applicant an email stating, *inter alia*, that should he wish to contest the non-renewal of his contract, he needed, as a first step, to file a request for management evaluation. The Applicant

was also referred to the website of the Office of Administration of Justice, which explains the appeal procedures. Specifically, the email stated:

> [T]his message serves to reiterate that your appointment, which was set to expire on 29 February 2012 was not renewed for operational reasons, namely, due to shortage of funding under the project against which you were recruited and served, nor was it ever envisaged that there would be a contract renewal under that project. You were duly aware of these limitations. Further, notwithstanding the fact that fixed-term appointments are allowed to expire on their terms and that this may occur without notice b[eing] given, you were notified by your supervisor three weeks before your contract was set to expire. As to the staff selection procedures which led to your recruitment to the post in question and the subsequent on-boarding process, I would re-state that these processes were duly followed.
>
> Should you nevertheless wish to challenge decisions taken by the Organization in these matters, please be hereby advised that the Administrative Tribunal of the ILO does not have jurisdiction in this case and the proper avenue of formal recourse would be to request management evaluation of the contested decision (the following link will provide you more detailed information on the UN's administration of justice process: http://www.un.org/en/oaj/unjs/stepbystep.shtml). Having said that, please be mindful of the statutory time-limits to be observed in this process under which an administrative decision has to be contested within 60 days from the date on which notification of the decision was received.

Consideration

13. Whilst, in fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing, the General Assembly has requested in its resolution 66/237, adopted on 24 December 2011, both the Dispute Tribunal and the United Nations Appeals Tribunal to review their procedures in regard to the dismissal of "manifestly inadmissible cases". It is a matter of record that the Dispute Tribunal has, with a view to fast tracking cases, entertained matters of admissibility or receivability on a priority basis in appropriate cases, and similarly rendered summary judgments under art. 9 of the Rules of Procedure. However, any

application for dismissal of cases that appear manifestly inadmissible or devoid of merit have to be dealt with on a case-by-case basis bearing in mind the wise words of Megarry J in *John v. Rees* [1970] Ch 345 at 402 (U.K.):

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

14. In the instant case, the Applicant faces two preliminary hurdles.

15. Pursuant to art. 8.1 of the Statute of the Dispute Tribunal, read together with staff rule 11.2(a), an applicant must, as a mandatory first step in cases that do not fall under staff rule 11.2(b), request management evaluation of a contested decision before filing an application with the Dispute Tribunal (*Planas* 2010-UNAT-049). The purpose of such management evaluation is primarily to allow management to review, and possibly correct, the challenged administrative decision, thereby avoiding unnecessary litigation before the Dispute Tribunal (*Kratschmer* UNDT/2012/148). Where the concerned individual has failed to request management evaluation, the Dispute Tribunal has no jurisdiction to consider her or his application (*Planas*).

16. In his application, the Applicant states that he requested management evaluation of the contested decision, as proof of which he annexes his email of 12 July 2012 to the Chief, HRMS. Although in sec. VI of his application he states that his request for management evaluation was filed on 14 July 2012, sec. X (Supporting documents) of his application makes it clear that, by "request for management evaluation", the Applicant refers solely to the aforesaid email of 12 July 2012.

17. It is obvious from the Applicant's communications with HRMS between 12 and 18 July 2012 that he was informed of the proper appeal procedures.

Specifically, he was told that the Administrative Tribunal of the ILO lacked jurisdiction over his matter and that "the proper avenue of formal recourse would be to request management evaluation of the contested decision". By email of 18 July 2012, the Applicant was provided with a link to a step-by-step guide for appeals, published by the Office of Administration of Justice. He was also asked to be "mindful of the statutory time-limits to be observed in this process under which an administrative decision has to be contested within 60 days from the date on which notification of the decision was received".

18. In the Tribunal's considered view, the Applicant's emails of 12 and 17 July 2012 did not amount to a request for management evaluation of the decision not to renew his contract. They contained a mixture of complaints, grievances (including the Applicant's dissatisfaction with his travel arrangements to Afghanistan in March 2011), and requests (including with respect to two or three months' payment in lieu of notice). The Tribunal finds that no reasonable decision-maker would have interpreted the emails of 12 and 17 July 2012, either individually or read together, as a request for management evaluation of the decision not to renew his contract beyond 29 February 2012.

19. Furthermore, by email dated 18 July 2012, the Applicant was informed by the Administration, in clear terms, of the procedures for appealing the contested decision. There is no evidence before the Tribunal that the Applicant sought to request management evaluation after he received the email of 18 July 2012. Furthermore, there is no correspondence whatsoever on the record before the Tribunal that is addressed to the Management Evaluation Unit.

20. In any event, even if the Tribunal were to consider the Applicant's emails of 12 and 17 July 2012, either individually or read together, as a request for management evaluation—or even if he filed any other communications in July 2012 actually requesting management evaluation—the present application would still not be receivable. The Applicant was informed of the contested decision in February

2012. Pursuant to staff rule 11.2(c), he had 60 calendar days from the date of notification of the administrative decision to file his request for management evaluation. Even if the Applicant were to have filed a request for management in July 2012, it would have been approximately three months late.

Conclusion

21. The Tribunal finds that the present application is not receivable as the Applicant failed to request a management evaluation of the contested decision. Furthermore, even if the Tribunal were to accept the Applicant's emails dated 12 and 17 July 2012 as his request for management evaluation, it would have been out of time.

22. The present application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 18th day of January 2013

Entered in the Register on this 18th day of January 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York