



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

GEHR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Ingeborg Daamen-Mayerl, UNOV/UNODC

## **Introduction**

1. The Applicant, a former staff member of the United Nations Office on Drugs and Crime (“UNODC”), contests the decision not to renew his fixed-term appointment upon its expiry on 31 December 2011.

2. He mainly asks for adequate compensation for the unlawful non-renewal of his contract, the lack of due process and for the moral injury and emotional distress he has suffered as a consequence.

## **Facts**

3. The Applicant joined the UNODC in Vienna in 2002 and in 2007, he was appointed as Crime Prevention and Criminal Justice Officer, P-5, Terrorism Prevention Branch (“TPB”), Division of Treaty Affairs (“DTA”) on a fixed-term contract.

4. Following a restructuring exercise in the TPB in April 2008, the Applicant’s functional title changed to Chief, Counter-Terrorism Legal Services Section. In this capacity, he was the First Reporting Officer of five staff members. In the fall of 2009, the Chief, TPB, and the Officer-in-Charge, DTA, announced to TPB staff that the Branch was to be reorganized.

5. From 1 November 2009 to 31 January 2010, the Applicant was offered a short contract, as a result of the financial situation facing the Organization as a whole. On 8 December 2009, the Applicant was informed that the post he had encumbered would be abolished and that he would be reassigned to the position of Senior Legal Adviser, to be created within the Office of the Chief, TPB.

6. An exchange of communication ensued between the Applicant and the Chief, TPB, where the Applicant pointed out that the position of Senior Legal Adviser would not involve any supervisory functions, and he asked to be provided with a written “proposal... [in order for him to] make a fully informed decision”. The Chief, TPB, responded by email of 11 December 2009, confirming that the

Applicant was to be laterally reassigned to the position of Senior Legal Adviser, which functions were “in line with the overall restructuring of TPB.”

7. On 12 January 2010, the Chief, TPB, sent an email to TPB staff members, attaching the draft terms of reference for the new structure and asking for their input. The Applicant replied on 14 January 2010, suggesting that someone else should develop the terms of reference for the position of Senior Legal Adviser, since he had never aspired to the position.

8. By an email of 20 January 2010, the Officer-in-Charge, DTA, invited the Applicant to promptly express his reservations, if any, and sought confirmation that he wished to take on the position of Senior Legal Adviser. In response to these queries, the Applicant stated that he maintained the view which he had previously conveyed in writing to the Chief, TPB, and asked whether any administrative decision had been or was to be taken concerning his role in UNODC.

9. Further exchanges ensued between the Chief, TPB, the Chief of the Human Resources Management Service (“HRMS”) and the Applicant, in which the latter enquired whether an administrative decision had already been taken with respect to his reassignment.

10. By an email of 27 January 2010 to the Applicant, the Chief, TPB, stated:

[T]he managerial decision to laterally reassign you ... was taken as part of the restructuring of TPB, as requested and approved by the [UNODC] E[xecutive] D[irector] ... [T]he administrative implementation of the decision will be part of the formal implementation of the new TPB structure, once new Terms of Reference and detailed structure of the Branch have been elaborated.

11. On the same day, the Applicant sought further clarifications as to whether or not the Executive Director’s approval constituted the administrative decision to reassign him.

12. On 29 January 2010, the Applicant sent a draft work plan for the new position of Senior Legal Adviser, in response to a request from the Chief, TPB.

13. In a letter dated 31 January 2010 sent to the Executive Director, UNODC, the Applicant explained that, in his view, the decision to abolish his post and to reassign him to the position of Senior Legal Adviser was motivated by extraneous considerations. He further explained that the decision had been preceded by reports of prohibited conduct, including harassment, against the Chief, TPB, and the Officer-in-Charge, DTA, who were his First and Second Reporting Officers, respectively.

14. On 1 February 2010, the Applicant's contract was extended to 31 January 2011 and by memorandum dated 11 February 2010, the Officer-in-Charge, DTA, sent an amended version of the chart together with the terms of reference for TPB to the Executive Director, UNODC, recommending that the new structure become effective retroactively as from 1 February 2010.

15. On 12 February 2010, the Chief, TPB, informed TPB staff that the Executive Director, UNODC, had formally approved the new structure and the next step would be the drawing up of the terms of reference for individual positions within the structure. Shortly thereafter, she sent to the Applicant draft terms of reference for the position of Senior Legal Adviser and asked for his comments and suggestions.

16. On 22 February 2010, the Applicant submitted a request for management evaluation of the decisions of 12 February 2010 to abolish the post of Chief, Counter-Terrorism Legal Services Section I, and to laterally reassign him to the position of Senior Legal Adviser. The decisions to abolish the post he encumbered and to laterally reassign him were both upheld by the Dispute Tribunal and the Appeals Tribunal (see *Gehr* UNDT/2011/142 and *Gehr* 2012-UNAT-236).

17. The Applicant thereafter filed his first case with the Tribunal on 27 April 2010, which was later followed by twenty-two other cases relating to various aspects of his employment situation at UNODC. On 1 February 2011, the Applicant received an extension of contract until 31 December 2011.

18. Pursuant to the Applicant's allegations, which are contested by the Respondent, sometime in 2011 he was informed by the Ministry of Foreign Affairs of the Austrian government that the Executive Director, UNODC, had approached the Head of Foreign Affairs and had asked if by 1 September 2011, the Austrian government could take the Applicant back from UNODC. The Applicant further alleges that the reason given was that he had filed cases before the Dispute Tribunal against UNODC.

19. On 8 November 2011, the Applicant wrote to the Director, DTA, UNODC, inquiring on the status of the extension of his contract beyond 31 December 2011. Having received no response, he sent two other emails on 14 and 18 November 2011.

20. Meanwhile, on 28 November 2011, the Applicant filed a complaint with the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) against the Executive Director, UNODC, and the Director, DTA, UNODC.

21. In his complaint against the Executive Director, UNODC, the Applicant made reference to the alleged communication between the former and the Austrian government. With respect to the Director, DTA, UNODC, the Applicant complained about the former's failure to respond to his request on the status of his contract, which was due to expire on 31 December 2011.

22. On 29 November 2011, the Director, DTA, UNODC, replied to the Applicant's email of 8 November 2011, informing him that his fixed-term appointment would not be renewed and that it would expire on 31 December 2011, pursuant to staff rule 4.13 and staff regulation 4.5 ("contested decision").

23. The ASG/OHRM responded to the Applicant's complaint of harassment on 14 December 2011, informing him that based on the inquiries conducted by her office, it was confirmed that the Executive Director, UNODC, did not make any request to the Austrian government and that even if he did, it would not constitute

harassment or abuse of authority. Regarding his complaint against the lack of response from the Director, DTA, UNODC, the ASG/OHRM noted that it had become moot, because by the time of the ASG/OHRM decision, the Applicant had received a response from the Director, DTA, and that any delay in response would not constitute harassment. The ASG/OHRM reached the conclusion that the Applicant's complaints did not satisfy the requirements under sec. 5.14 of ST/SGB/2008/5 to warrant the conduct of a fact-finding investigation.

24. On 13 December 2011, the Applicant requested management evaluation of the contested decision and on 31 January 2012, he received a response, by which the decision was upheld. On 10 April 2012, the Applicant filed the current application before the Tribunal and on 11 May 2012, the Tribunal received the Respondent's reply.

25. On 4 November 2012, the Applicant filed a motion for recusal of the undersigned judge and by Order No. 92 (NBI/2013), dated 2 May 2013, the then President of the Dispute Tribunal rejected the application for recusal.

26. The Tribunal, by Order No. 169 (GVA/2013), issued on 4 November 2013, ordered the parties to file any objections to a judgment being rendered without holding an oral hearing. On 5 November 2013, the Applicant requested the Tribunal to hold a hearing in the matter to clarify matters especially with regard to the allegation regarding the request by the Executive Director, UNODC, to the Austrian government.

27. The Tribunal held a hearing of the substantive application on 26 November 2013, which both parties attended *via* videoconference.

### **Parties' submissions**

28. The Applicant's contentions are :

- a. He was "marched to the door" through the continuous breaches of his contract, harassment, abuse of authority, arbitrariness and taking of unlawful decisions over the last two years preceding the end of his contract;

b. The non-renewal of his appointment is tainted with improper motives and there is evidence of countervailing circumstances which are intrinsically linked to the contested administrative decision;

c. The reasons for non-renewal of his contract were not disclosed to him;

d. The decision not to renew his contract constitutes retaliation for the formal dispute resolution processes he had initiated against the Administration before the UNDT; it was taken a day after he had lodged a complaint of harassment and abuse of authority against the Director, DTA, UNODC, and the Executive Director, UNODC, respectively;

e. The Administration did not follow-up the Applicant's reports of misconduct and did not properly evaluate his contentions; and

f. The act of the Executive Director, UNODC, to contact the Austrian Ministry regarding the Applicant's departure from UNODC contributed to aggravating an already hostile working environment.

29. The Applicant prays the Tribunal to:

a. Order the Respondent to provide reasons for his non-renewal;

b. Award adequate compensation for the unlawful non-renewal of his contract;

c. Award him adequate compensation for the lack of due process and for the moral injury and emotional distress he suffered as a consequence; and

d. Refer the persons responsible for the contested decision to the Secretary-General for accountability.

30. The Respondent's submissions are:
- a. Fixed-term appointments do not carry any expectancy of renewal and such a decision can only be vitiated if the Administration created an expectancy of renewal, which was not the case;
  - b. The decision not to renew the Applicant's contract is not tainted by improper motives;
  - c. The Applicant bears the burden of proving presence of harassment, prejudice and/or other improper motivation that he alleges to be the underlying ground for non-renewal of his contract;
  - d. The Applicant's allegation of retaliation for filing a complaint of harassment has no basis, because at the time the contested decision was taken, the Director, DTA, UNODC, was not aware of the Applicant's complaint against him; he became aware of it only on 1 December 2011;
  - e. When the decision was communicated to him, the Applicant did not ask the Administration to provide him with reasons for the non-renewal of his contract; he only did so upon filing his application to the Tribunal;
  - f. The Applicant had ceased to make substantial contributions to the work of the Organization since the restructuring exercise in 2009 and took up an unproductive attitude towards work for more than two years;
  - g. He refused to participate constructively in performance related meetings and projects to even come up with a draft work plan or to share his performance or improvement plan;
  - h. The Applicant made it difficult for managers to have a face-to-face meeting with him due to the fact that he frequently tape recorded their conversations, in furtherance of his claims before the Tribunal;
  - i. He made very little demonstrable progress towards his assignments and other substantive duties and upon his departure UNODC, through other junior staff members, made demonstrable progress;



- j. The Applicant accused and dragged unwitting staff members into his numerous litigations before the Tribunal which had a profoundly demoralizing effect on other staff members in his Branch;
- k. The Applicant took the disputes he had with management to various non-party players, for example to the diplomatic corps and various Permanent Missions, while making unfounded accusations/allegations against senior officials;
- l. He had refused to cooperate with management in any significant respect and there was no hope of any change; his relationship with management had completely broken down and had led to mutual loss of trust;
- m. If indeed the Applicant was being “marched out”, this would have happened in 2009, when the UNODC was restructured and implemented cost-saving measures to meet the financial crisis facing the Organization, when several staff members were separated from service; and
- n. Management could no longer justify the use of existence of voluntary contribution towards the Applicant’s salary yet the tasks of the Organization were not being fulfilled.

### **Consideration**

31. Staff rule 4.13 (c) and staff regulation 4.5 (c) provide that fixed-term appointments do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.

32. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal noted that despite the provision in the Staff Rules and Regulations that fixed-term appointments do not carry any expectancy of renewal and are *ipso facto* extinguished on expiry, a non-renewal decision is a distinct administrative decision that can be challenged.

33. In the present case, a month before the Applicant’s contract was due to expire, he inquired on whether the extension of his contract would be approved. In

reply, the Director, DTA, UNODC, informed the Applicant that “[his] fixed-term appointment [would] not be renewed and [would] therefore expire on its terms on 31 December 2011 pursuant to Staff Regulation 4.5 and Staff Rule 4.13.” This response was a decision not to renew the Applicant’s contract, which is the subject of the present Judgment.

34. In assessing whether the decision not to renew the Applicant’s contract was motivated by improper considerations or if there were any countervailing circumstances, the Tribunal reiterates a long standing principle that even though a staff member does not have a right to the renewal of his or her contract, that decision may not be taken for improper motives (see *Obdeijn* 2012-UNAT-201). As such, the Organization has a duty to act fairly, justly and transparently in its dealings with staff members (see *Ahmed* 2011-UNAT-153). Also, due process requires that a staff member must know the reasons for a decision not to renew his appointment so that he or she can act on it (see *Hepworth* 2011-UNAT-178).

35. In considering the propriety of a contested administrative decision, the Tribunal, *inter alia*, has to consider whether it was based on improper motives (see *Obdeijn* 2012-UNAT-201). However the burden of proving that the decision was based on improper motivation lies with the staff member contesting the decision (see *Asaad* 2010-UNAT-021).

36. The Tribunal notes that when the contested decision was communicated to the Applicant, he did not ask the Administration to provide him with reasons for the non-renewal. It is only in his application to the Tribunal where the Applicant asked that the Respondent be ordered to provide reasons for his non-renewal. The reasons for non-renewal have now been listed extensively and in detail in the Respondent’s submission above. The Respondent emphasized that the Applicant’s relationship with senior managers of the Organization had been tense for a considerable period of time and had led to a negative working relationship with minimal output. According to the Respondent, the Applicant had developed an unproductive attitude towards his work, which was coupled with his refusal to cooperate with management, also with respect to his performance evaluation.

37. The Tribunal also notes that the Applicant did not object to the description of the deteriorated working relationship between him and his managers. Neither did he counter any argument regarding the fact that there was no possibility to repair that deteriorated relationship.

38. In *Rees* 2012-UNAT-266, the Appeals Tribunal held that in circumstances where “the workplace environment and the interpersonal relationships had become unsustainable for all concerned”, the decision not to renew a contract may be reasonable and lies within the Administration’s discretionary powers. Taking into account all circumstances of the present case, it is the considered view of the Tribunal that it is established that the Applicant’s relationship with the Organization had completely broken down and there was mutual loss of trust between him and the senior managers of UNODC. This in itself constitutes a valid ground for the non-renewal of the Applicant’s contract. With the existence of such a relationship, the Tribunal finds it more than unlikely that there could have been any countervailing circumstances towards the renewal of the Applicant’s contract.

39. In addition, the Applicant has not met the burden of proof that the decision not to renew his contract was based on improper motives.

40. The Applicant argues that the contested decision was taken a day after he had filed a complaint against the Executive Director, UNODC, and the Director, DTA, UNODC, to the ASG/OHRM, and as such amounts to retaliation for reporting misconduct.

41. The Tribunal is of the view that the reasons proffered by the Respondent as to the basis of non-renewal of the Applicant’s contract are acceptable, because the issues raised were ongoing for a considerable period of time and did not come into existence only a few days before the decision not to renew the Applicant’s contract was taken.

42. The Applicant generally alleges retaliation and that the contested decision was tainted with improper motives. Other than his assertions that there is evidence of countervailing circumstances linked to the administrative decision, no cogent evidence is produced in support of these assertions. This Tribunal recalls that the

Applicant filed a request for protection from retaliation with the Ethics Office against his supervisors and when the Ethics Office delayed in issuing a response to his request, the Applicant brought a claim before the Tribunal against the Ethics Office; this matter was disposed off in Judgment *Gehr* UNDT/2012/069.

43. When the Ethics Office finally issued a decision denying the Applicant protection because his case did not establish a *prima facie* case of retaliation, the Applicant challenged this decision before the Tribunal, which has already been adjudicated in Judgment *Gehr* UNDT/2013/127.

44. Furthermore, the Tribunal recalls that the Applicant made reports against his supervisors, for alleged prohibited conduct, in various documents dated 31 January, 1 and 8 December 2010, respectively, addressed to the Executive Director, UNODC. The Executive Director, UNODC, took no decision and the Applicant filed a claim with the Tribunal challenging his inaction; this matter was adjudicated in Judgment *Gehr* UNDT/2012/095.

45. Additionally, the Tribunal recalls that on 5 January 2012, the Applicant filed a claim challenging the decision of the ASG/OHRM not to conduct a fact-finding investigation following his report against the Director, DTA, and the Executive Director, UNODC, which he referred to as prohibited conduct. The Tribunal issued Judgment *Gehr* UNDT/2012/070 in which it disposed of the Applicant's claim.

46. In view of this background, this Tribunal finds that the single complaint of 28 November 2011, by which the Applicant filed a report of harassment against his senior managers, cannot reasonably be considered as the reason behind the contested decision.

47. Finally, the Tribunal does not find it relevant whether or not the Executive Director, UNODC, contacted the Austrian Ministry of Foreign Affairs. The grounds for the non-renewal, as stated above, are valid and supported by the evidence, regardless of any such contacts. Therefore, the Tribunal did not find it necessary to hear witnesses with respect to this part of the Applicant's allegations.

**Conclusion**

48. In view of the foregoing, the Tribunal DECIDES that the application is dismissed in its entirety.

*(Signed)*

Judge Thomas Laker

Dated this 11<sup>th</sup> day of December 2013

Entered in the Register on this 11<sup>th</sup> day of December 2013

*(Signed)*

René M. Vargas M., Registrar, Geneva