UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/014
Judgment No.: UNDT/2014/146
Date: 19 December 2014
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

WU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. By application filed on 12 April 2014, the Applicant, a retiree who had been re-employed as a Reviser at the Division of Conference Management ("DCM")/Languages Service("LS")/Chinese Translation Section ("CTS"), United Nations Office at Geneva ("UNOG"), contests the decision not to renew his temporary contract beyond the end of November 2013.

Facts

2. The Applicant retired from the Organisation on 30 June 2011, after 25 years of service, upon his reaching the mandatory retirement age. He is in receipt of a pension benefit from the United Nations Joint Staff Pension Fund.

3. In 2011 and 2012, the Applicant was re-employed as a Reviser, at the R-III level at the United Nations Office at Nairobi ("UNON"), under several temporary appointments. Thereafter, from 13 August 2012 to 30 November 2012, he was employed as reviser at CTS, LS, DCM, UNOG, also under a temporary appointment.

4. In 2013, he was granted a temporary appointment as Reviser, at the R-III level, at CTS, DCM, UNOG, from 1 July to 27 September 2013, which was subsequently renewed on 28 September 2013 until 30 November 2013.

5. The Applicant's letter of appointment, which he signed on 2 October 2013, stated, under special conditions, *inter alia*, that

> [i]n accordance with the mandatory earnings limit established by the General Assembly Resolutions 57/305 of 15 April 2003 and the opinion of the Advisory Committee on Administration and Budgetary Questions of 6 October 2008, this offer and consequent appointments are subject to a maximum limit of 125 days actually worked per calendar year. The maximum applies to remuneration you may have received or will receive during this calendar year from the United Nations, including the remuneration received for contractual translation work, as well as from other entities or the United Nations common system, including the Funds and Programmes. Should the maximum of 125 days actually worked

> for the calendar year be exceeded, appropriate recovery/re-payment of amount(s) in excess of the limit of 125 days actually worked will be effected.

6. By email of 13 November 2013, the Chief, CTS,LS, DCM, UNOG (the "Chief, CTS") in response to an inquiry from the Chief, LS, DCM, UNOG, sent the latter a list of the documents of the "jobs" pending at CTS, noting that there were then 19 documents requested for Chinese translation and that "a careful review of these documents … shows that eight (8) of them ha[d] already been translated while three (3) others [were] currently under translation and [would] soon be finished. The rest (8 documents in all) [would] be processed by CTS in-house".

7. On 18 November 2013, upon the Applicant's inquiry, the Chief, CTS, informed him orally that his contract would not be extended beyond 30 November 2013.

8. On the same day, the Applicant sent an email to the Chief, CTS, copied to the Chief, LS, DCM, UNOG, requesting to be provided with the "reasons behind the glaring differential treatment" between him and his colleagues.

9. The Chief, CTS, responded by email of the next day, 19 November 2013, reiterating what he said he had told the Applicant in previous meetings, namely that temporary assistance for meetings was arranged in light of the Section's projected workload and standing capacity and that the Committee on Conference had put an emphasis on increased use of contractual translation. He further stated that "Chinese Translation Service in [the Department for General Assembly and Conference Management ("DGACM")] ha[d] discontinued use of temporary on-board free-lance contracts in view of contractual translation".

10. By email of 20 November 2013, the Applicant responded, noting that the Chief, CTS, had not addressed his concern of differential treatment and asking why the policy on temporary assistance for meetings only applied to him and not to others.

11. On 25 November 2013, the Applicant requested management evaluation of the decision not to extend his appointment and filed a request for suspension of action concerning it. The Tribunal, by Order No. 188 (GVA/2013) of 28 November 2013 rejected the application for suspension of action, on the grounds that it did not meet the criteria of *prima facie* illegality. By letter of 14 January 2014, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to accept the recommendation of the Management Evaluation Unit ("MEU") to uphold the contested decision.

Procedure

12. The Applicant filed the present application on 12 April 2014 and the Respondent filed his reply on 15 May 2014, including an *ex parte* submission concerning the actual amount of days worked in 2013 by other retirees.

13. On 21 May 2014, the Applicant filed a motion to disclose the Respondent's *ex-parte* filing. By Order No. 72 (GVA/2014) of 27 May 2014, the Tribunal granted the Applicant access to the Respondent's *ex parte* submission, as redacted by the Tribunal, and invited him to submit comments thereon, which he did on 9 June 2014.

14. Upon the Respondent's request, the Tribunal, by Order No. 86 (GVA/2014) of 13 June 2014 granted him leave to file comments on the Applicant's 9 June 2014 submission, which he did on 27 June 2014.

15. By Order No. 166 (GVA/2014) of 10 October 2014, the Tribunal convoked the parties to a hearing on 29 October 2014. On the same day, the Applicant filed a motion to call the Chief, CTS, as a witness, "as he deem[ed] it essential to clarify the circumstances behind the case that are material to the determination of the case". The Respondent, without requesting leave, filed a reply to the Applicant's motion, requesting the Tribunal to dismiss it. By Order No. 170 (GVA/2014) of 14 October 2014, the Tribunal ordered that the Applicant's motion be rejected, stressing that for the time being it did not consider it necessary to call any witnesses.

16. A hearing in the presence of the parties was held on 29 October 2014. During the hearing, and by Order No. 175 (GVA/2014) of 29 October 2014, the Tribunal requested the Respondent to provide additional explanations, *inter alia*, with respect to the fact that in his email of 19 November 2013 to the Applicant, the Chief, CTS, had stated that "the Chinese Translation Service in DGACM had discontinued use of temporary on-board free-lance contracts in view of contractual translation" and the Respondent's admission in the framework of the present proceedings that in fact six freelancers, out of which four were retirees, had been employed in December 2013.

17. The Respondent filed the required explanations on 1 December 2014, and the Applicant responded thereto on 15 December 2014.

Parties' contentions

18. The Applicant's principal contentions are:

a. The decision was discriminatory and unlawful; extensions of short-term contracts to retirees in CTS are based on favouritism and show differential treatment based on extraneous factors; the attendance lists for CTS, LS, DCM, UNOG, for the years 2012 and 2013 show that the Applicant was granted only 77 working days in 2012 and 106 working days in 2013, while all the other retired revisers were granted the maximum of 125 working days; the Chief, CTS, when granting him only 77 working days in 2012 was not aware of the days he had worked at UNON in 2012;

b. The decision of the Chief, CTS, to grant the maximum 125 days contract to some retirees but not the Applicant was influenced by them having invited the Chief, CTS, and his wife for dinners and/or having given them gifts, the Applicant has never given gifts to or invited the Chief, CTS, for dinner; he has provided proof of such preferential treatment of those other retirees;

c. The Chief, CTS, behaviour constitutes a violation of the ethical rules which prohibit managers to accept gifts from their subordinates;

d. The Chief, CTS, applies such differential treatment of retirees also with respect to the timing of contracts according to personal needs and the complexity of the assignment;

e. The argument that he was granted a contract by the Chief, CTS, in 2012 and 2013 does not show that the latter treats him equally, rather, it shows that the Chief, CTS, wanted to avoid any charges of stark discrimination;

f. The Respondent's argument of cost-effectiveness does not stand, since on the contrary, retirees who are less productive, efficient and qualified than the Applicant have been granted the maximum of 125 days; the Chief, CTS, is not interested in efficiency but rather in repaying people who please him;

g. The fact that since 2003, all retirees except him have always been offered the maximum of 125 days creates, in itself, an expectancy for renewal;

h. Those three retirees other than him who were not granted the 125 days, as referred to by the Respondent, were in a different situation or were not interested in getting the maximum number of days; one of them retired from the Food and Agriculture Organization and not from the United Nations, let alone from UNOG;

i. The fact that six free lancers were recruited in December 2013 for a total of 16 weeks shows that the Respondent's argument that there was no operational need for temporary translators and that workload could be carried out by regular staff members was untrue;

j. Based on sec. 7 of ST/AI/2003/8, the Applicant should have been recruited in 2013, instead of a retiree from the Food and Agriculture Organization of the United Nations and a retiree outside of the UN, since he was an available and qualified UN retiree ;

k. He requests to be paid one year salary as compensation for the violation of his rights; that the Respondent be ordered to accord him equal

treatment, with respect to specific timing and duration of re-employment contracts and assignment of documents and to take appropriate action against the Chief, CTS, for accountability.

19. The Respondent's principal contentions are:

a. The Applicant's letter of appointment shows that following his retirement, his appointments with the United Nations were subject to conditions that were more restrictive than those applying in the general policy on temporary appointments; as such, he was subjected to a maximum of 125 days actually worked. The letter of appointment further noted, under special conditions, that to the extent the provisions differ from the rules of the employing organizations governing temporary appointment in the staff rules, his contract was governed by the *Agreement between the United Nations System/Chief Executive Board for Coordination and the Association internationale des traducteurs de conférence regulating the conditions of employment of short term translators and persons serving in related functions* (CEB-AITC agreement); in view of his status, the Applicant did not have any expectancy of renewal or right to be granted 125 working days per year;

b. The Applicant's argument that he had a legitimate expectancy to have his contract extended since other retirees were granted the maximum 125 days cannot stand, since this does not constitute an express promise or firm commitment; under the applicable rules, the Administration is not obliged to apply perfectly equal treatment with respect to the actual number of days worked, availability or assignment of work, which would be contrary to the purpose of temporary free-lancers, that is to address the Organization's short-term staffing needs; therefore, the mere fact that some retirees were granted more days than others in a given year does not suffice to establish extraneous factors;

c. The Applicant bears the burden of proof and having failed to provide evidence that the decision was ill-motivated and his allegations in this respect are unsubstantiated; on the contrary, the Chief, CTS, although he

had no obligation to offer the Applicant short-term contracts, supported the Applicant's appointments in 2012 and 2013;

d. The backlog in CTS was insignificant as of 13 November 2013 and could be processed "in-house" and no important meetings were to be held in December; therefore, in view of projected workload the Applicant's service was no longer needed and the reasons provided to him were supported by the facts;

e. The Respondent admits that his reference to "regular staff" being able to process the workload even if it were significant, contained in the response to the suspension of action, was inaccurate; however, this was just an "even if" extrapolation, and the record shows that in fact, the Chief, CTS, had consistently held that the workload could be processed by the "standing capacity/in-house", which has a different meaning than "regular staff";

f. Out of the six free-lancers hired in December 2013 only four were retirees, who were hired for periods of one to three weeks in December; in 2013, a total of ten retirees, including the Applicant were hired hence he was not the only one "excluded" in December; apart from the Applicant, out of the ten retirees hired in 2013, three others worked less than the maximum of 125 days (59, 116 and 123, respectively), and had exactly the same status as the Applicant, namely as retirees re-employed under the terms of ST/AI/2003/8;

g. The Applicant's alleged superiority and his allegation that other temporary translators were hired by the Chief, CTS, "to lie idle" are mere contentions insufficient to prove ill-motivation; they were not substantiated and/or had no impact on the contested decision; the same holds true with respect to the allegation of discrimination and favouritism;

h. It does not fall on the Applicant to organize the Section's work and it falls within the discretion of the Chief, CTS, to decide who he wants to assign to certain tasks, including the recruitment of freelancers or the decision not to assign the Applicant to some French translations;

i. In view of his status, the issue at stake, i.e. whether he should have been granted an additional 19 days in 2013 and four in 2012—in fact he was granted 121 days in 2012 and 106 in 2013—the amount the Applicant is seeking as remedies and the application are abusive;

j. The application should be rejected in its entirety.

Consideration

20. According to the longstanding jurisprudence of the Appeals Tribunal, fixed-term and temporary appointments do not carry any expectancy of renewal or conversion to any other type of appointment (*Beaudry* 2010-UNAT-085, *Abdalla* 2011-UNAT-138, *Ahmed* 2011-UNAT-153; *Appellee* 2013-UNAT-341), unless the Administration has made an express promise which may create an expectancy for a staff member that his or her appointment will be extended (*Abdalla* 2011-UNAT-138; *Ahmed* 2011-UNAT-153, *Appellee* 2013-UNAT-341). At the same time, a decision not to renew an appointment shall not be motivated by bias, prejudice or improper motives, and the Administration has the duty to act fairly, justly and transparently in dealing with the staff member (*Pirnea* 2013-UNAT-311). The Appeals Tribunal has also consistently held that the burden of proof to establish that the decision was motivated by such improper motives falls on the Applicant (*Badawi* 2012-UNAT-261, *Pirnea* 2013-UNAT-311). Finally, the Appeals Tribunal confirmed that when the Administration provides a reason for the non-renewal of an appointment, such reason must be supported by the facts (*Islam* 2011-UNAT-115).

21. Staff regulation 4.5(b) and staff rule 4.12 provide that "temporary appointments do not carry any expectancy, legal or otherwise, of renewal" and that "[a] temporary appointment shall not be converted to any other type of appointment". Section 1 of Administrative Instruction ST/AI/2010/4/Rev.1 (Administration of temporary appointments) provides that "[t]he purpose of the temporary appointment is to enable the Organization to effectively and expeditiously manage its short-term staffing needs", namely to address "seasonal or peak workloads and specific short-term requirements for less than one year".

22. The employment of retirees is further restricted by Administrative Instruction ST/AI/2003/8/Amend.2 (Retention in service beyond the mandatory age of separation and employment of retirees), which provides that:

> 5.1 Former staff members above the mandatory separation age of 60, or 62 for staff appointed on or after 1 January 1990, shall not be employed by the Organization, unless:
>
> (a) The operational requirements of the Organization cannot be met by staff members who are qualified and available to perform the required functions;
>
> (b) The proposed employment would not adversely affect the career development or redeployment opportunities of other staff members and represents both a cost-effective and operationally sound solution to meet the needs of the service.

and that

> 6.1 Employment of former staff who are in receipt of a pension benefit from the United Nations Joint Staff Pension Fund shall be subject to the following restrictions:
>
> …
>
> (b) Language services staff may not be re-employed for more than 125 days actually worked during a calendar year

23. Section 7 of the same administrative instruction provides that:

> Retirees from another common system organization may exceptionally be employed in the absence of qualified and available non-retiree candidates, as well as of qualified and available United Nations retiree candidates, provided the conditions in sections 5 and 6 of the present instruction are met.

24. The limitation offset forth in sec. 6.1(b) is confirmed by the Applicant's letter of appointment on file, which notes under special conditions, *inter alia*, that "this offer and consequent appointments are subject to a maximum limit of 125 days actually worked per calendar year".

25. It is clear from the actual wording of the above-quoted provisions that retirees who are employed as languages services staff do not have an entitlement or a "right" to be employed for a maximum of 125 working days; rather, the applicable rules—confirmed by the special condition contained in the Applicant's

letter of appointment—prohibit their employment "beyond" the maximum of 125 days actually worked per calendar year. As such, the conditions of employment of retired language services staff are far more restrictive than the employment of other categories of staff members under temporary appointments.

26. In the case at hand, the Applicant was granted several temporary appointments, upon his retirement, to work as a reviser both at UNON and at DCM, CTS, UNOG. It is not disputed that the Applicant was employed for a total of 106 working days in 2013. In view of the provisions above, he did not have an entitlement, *per se*, to be granted an extension of his appointment, up to the maximum of 125 days actually worked.

27. The foregoing notwithstanding, and taking the above parameter set by the applicable rules and by the jurisprudence of the Appeals Tribunal into account, the Tribunal considered it necessary to look into the reasons provided for the contested decision, and whether they were supported by the facts.

28. In his email of 19 November 2013 to the Applicant, the Chief, CTS, had stated that "temporary assistance for meetings … was arranged in the light of the Section's projected workload and standing capacity" and that the Committee on Conference had put emphasis on increased use of contractual translation. He further noted that the "Chinese Translation Service in DGACM ha[d] discontinued the use of temporary on-board free-lance contracts in view of contractual translation".

29. Further, in the written explanation provided by the Chief, CTS, to UNOG, in the framework of the suspension of action proceedings, the former had stated that "CTS capacity in December [could] adequately deal with the expected workload" and that "[f]or [CTS], the peak seasons where more temporaries [were] taken on board to strengthen its standing capacity [were] over for the years 2013".

30. With respect to CTS workload, the Chief, CTS, stated in an email to the Chief, LS, DCM, of 13 November 2013—that is, only a few days prior to the contested decision—that "eight of [the remaining documents] ha[d] already been translated while three others [were] currently under translation and [would] soon

be finished" and "the rest [would] be processed by CTS in-house". The documents on file confirm that the actual workload of CTS at the time of the contested decision was limited.

31. However, the Respondent admitted, in the framework of the present proceedings, that in December 2013, six freelancers were contracted within CTS, including four retirees, for limited periods of time.

32. The Tribunal is of the view that the statement by the Chief, CTS, in his 19 November 2013 email to the Applicant about the Chinese Translation Service in DGACM having discontinued the use of temporary on-board free-lance contracts shows an evolving situation within DGACM, including DCM, and does not mean that such discontinuation also (fully) applied to CTS. Hence, the statement by the Chief, CTS, in this regard was not in contradiction with the recruitment of a limited number of free-lancers by CTS in December 2013.

33. The Tribunal further found that according to the documents on file, including the personal action forms of the Applicant, the notion of "in-house", used by the Chief, CTS, in the above-referenced internal email of 13 November 2013, includes the recruitment of retirees on temporary appointments. Therefore, the statement by the Chief, CTS, that the workload could be processed "in-house" was not in contradiction with the employment of a limited number of free-lancers, including retirees, on temporary appointments in December 2013.

34. As noted above, under the applicable legal provisions, the actual employment of retirees, under temporary appointments, and up to the maximum of 125 days, depends on the current and projected needs and exigencies of each service. While CTS might have had some needs to further hire free-lancers for short periods in December 2013, the record shows that these needs were indeed limited. In view of the foregoing, the Tribunal is satisfied that the reason provided by the Administration for its decision not to extend the Applicant's temporary appointment beyond 30 November 2013, up to the maximum of 125 days, namely the projected workload and the available workforce at CTS, LS, DCM, UNOG, was supported by the available evidence.

35. The Tribunal further finds that nothing on file allows concluding that the Administration created an expectancy, through an express promise to the Applicant, that his appointment would be extended beyond 30 November 2013.

36. Also, the Applicant, who bears the burden of proof in this respect, fails to provide any evidence of his allegations of bias or discrimination. Particularly, the Tribunal notes that out of the ten retirees who received temporary contracts in 2013, four—including the Applicant—were granted less than the maximum 125 days. Also, with respect to the argument of favouritism, raised by the Applicant particularly with respect to two retirees who allegedly had been favoured by receiving the maximum of 125 days in 2013 and previous years in view of the fact that they had invited the Chief, CTS, the Tribunal noted that one of these two retirees was only granted 116 days out of the maximum 125 days in 2013. The Applicant's argument of favouritism can therefore not stand. In light of the foregoing, the Tribunal decided not to call the decision maker, that is, the Chief, CTS, as a witness—as suggested by the Applicant—since his evidence was irrelevant for the adjudication of the present case. The Tribunal did also not find it necessary to share the *ex parte* submission filed by the Applicant with the Respondent, since it did not base its decision thereon.

37. Finally, the Tribunal notes that the present case is about the non-extension of the Applicant's temporary appointment, and not about a "non-selection" decision. Therefore, any arguments and references made by the Applicant to the respective merits of retirees who were granted a contract in December 2013 as compared to his were of no relevance and, hence, did not need to be addressed by the Tribunal. The same applies to the Applicant's argument with respect to sec. 7 of ST/AI/2003/8/Amend.2, since neither he nor any other UN retiree can claim a right for extension of employment from this provision.

Conclusion

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

The application is rejected.

(*Signed*)
Judge Thomas Laker

Entered in the Register on this 19th day of December 2014
(*Signed*)
René M. Vargas M., Registrar, Geneva