



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

KHALAF

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

## **Introduction**

1. The Applicant has challenged the decision by the United Nations Assistance Mission for Iraq (UNAMI) dated 27 October 2013 and communicated to him on 5 November 2013 not to renew his fixed-term appointment beyond 31 December 2013 (Contested Decision).

## **Procedural history**

2. Following case management orders the parties advised the Tribunal that they did not request a hearing of the case and that it could be decided on the papers.

3. The parties were unable to produce a statement of agreed facts and issues and submitted separate statements instead. The Respondent sought leave to make submissions on the statement of facts submitted by the Applicant. The Applicant made comments and submissions of facts on matters raised in the Respondent's reply.

4. Having considered both statements of facts, the Tribunal finds that such facts as are in dispute between the parties are not material to the issues before the Tribunal and therefore further submissions on the facts were not required.

## **Facts**

5. The Applicant was locally recruited to the Kirkuk duty station of UNAMI in 2009, to serve as an Associate Political Affairs Officer (APAO) in the Office of Political Affairs (OPA) based in Kirkuk. He was recruited against a post that was transferred on a temporary basis from Baghdad to Kirkuk although he states that he was never informed that he was temporarily on loan to Kirkuk.

6. On 22 March 2012, UNAMI was directed by the Department of Political Affairs (DPA) and the Department for Field Services (DFS) to: review the Mission's posture and activities in Iraq; rationalize staffing; and realign functions, while reducing the budget by 15 percent. At this time, the political

situation in Iraq required OPA to engage in mediation efforts in western Iraq and UNAMI to assist the Iraqi government in dealing with the outstanding issue of missing Kuwait and third country nationals and property. Accordingly, the workload of OPA increased.

7. At that time there were six National Professional Officers (NPOs) in Baghdad and four in Kirkuk. Three of the NPOs in Kirkuk (the Applicant, D and MC<sup>1</sup>) were encumbering posts allocated to Baghdad. In order to respond to the increased operational demand on OPA within its existing human resources, the Mission proposed returning the posts previously on loan to Kirkuk to Baghdad or deployed in the field as part of the Baghdad office's governorate liaison network.

8. In his Application, the Applicant stated that following this directive all Kirkuk office staff attended a meeting hosted by the Chief of Staff and a meeting hosted by the Head of Office. The Applicant stated that: "In none of these meetings were the staff informed that we should be deployed, let alone our contracts will not be renewed". He also stated that there was more than one meeting to discuss the 2013 budget where the staff was informed that there would be no changes to the Office's political section.

9. On 7 January 2013, following the approval of the UNAMI budget for 2013, the Director of OPA (the Director), sent the following email to the Applicant and the two other NPOs in the Kirkuk office:

Dear All,

Following the approval of the 2013 UNAMI budget, I am writing to advise you that from 1 January 2013 the post you encumber has been redeployed to Baghdad under the supervision of the Chief of Political Affairs. As such, steps are being taken to fill these positions locally in Baghdad.

As the current incumbent of the post you are given priority to express your interest to be reappointed at your current level in Baghdad. Please note that any expenses against the movement/reappointment will be borne by you.

In the event that you are not interested in the reappointment in

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<sup>1</sup> MC is the applicant in Case No. UNDT/NBI/2014/017.

Baghdad, the posts will be advertised for Baghdad duty location on 1 February 2013 and suitable candidates willing to work in Baghdad will be selected.

Please let me know your decision by 6 of February if you are interested.

10. On 14 January 2013, the Applicant wrote to the Director asking for clarification of certain issues before he responded. He sent follow up emails on 21 and 22 January 2013. On 28 January 2013, the Applicant sent the Deputy Special Representative of the Secretary-General (DSRSG) an email asking for his assistance after receiving no response from the Director to his reminders.

11. On 28 January 2013, a Political Affairs Officer wrote to the Applicant on the Director's behalf. He apologised for his delay in responding due to his absence. He explained that UNAMI had received directives from DPA/DFS on the Mission's posture and activities in Iraq and the need to rationalize staffing and realign functions to reduce resources. There was an increase in the workload in Baghdad which required that functions and posts approved by the General Assembly for Baghdad be maintained in Baghdad.

12. He further explained that the Kirkuk APAO posts came under the Director of OPA both substantively and administratively. It was the program manager's prerogative to decide their redeployment, subject to the operational requirements of the Mission. He stated that the Applicant was initially recruited by UNAMI for Kirkuk while the posts were approved for Baghdad, unlike the fourth colleague who was recruited against a post approved for Kirkuk. He concluded that it had become necessary to redeploy the three APAOs to Baghdad. He explained that the posts they encumbered were originally assigned to Baghdad. He gave the Applicant until 6 February to make a decision.

13. On 29 January 2013, the Applicant sent an email to the Director in which he alleged that the email from the Political Affairs Officer contradicted what the Director had told him during a phone call and asked why he had not provided

the clarifications that the Applicant asked for, as he promised. He told the Director that he had reason to believe that the decision was not related to the budget. The Applicant reminded the Director that there were still two pending issues to be resolved:

- a. His uncompleted ePAS; and
- b. His call for investigation of the former Head of Office.

14. On 7 February 2013, in an email to the Director, the Applicant noted that the deadline for him to express his interest in being reappointed at his current level in Baghdad passed the day before without him receiving the clarifications he had asked for. He said he was determined to continue his career in UNAMI but still had questions which he listed in regards to redeployment to Baghdad. The email stated:

The deadline passed yesterday and we have not received the clarifications we asked for yet. We would like to inform you that we are really determined to proceed with our careers in UNAMI. However, we still have few unanswered questions in regard to your decision of redeploying both of us to Baghdad. Hereunder, we list those questions wishing that you have time, this time, to make them clear to us:

- i. As you may know, Kirkuk is our home town and we are settled here, we have our children at schools beside many other involvements. Accordingly, we need few months before we can practically move out.
- ii. Due to the severely bad security situation in Kirkuk, we can never leave our families behind.
- iii. All political affairs officers in Baghdad are holding NO-B while we are still NO-A. If we are signing a new contract, we want to be upgraded.
- iv. Being relocated to a duty station away from home, we will be faced with different channels of spending like rent, travels, schools...etc. We will be entitled to be paid for these extra spendings.
- v. We reiterate on our original inquiries, mentioned in our below email to you, which are not yet answered.

15. On 10 February 2013, the Applicant sent the Director an email informing him that he had contacted the Ombudsman's office to ask for third

party mediation.

16. On 24 February 2013, the Applicant sent the UNAMI Chief of Staff an email explaining the issue following their meeting with him a few days earlier during his visit to Kirkuk. The Applicant forwarded all the emails he exchanged with UNAMI in Baghdad.

17. On 25 February 2013, the Applicant received an email from the Chief of Staff, informing him that he had discussed the issue with the Chief of Mission Support (CMS) and the Director and that he would be informed of the outcome of this meeting within a fortnight.

18. On 13 March 2013, the Head of Office, Kirkuk, wrote to the Applicant to confirm in writing a discussion in which he had informed the Applicant that the Mission must relocate his post, lent to Kirkuk in 2009, for operational reasons. He also said that the Applicant's contract, running until 30 June 2013, could not be renewed.

19. On 18 March 2013, the Applicant responded to the Head of Office asking, *inter alia*, how the movement to Baghdad could be related to the budget; if he would be upgraded to a similar grade as his colleagues in Baghdad when he moved there and about previous pending issues including an investigation commenced in 2011.

20. On 2 April 2013, the Head of Office invited the four NPOs to a meeting to discuss the extension of their contracts. The Applicant did not attend as he was on leave.

21. On 8 May 2013, the Chief of Staff advised the Applicant that his appointment would be extended to 31 December 2013 on an exceptional basis. A budget proposal for 2014 would be submitted in June 2013, and if his appointment would be affected, he would be informed at the earliest opportunity.

22. On 30 June 2013, the Head of Office sent an email to the DSRSG, referring to a discussion between the two earlier that day. He discussed means

for creating two additional APAOs in Kirkuk.

23. The Head of Office sent the Applicant a copy of the budget proposal for the NPO positions in Kirkuk on 2 July. The budget proposed staffing changes in the region including that, “The Kirkuk office is proposed to be strengthened by the establishment of 2 programme Officer (National Officer) posts. These posts will provide substantive support to the Head of Office in monitoring, analyzing and forecasting developments in Kirkuk”. In his cover e-mail to the Applicant the Head of Office said, “Now all will remain with the ACABQ and 5<sup>th</sup> committee in New York”.

24. On 27 October 2013, the Head of Office received an email from the UNAMI Senior Political Affairs Officer under the subject line, “Contract extension requests for Messrs M, KK, D, and [the Applicant]” advising that there would be no contract extension for the three APAOs beyond 31 December 2013. He said, “I suppose there is an understanding between you and [the Director] that their contracts will terminate without further extension and that the posts will be redeployed to strengthen our GLO functions”. The Senior Political Affairs Officer noted that they would then need to discuss in due course how and when to notify the Applicant of his “contract termination” in the least contentious manner.

25. On 3 November 2013, the Head of Office sent an email to the Political Affairs office in Baghdad denying any understanding between OPA Baghdad and the UNAMI office in Kirkuk in regards to this case. The Head of Office told the OPA managers that they had exchanged numerous emails and UNAMI Administration had decided to ask for extra budgetary positions for Kirkuk NPOs. The Head of Office added that he had already asked UNAMI Administration how they wanted the Kirkuk office to operate without field officers. He finally noted that the message was sent more than a week earlier but he had not received any answer.

26. On 5 November 2013, the Head of Office forwarded to the Applicant the email dated 27 October 2013 from the UNAMI Senior Political Affairs Officer advising that there would be no contract extension for him and the other two NPO colleagues beyond 31 December 2013.

27. On 10 November 2013 the Head of Office sent an email to the Director, copied to the Applicant and the other affected staff members, reminding him that the program manager not the Head of Office should inform staff members about the status of their contracts. He informed him that the three staff members were waiting for his message to clarify their status beyond 31 December 2013.

28. On 12 November 2013, the Applicant submitted a request for management evaluation.

29. On 14 November 2013, the Director advised the Applicant and other APAOs in Kirkuk that due to operational requirements to strengthen OPA's functions by consolidating the field liaison network in the governorates, and because only one APAO post would remain in Kirkuk, a written assessment would be held for the purposes of establishing which APAO would remain in Kirkuk. The Applicant was invited to participate but did not take the test. The option of keeping a second post in Kirkuk was possibly to be considered.

30. On 17 November 2013, the Applicant replied to the Director's email requesting clarification on the criteria adopted to conduct the written assessment and expressing concerns about its environments especially after the Applicant had already filed a request for management evaluation.

31. The Applicant's appointment was renewed to 31 January 2014 to enable him to complete the check-out process.

32. On 6 January 2014, the Under-Secretary General for Management informed the Applicant that the Secretary-General had upheld UNAMI's decision.

33. On 8 February 2014, UNAMI advertised three NPO-A job openings for Associate Political Affairs Officers in Baghdad. The Applicant did not apply.



## **Issues**

34. Was the Applicant adequately consulted prior to the contested decision being taken?

35. Did the Applicant have a legitimate expectation that his appointment would be renewed?

36. Was the decision of the Administration ill motivated or made in bad faith?

37. If the decision not to renew the Applicant's appointment was unlawful, what remedy is the Applicant entitled to?

## **Applicant's submissions**

38. The decision of non-renewal triggers the application of ST/SGB/274 (Procedures and terms of reference of the staff management consultation machinery at the departmental or office level). UNAMI management had the obligation to inform the affected staff members in advance, consult with them and give them an opportunity to provide their views prior to issuing the decisions. The Applicant was kept in the dark with regard to his employment status.

39. UNAMI has never communicated with him to explain the Office's operational necessities requiring his post to be based in Baghdad. He submitted that: "The first time [he] heard about a 'redeployment' was in [the Director's] email on 07/01/13 [...] which instruct us to be deployed to Baghdad or quit".

40. He had a legitimate expectancy of renewal of his fixed-term contract. The DSRG's narrative in the 2014 budget proposal sent to the ACABQ and 5<sup>th</sup> Committee in New York and forwarded to him gave a clear explicit promise for renewal.

41. The decision not to extend his contract is the latest in a series of decisions which demonstrates a campaign against him and an attempt to end his employment with the Organization. His repeated attempts to question and

challenge the decision leading up to the non-renewal decision have either been met with a lack of response or produced further actions in retaliation against him.

42. In support of his allegations of ill motivation the Applicant referred to the following events at paragraphs 20 to 25 and 36 of his application:

- a. Being interviewed by investigators without notice in January 2011. The allegations were unsubstantiated and no actions were taken against him on that investigation.
- b. The failure by the previous SRSG to investigate his complaint against the Head of Office and his supervisor.
- c. The non-completion of his 2011 ePAS because of a disagreement about midpoint comments made by his supervisor.
- d. A proposal in July 2011 by the then Head of Office to introduce grading of NPOs which the Applicant and others objected to. The proposal was not implemented.
- e. Six days after the first reply by affected staff members to the redeployment decision he received a call from an unidentified number at 3am. Nobody spoke on the line. He reported this call.
- f. The Applicant raised concerns about the exam offered by the Director of OPA and did not participate in it because of concerns about its legality. He questions the timing of the offer as it came after UNAMI already decided not to renew his contract and after he filed a complaint to MEU.

43. The Applicant further submitted that the improper motivation can be clearly noticed in the state of confusion the UNAMI administration demonstrated dealing with his case. Through the course of 2013 they issued four different decisions, each decision followed a contradicting expectation:

- a. The redeployment email on 7 January 2013 followed the discussions on 2013 budget in which senior managers of UNAMI underscored that there will be no changes in the Kirkuk political section.
- b. The six month extension on 8 May 2013 followed a request from the Kirkuk Head of Office for an extension for all four APAOs in Kirkuk.
- c. The non-renewal decision on 27 October 2013 followed the 2014 UNAMI budget proposal sent to The ACABQ and the 5<sup>th</sup> Committee in NY.
- d. The written assessment offer on 14 November 2013 came up two days after he and a colleague filed an application to MEU requesting a management evaluation.

### **Respondent's Submissions**

44. The Applicant was consulted prior to the deployment of the post. The reasons for the deployment of the post were fully explained to him. He was given full opportunity to express his views and offered the possibility of applying for reappointment to the post in Baghdad. His appointment was extended to assist him in finding solutions to personal issues in case he was reappointed to Baghdad.
45. The Applicant rejected the proposal for redeployment and made a counter offer which the Organisation was under no obligation to accept.
46. The Applicant had no legitimate expectancy of renewal of his fixed-term appointment.
47. There were no improper motivations or bad faith in the decision. The Applicant declined to participate in the competitive process for the remaining post in Kirkuk and/or he could have applied for the two posts in Baghdad. As he did not his employment relationship with the Organization expired at the end of the term stipulated in his letter of appointment.

48. The Applicant has failed to prove that the contested decision was motivated by an improper purpose.

### **Considerations**

49. In *Simmons* 2014-UNAT-425, the United Nations Appeals Tribunal (UNAT) held that “the Organization has the power to restructure some or all of its units which include cancellation or abolition of posts or reassignment due to organizational or budgetary reasons”.

50. The Administrative Tribunal of the International Labour Organisation (ILOAT) has held that it is well settled jurisprudence that “an international organisation necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”.<sup>2</sup>

### **Issue 1**

*Was the Applicant adequately consulted prior to the contested decision being taken?*

51. The Contested Decision, namely that the Applicant’s contract would expire without further extension on 31 December 2013, was contained in the email of 27 October 2013 from the Senior Political Affairs Officer to the Head of Office and others. This email was not conveyed directly to the Applicant but was forwarded to him by the Head of Office. No evidence of a formal letter addressed to him was produced to the Tribunal. This is unusual. It is surprising that such an important decision was not communicated directly to the Applicant.

52. However, the Tribunal is satisfied that the Applicant had written notice of the impending decision from as early as 7 January 2013. From that date he engaged in extensive correspondence with the Administration about this issue.

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<sup>2</sup> ILOAT Judgment No. 2967, quoting ILOAT Judgment Nos. 2510 and 2856. Cited in *Gehr* 2012-UNAT-236.

53. The Tribunal finds that the Applicant was made aware on 28 January 2013 that the post he encumbered was on loan from Baghdad.

54. On 8 May 2013, he was advised that his contract, which was due to expire on 30 June 2013, would be extended to 31 December 2013. This was subject to the budget proposal which was to be submitted in June 2013.

55. The evidence also shows that the Applicant was invited to attend at least one meeting to discuss the extension of his contract. Although he could not attend, a letter summarising the meeting was sent to him. At that stage, a final decision had not been made as it was dependent on the decision of the General Assembly on the budget proposal.

56. Following this, the Applicant took advantage of every available opportunity to provide his views to the Administration. His position appears to have been supported by the Head of Office, which shows that he was listened to.

57. The Tribunal holds that the Applicant was consulted and that such consultation met the test set out previously in *Rees* UNDT/2011/156, *Gehr* UNDT/2011/142 and *Adundo et al.* UNDT/2012/188.

Consultation does not necessarily include negotiation and certainly does not guarantee agreement, but it must be carried out in good faith. Consultation should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined.

## **Issue 2**

***Did the Applicant have a legitimate expectation that his appointment would be renewed?***

58. Pursuant to staff rule 4.13(c), a fixed-term appointment does not carry any expectancy of renewal or conversion, irrespective of the length of service.

59. However in certain circumstances this presumption of non-renewal can be rebutted. One such circumstance is when the staff member has acted in reliance on an express promise that his or her contract will be renewed.<sup>3</sup>

60. The Applicant's claim to a legitimate expectation of renewal is based on the DSRG's narrative in the 2014 budget proposal sent to the ACABQ and the 5<sup>th</sup> Committee in New York and forwarded to him. In his mind that amounted to a clear explicit promise for renewal.

61. The correspondence shows that the Head of Office was supportive of the need for the NPO posts in Kirkuk to be continued in view of the workload and that he communicated this to the Applicant.

62. While these factors may have given the Applicant some cause for hope that the *status quo* would be maintained in Kirkuk, neither the budget proposal nor any views expressed by the Head of Office can be interpreted as an express promise that his contract would be renewed.

63. The Tribunal holds that the Applicant had no legitimate expectation of renewal

### **Issue 3**

#### ***Was the decision of the Administration ill motivated or made in bad faith?***

64. In *Rolland* 2011-UNAT-122, UNAT held that there is a presumption of regularity of administrative decisions. This presumption may be displaced. The person alleging ill-motivation bears the burden of proving it.

65. Such proof should include a demonstrable causal nexus between the proffered evidence of ill motivation and the contested decision. Any evidence of ill motivation must logically pre-date the decision. Events which occurred after the decision are generally irrelevant to the issue of the motivation of the decision maker.

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<sup>3</sup> *Hepworth* 2015-UNAT-503.

66. The official reason given by the Administration for the non-renewal of the Applicant's fixed-term contract was that the post he encumbered had been redeployed to Baghdad. This reason was first communicated to the Applicant and his colleagues eleven months before the final decision. As an incumbent of one of the affected posts he was given priority to express his interest to be reappointed at his current level in Baghdad several months before the final decision. The deadline passed without him expressing an interest although he did request a number of clarifications.

67. The decision of non-renewal was triggered by the decision to redeploy the post. The decision to redeploy was based on the directive from DPA and DFS to review the Mission's posture and activities in Iraq and reduce the budget by 15 percent.

68. The local administration made concerted efforts to secure more NPO posts for Kirkuk including a budget bid to ACABQ but these were not successful.

69. Of the six events advanced by the Applicant to support his allegation of ill motivation four occurred in 2011. Of these, one related to his interview by an investigator that did not result in an investigation against him and another to the failure of the administration to investigate a complaint he had filed against his former Head of Office and supervisor.

70. Neither of these has any logical connection with the impugned decision. In particular, by 2013 there was a new Head of Office in Kirkuk who was supportive of retaining the Applicant's post there.

71. The next allegations concerned the Applicant's disputed ePAS for 2011. This has been superseded by the Applicant's ePAS for 2013-4 in which he was assessed as fully competent and was described as reliable and trustworthy.

72. The Applicant expressed concern that a 2011 proposal to introduce grading for NBOs was an attempt to end his contract. Again this occurred two years before the redeployment and in any event the grading proposal did not eventuate.

73. In 2013 the Applicant reported a silent phone call six days after he responded to the redeployment decision.

74. The Tribunal finds that none of these events can be taken as reliable evidence of any temporal or other link to the decision of 27 October 2013 which is sufficient to displace the presumption of regularity of the reason for the non-renewal.

75. The Tribunal finds that the Applicant has not discharged his burden of showing that the decision was not properly motivated or that it was made in bad faith.

### **Conclusion**

76. The Application is dismissed in its entirety

*(Signed)*

Judge Coral Shaw

Dated this 31<sup>st</sup> day of December 2015

Entered in the Register on this 31<sup>st</sup> day of December 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi