UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/015/ JAB/2008/018
Order No.: 73 (NY/2010)
Date: 16 April 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ALAUDDIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON APPLICATION FOR SUMMARY JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Peri Johnson, UNDP

Introduction

1. In separate proceedings, the applicant's contract with the United Nations Development Programme (UNDP) was not extended. He requested administrative review of this decision. The Ethics Office of UNDP found, in effect, that the decision was illegal and recommended re-integration. This was accepted by UNDP. However, the applicant was required to resign from his national government in order to be integrated. The applicant seeks to challenge the non-extension of his contract and in effect, the requirement that he resign from his government in order to return to UNDP. Pursuant to arts 9 and 19 of the Tribunal's Rules of Procedure and following a directions hearing of 19 February 2010, the respondent has submitted a motion for summary judgment to dismiss the proceedings.

The applicant is employed by the UN

2. The applicant was working as a senior bureaucrat in the Government of Pakistan. In 2003 he was approached by the Resident Representative of UNDP, who asked him to consider joining UNDP as Assistant Resident Representative. The letter of 18 June 2003 offering him an appointment (letter of offer) contained a clause as follows –

> We are pleased to offer you an appointment as Assistant Representative (Environment) UNDP Islamabad on an initial fixed-term for three months at Level NOC [National Officer level C] Step IV. This contract will be extended subject to your satisfactory performance and your medical clearance ... The yearly contract will be renewable depending upon your satisfactory performance.
>
> …
>
> Please return the duly signed copy of this letter to confirm your acceptance of this offer and indicate the date of joining the post. Kindly also provide us with a copy of NOC from the Government of Pakistan for taking up this assignment.
>
> If you need any other information or clarification, please contact us.

…

3. On 13 August 2003 the Human Resources Manager (HRM) acknowledged receipt of a letter from the applicant informing UNDP that "[the applicant has] obtained clearance from the competent authority to take up the subject assignment" and requesting him to "visit our office at the earliest to sign the Contract and assume your duties...". On 22 August 2003 the applicant's "Letter of Appointment" was signed for a fixed-term of three months expiring on 21 November 2003. The letter characterises itself as an offer and the applicant signed it by way of acceptance. The form is plainly generic and contained the usual term –

> The Fixed-term Appointment does not carry any expectancy of renewal or conversion to any other type of appointment …

4. No reference was made to the terms of the original letter of offer. This contract was successively extended each year until 2007, when the applicant was informed that it would not be renewed past 31 December 2007.

The interpretation of the contract of employment

5. It seems clear here that the parties, by the offer and acceptance embodied in the letter of offer, entered into an agreement of employment. That offer does not suggest that it would be necessary to enter into a further or additional agreement and, objectively, appears to be complete. Indeed the last two paragraphs unambiguously imply that no such further documentation was necessary. Whatever qualification may have been in the mind of either the applicant or the relevant UNDP official is immaterial, unless it was common to both. Whether, in fact, the applicant actually signed this contract is, however, somewhat unclear although it is implied by him that he did so after he had received the clearance from his government. The applicant claimed that he signed the later Letter of Appointment on being assured that it was governed by the terms of the letter of offer (called by him the "appointment letter") and that the Offer of

Appointment "covers only the probation period", an understanding entirely justified by the distinction made in the earlier letter itself. For the purposes of the present application, I must proceed upon the basis that there is no dispute about this issue since otherwise art 9 of the Tribunal's Rules of Procedure prevents consideration of the application for summary judgment. Of course, should the application fail, there is nothing to prevent the respondent from litigating this issue if it wishes to do so.

6. There is no reason to infer that, when it was signed, the letter of offer did not become a binding contract in accordance with its categorical language, subject to provision of the stipulated clearance. Under staff regulation 4.1, all contracts of employment must use the form in annex II. The letter of appointment was in this form. However, it does not follow that the entire contract is necessarily and exclusively contained in this form. It is necessary in circumstances such as the present to consider whether any binding collateral contract was entered into between the parties. Accordingly, if the letter of offer amounted to an agreement upon the contractual terms to be dealt with or added to a subsequent formal agreement ie, the annex II form, three possibilities emerge. The first is that (as appears to be the case) the letter of offer finally settled all the terms of their agreement and was intended to be immediately binding in respect of those terms, but (as appears to be possible, though unlikely) they at the same time proposed to have the terms restated in a form which will be fuller or more precise but not different in effect. The second scenario is where the parties had completely agreed upon all the terms of their contract and, intending no material departure from that expressed or implied in the letter of offer, but nevertheless made performance of one or more of the terms conditional upon the execution of another, possibly more formal document. Or, thirdly, the case may be one in which the intention of the parties was not to make a concluded bargain at all, unless and until a formal contract was executed (which I mention merely as a logical possibility that, as it appears to me from the terms of the letter of offer, is not the fact).

7. In the first and second scenarios, there is a binding contract: in the first, the parties being bound at once to perform the agreed terms, whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and, in the second, there is a legally binding agreement obliging the parties to join in bringing the formal contract into existence and then to carry it into execution (the so-called agreement to agree). For obvious reasons, the first scenario is more common. The point is that merely because the parties have agreed that they will enter into an additional formal agreement embodying the terms agreed upon does not, by itself, show that they are still negotiating. The crucial question is whether they have reached agreement on the terms. So far as the second scenario is concerned, where all the essential terms of a contract had been agreed upon, and the outstanding requirement was a further document setting out some additional not inconsistent conditions as to express or implied matters (such as notice of expiry not being necessary or satisfactory performance being determined in accordance with the ordinary rules for performance appraisal), the first agreement binds the parties to sign the further document to complete their bargain and is not inoperable: in short their agreement to agree on the final terms is legally binding. On the other hand, agreements in the third scenario simply have no legal effect aside from the possibility, open here, that the respondent's offer amounted to a representation intended to be acted upon by the applicant (at least to the extent of obtaining the clearance from his government in reliance upon it) and his doing so, which would give rise to a legitimate expectation that the respondent would effectuate its representation. This possibility aside, the crucial question is whether the parties intend to enter into binding obligations, a question to be determined by what they have actually *agreed*, as embodied here in the letter of offer, and not by any subjective assumptions or intentions they may have entertained.

8. (This analysis happens to reflect the common law, but that gives it no authority, since it is simply a method of characterising the particular factual issues that arise where there is an agreement in circumstances that envisage some later

documentation. Making the assumption about the facts to which I have referred for present purposes, this case plainly falls into one or other of the first two scenarios.)

9. If the letter of offer was either signed or (as the applicant claims) he was induced to sign the Letter of Appointment upon the representation that it amounted to an agreement to adopt or apply the conditions of the letter of offer, or both, the latter constituted a legally binding contract which bound the respondent to enter into (what was envisaged and in fact became) the Letter of Appointment. There is no basis, however, for supposing that the parties intended the later document to supersede the earlier or, in other words, to vary its terms in any significant respect. On the contrary, the Letter of Appointment was intended to *fulfil* and not to significantly *qualify* the terms agreed by the letter of offer. They must be read together. Applying the conventional rules of construction, the mere use of generic and general language in the later document cannot override the specific and particular language of the earlier and thus the requirement that the contract was "renewable" in the event of satisfactory performance remained.

10. There is, however, some difficulty in construing the word "renewable": does it merely mean that the contract might or might not be extended as the respondent decided (and the applicant agreed) or does it mean that the contract would be extended providing the applicant's performance was satisfactory? Even in the former event, of course, the reason for not extending would have to satisfy the requirements of propriety and reasonableness. The applicant has in effect submitted that the latter interpretation is correct but the question has not been addressed by the respondent. The issue has been overtaken by events, as will be seen, since the respondent has, in effect, accepted that the decision not to extend was unlawful (for, I understand, other reasons). Nevertheless, because of the importance of the issue, I should mention at least some of the critical points. First, the phrase is to be construed in its ordinary English meaning. The respondent is not permitted to give it a special meaning simply because it might have that

meaning in its usual practice. If it intended the term to mean anything other than its ordinary meaning, the respondent was bound to indicate the special sense in which it was meant. It could not suppose that the applicant would have any knowledge of such a meaning, nor could it be legally correct that the respondent's meaning trumps that given it by the applicant. All contracting parties are taken to agree to the ordinary language meanings of the words in their contract, unless there is evidence in the contract otherwise (and leaving aside the complicating possibility of joint extrinsic knowledge). The starting point, for obvious reasons, is that the contract must be construed according to its actual terms. If "renewable" meant merely that the respondent would be entitled to offer and the applicant to accept, an extension of the contract on its expiry, the condition of satisfactory performance was irrelevant. If the applicant's service were unsatisfactory, it is self-evident that the respondent would not be required to extend, and certainly could not be required to offer, an extension. The condition of satisfactory service makes sense only if it is indeed a condition of renewal, not of the mere consideration by the respondent of the possibility of renewal, but in the sense that the contract would be renewed if the applicant's service were satisfactory. Some contracts are not renewable in that, whatever the hopes or desires of the parties, the rules or regulations do not permit a contract to be renewed (such as the five-year term of the Ombudsman). However, there was no need to stipulate that the contract here could be renewed since there was never, and could not be, any condition that prevented the Secretary-General from renewing the contract providing it was useful to do so. A term that the contract was renewable in this sense was plainly otiose. It seems to me inevitable, or at least probable, that the phrase "renewable depending upon your satisfactory performance" in the letter of offer means "renewed etc".

11. Moreover, it is clear that the condition was inserted for an important reason. It was envisaged in the first place that the applicant would enter into only a very short term contract (very likely probationary in character). The term as to extension was plainly designed to induce him to believe that, if his performance

were satisfactory, the contract would be renewed to a year and thereafter from year to year. It was inserted to give him some security in his employment. I infer this from the condition itself. If the actual position was that, even if the applicant's service was satisfactory (indeed, outstanding – as it proved to be) his employment could yet be terminated without giving any reason at the expiration of three months or the ensuing year, the language used certainly did not convey that meaning and should not be interpreted to do so. Thus, an alternative approach is to regard the term as a representation by the respondent as to the conditions both necessary and sufficient to require extension, giving rise to a legitimate expectation that the representation would be honoured, since it was intended to induce the applicant to enter into the contract and he acted upon the inducement and did so, and for that purpose obtained from his government the necessary temporary release. Yet a third approach is to hold that it would be contrary to the requirement of good faith and fair dealing implied by the contract of employment that the respondent could repudiate the representation and decline to renew even if the applicant's performance fulfilled the condition. However mapped, these paths all lead to the same destination: the respondent was bound to extend the contract if the applicant's performance was satisfactory.

The applicant's contract is not renewed

12. At the time of the letter of offer the applicant was still employed as a senior bureaucrat with his domestic government, (as I understand it) having been granted leave. It is clear that UNDP was well aware of this and accepted the position.

13. The applicant claims that, in May 2007, whilst discussing his future employment plans with the Deputy Director, he informed her that his plan was to remain with UNDP. There was no suggestion that his contract might not be renewed. He said that, following this discussion, he informed his government of his intention, and obtained approval to complete at least the five-year term with UNDP (that is to say, up until 21 August 2008). However, on 17 September 2007

the applicant was informed by the Country Director in writing that his current contract, expiring on the 31 December 2007, would not be renewed. There was no indication given of any reason for so doing. It has not been suggested that his position was being abolished or reclassified or that budgetary constraints required his separation. Indeed, UNDP advertised in national newspapers for a replacement calling for identical qualifications. The standard of his performance had been appraised as exceeding expectations for 2004 and 2005, fully satisfactory for 2006 and his mid-term evaluation in 2007 was satisfactory.

14. On 16 November 2007 the applicant filed a request for administrative review of the decision not to renew his contract past 31 December 2007, pointing out in particular that it followed from the initial letter of offer, which he accepted, that his contract was bound to be renewed whilst his performance remained satisfactory and claimed that non-renewal was arbitrary and affected by extraneous matters. He also alleged that it was a retaliatory measure taken against him for having raised issues of wrongdoing in UNDP's Country Office in Pakistan.

The Ethics Office recommends re-integration into UNDP Pakistan

15. The respondent set aside the decision not to renew the applicant' s contract and the case was referred to the Office of Audit and Investigations (OAI) and the Ethics Office in accordance with the Policy for Protection against Retaliation. In July 2008 UNDP management decided that "taking into consideration the serious breaches made by the country office with regard to the earlier termination of [the applicant's contract]" whilst the matter was under review the applicant should be granted special leave without pay to enable him to assume a technical position with the Pakistani Government for one year from 1 July 2008. UNDP also decided to ask the applicant "to confirm in writing that he would not be making government policy and that his functions in the entity are not related to the functions in the UNDP and won't otherwise create a conflict of interest". This

necessarily assumed that the applicant's contract with the respondent was still on foot and had not yet expired.

16. On 27 January 2009 the Ethics Office, concurring with the OAI investigation report, concluded that the applicant had engaged in protected activities, that UNDP failed to provide "clear and convincing evidence that it would have taken the same action in the absence of the protected activity" and that the "Country Office's decision not to renew [the applicant's contract] was arbitrary and capricious ... [and considering] the totality of the circumstances, it is possible that ... [the applicant's] numerous allegations of wrongdoing caused the Country office to retaliate against him by not renewing his contract". Thus, the question *whether* the decision not to renew the applicant's contract was decided decisively against the respondent, the only doubtful question was its cause, namely retaliation or otherwise. This interpretation is confirmed by the conclusion of the Director of the Ethics Office –

> Given the OAI's detailed investigation of your retaliation complaints and in the absence of a convincing reason for not renewing your contract, I concur with OAI's conclusion that there may be finding of retaliation in this case. Certainly, the actions on the part of the CO senior management constitute an abuse of authority.

17. The Ethics Office therefore recommended that the applicant be re-integrated into UNDP's Country Office following his return from special leave without pay.

18. These findings and recommendations were accepted. The attitude of the responsible senior management was made very clear in an email of 31 January 2009 from the Executive Office –

> We have sent you the report and the message sent to us from our Ethics Office regarding ... [the applicant]. Kindly make sure that the appropriate action as recommended by the ethics office is taken and such kind of error is not repeated or avoided. The CO has to implement the decision and also avoid unnecessary litigation and other form of appeal process.

Discussions then commenced with the applicant on his return to UNDP. Of course, the return necessarily assumed that the applicant was still employed by the UN, though he was on leave. No question of re-employment arose. The only question was how and when he was to be re-integrated.

19. The first step was a request made by UNDP to the Pakistani Government to release the applicant in order to allow him to resume his assignments in UNDP. This was unsuccessful. UNDP was informed that the applicant could not be released on deputation the second time until he had completed three years of service with the government from the date of his return. It followed therefore that reinstatement with UNDP required the applicant to resign from his position with the Pakistani Government. However, his resignation was said to be insufficient and he was informed that the Country Office would proceed with the necessary administrative steps for reappointment as soon as the *acceptance of his resignation* was provided. This, of course, was a matter outside the applicant's control.

20. UNDP also noted that, whilst working with UNDP from 1 January to 30 June 2008 and thereafter on special leave without pay from UNDP that the applicant had been posted as an officer holding various positions with the Pakistani Government. It was said that this was a "discrepancy" and the applicant was asked to "provide evidence that [he] requested prior authorisation from UNDP as required by the Staff Regulations for outside activities ... [and] specify whether [he] received outside remuneration during this period". I mention this matter, merely as history, since the issue was later resolved and nothing turns on it.

UNDP requires applicant's resignation from employment with his government

21. On 5 August 2009 the applicant was informed by Office of Human Resources, UNDP as follows –

> ... [In] order to proceed with your return to UNDP, we would need you to resign from your government as a national civil servant. In the past, there have been exceptional cases where staff members were allowed to be seconded from their national civil service. However, since the establishment of the UN Ethics Office, and subsequently of the UNDP Ethics Office, we have been advised that individuals cannot have two loyalties and therefore if they are national civil servants and want to join the UN, they have to resign from their national administration.

22. The Director of the Ethics Office had already, in June 2009, informed the applicant that the "UN rules in general do not permit serving both UNDP and a national government [so that] when you are reinstated, you should resign from your government ... [and the] Ethics office will advise that your secondment arrangement must end". I am somewhat skeptical that advice was received in these terms from any legally qualified official, since for reasons that I set out below, it was so egregiously mistaken as to be not only unreasonable but incompetent. This skepticism is fortified by the advice of the Ethics Office to UNDP dated 1 March 2010, which has been tendered. The author refers to staff regulations 1.1(a) and (b) and 1.2(d) and (e) and states "staff members are prohibited from accepting employment from a Government". The basis for this opinion appears to be the characterisation of the responsibilities of staff members as not national "but exclusively international", a point which is emphasised by the terms of the written declaration required to be made which involved the promise "not to seek or accept instructions in regard to the performance of my duties from any government or other source external to the Organization". The substance of this undertaking is repeated in staff regulations 1.2(d) and (e). It is worth at this point to observe that the prohibition is "seeking or accepting *instructions*", not seeking or accepting employment. Not only is the distinction obvious but, equally obvious, is the inevitable inference that the distinction was intentional on the part of the Secretary-General who promulgated the staff regulations and the General Assembly which approved them.

23. The Ethics Office reasoned from this prohibition "that the staff member cannot *receive* instructions from a government as such an act would be

inconsistent with the independence and impartiality expected of international civil servants" (italics added). This is a clear *non sequitur*. No person can undertake that his or her government will not instruct them to do some act or other and, accordingly, that they will not receive some instruction or other but this is *not* either the undertaking required or the stipulation of the regulation. Indeed, it is obvious that no citizen can forbid or prevent his or her government, whether employed by that government or not, from *giving* instructions. What is required is that the staff member "shall neither *seek nor accept* [such] instructions" (italics added) and to act in accordance only in "the interests of the United Nations". A person who happens to be employed as a civil servant with a national government and given leave to enable service with the United Nations can, it is clear, nevertheless conscientiously make the undertaking required and there is no reason to suppose that it would not conscientiously be fulfilled, that is to say, that if there were any extraneous instruction the staff member, would either disregard it or resign. If I may repeat the Australian idiom, this would be obvious to blind Freddie sitting outside the Wiluna pub and should have been obvious to the decision-maker. Furthermore, it should be inferred that a government, almost certainly that of a Member State, that grants leave to enable its employee to work for the UN, would not act in such a way as to require that person to act contrary to the regulations of the UN and to the solemn undertaking as an international civil servant. The grant of leave in these circumstances necessarily implies an undertaking not to do so. It does not strike me as appropriate to make decisions upon assumptions that question the good faith of Member States.

24. Furthermore, the current (as well as the superseded) Staff Regulations and Rules (ST/SGB/2009/7) envisage secondment from government service (italics added) –

> **Regulation 4.1**
>
> As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member *on secondment from government service*, shall receive a letter of

> appointment in accordance with the provisions of annex II to the present Regulations ... and signed by the Secretary-General or by an official in the name of the Secretary-General.
>
> **Rule 4.13**
>
> **Fixed-term appointment**
>
> (a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time, to persons recruited for service of a prescribed duration, including persons temporarily *seconded by national Governments* or institutions for service with the United Nations, having an expiration date specified in the letter of appointment.
>
> …

It is an unfortunate reflection on the care with which this matter was considered by both the Ethics Office and UNDP that these provisions, which (one way or other) have been part of the legal framework of the UN employment structure for decades, were not considered or, if considered, were ignored.

25. It appears therefore that the Ethics Office overlooked a number of fundamental and obvious considerations and if, as appears to be the case, its advice was intended to convey the conclusion that the applicant could not be employed in UNDP (on the assumption that he was given leave) unless he had first resigned from his position with the Pakistani Government, it was quite mistaken. It was, however, clearly proper – indeed, necessary – that UNDP should have acted on the advice of the Ethics Office, despite its being mistaken. I return to this issue below.

26. On 1 September 2009 the applicant's counsel informed counsel for UNDP that "the applicant has started the process to secure his resignation from the service of the Government of Pakistan, with a view to being re-integrated into UNDP". On 3 December 2009 the Director OHR extended the deadline for the applicant's resignation from his government and return to UNDP to 31 January 2010. The condition was added, however, that mere resignation was insufficient and it was now required that the Pakistani Government must accept the resignation before his return was possible. On 21 December the applicant sought

more time but on 7 January 2010 he was informed by the Director OHR that he was "required to return to the office on 1 February 2010 with the required governmental acceptance of [his] resignation, or [UNDP] will proceed with [his] administrative separation from the UNDP effective 31 January 2010". The applicant did not comply with this deadline and a decision was made to separate him.

27. The applicant did not seek administrative review or management evaluation of the decision requiring him to resign before the recommendation of the Ethics Office would be effectuated. Subject to this jurisdictional point, this was an administrative decision, the correctness of which is within the remit of the Tribunal to determine. The requirements of good faith and fair dealing – which can often be equated to the requirement of reasonableness (the instruments incorporated into the contract require that administrative decisions must be reasonable and not unreasonable) – obligate the decision-maker to exercise his or her discretion for the purposes for which it was conferred, taking into consideration all relevant matters, ignoring irrelevant ones, and making no significant mistake of fact or law. Here there was a plain mistake of law, comprising an egregious misunderstanding of the staff regulations. Furthermore, that the applicant would, when employed by the UN, still be formally employed by his government but on leave was an irrelevant matter in either deciding to offer him employment or reintegrating him into UNDP in conformity with the Ethics Office's recommendation. Putting the matter more generally, the advice, with the concomitant decision, was so absurd and unreasonable as to demonstrate that the due exercise of the decision-maker's discretion went seriously awry. The fact that UNDP was obligated to act on the advice of the Ethics Office does not change the fundamental fact that that advice was mistaken and cannot make the resulting decision, which must be as wrong as the advice upon which it was based, correct.

28. It will have been observed that, when the applicant agreed – with some prevarication, it is true – to resign (also on the basis, as it seems to me, of the

incorrect Ethics Office's advice) UNDP then stipulated, as a new requirement, that the applicant must also secure a letter of acceptance of his resignation. This was plainly a matter beyond his control and I am unable to see any legal basis for insisting upon it. Certainly, no attempt was made to justify its imposition.

29. This discussion has been confined to the legal issues raised by the failure to re-integrate the applicant into UNDP in accordance with its undertaking to do so. I have not discussed the question whether the requirement as to resignation was a *policy* as distinct from a *legal* decision. This is because the decision was never put to me as reflecting a change in policy. If it were a policy decision, it might be proper but it would be necessary to show, amongst other things, the source of the policy, the authority to generate and apply it and that it was not applied selectively to the applicant but was of general application.

30. It remains to note that it was obvious from the outset, and explicitly accepted by UNDP when employing the applicant that he was on leave (or "deputation") from the Pakistani Government. Since this contract had not – in light of the circumstances – expired, it was still governed by the original conditions, one of which was that it was not necessary that he resign from his position with the Pakistani Government, providing he was released, or deputized or placed on leave (whatever the term) to work for the UN. Thus, the imposition of the requirement as to resignation was a unilateral decision by one of the contracting parties to vary the terms of the subsisting contract. It matters not that the applicant had accepted it – he was misled by that contracting party (through its Ethics Office) into believing that there was a legal obligation on it to require his resignation. At all events, to require resignation was one thing, to require that his government must accept the resignation quite another and proving that acceptance yet another.

The jurisdictional issue

31. Counsel for the respondent had contended, at the directions hearing on 19 February 2010, that the original decision not to extend the applicant' s contract, in respect of which the applicant had submitted a request for administrative review, had in effect been reversed and the mode of correction – in accordance with the Ethics Office's recommendation – had been agreed. It was submitted that this matter was therefore moot and there was no issue raised by the request for administrative action and the appeal to the Joint Appeals Board, transferred to the Tribunal by virtue of the new system of internal justice, still outstanding. It was contended that the real complaint of the applicant was that the decision to separate him was unlawful but, since this decision had not been the subject of a request for management review, the Tribunal had no jurisdiction to determine it. Counsel for the applicant did not concede this point but did not put any substantive argument in contradiction. In fairness, the hearing was a directions hearing and not a hearing on the merits. It seemed to me that, if the submission of counsel for the respondent were accepted, that must be the end of the case on jurisdictional grounds and I suggested that an application for summary judgment would be appropriate to enable its correctness to be determined without undue delay, giving both parties the opportunity to tender documents and make further submissions. The application for summary judgment was filed on 1 March 2010. Both parties have filed further documents and made submissions.

32. In my opinion it clearly emerges from the account set out above that the original decision not to extend the applicant's contract is not moot. Although it has been conceded by the respondent that it was unlawful, the consequential compensation or correction has not been agreed or, if agreed, has not been effectuated. The respondent has insisted upon the applicant's satisfying a condition which the applicant submits is not lawfully required. Accordingly, the Tribunal is still seized with the original application, which has not been finally determined, despite the fact that, in effect, liability has been admitted.

33. Even if it is agreed that the proper "compensation" would have been effectuation of the Ethics Office's recommendation, including its variation by the later requirement of resignation (which was not at all events unconditional from the applicant's point of view, for reasons that are not presently relevant) the additional requirement of acceptance by the applicant's government of his resignation is not within that agreement and has always been repudiated by the applicant. The decision to separate the applicant, therefore, was not pursuant to the agreement upon the issue of compensation, which accordingly remains outstanding and concomitantly, the original application is on foot and undetermined by either agreement or decision.

34. An alternative approach is to regard the decision to separate the applicant by virtue of the legally impermissible imposition of conditions precedent to his being able to continue in employment with the UN as merely being the delayed consequence of the original decision to unlawfully deny him renewal of his contract. On this view, the interposition of the Ethics Office and the ensuing unsuccessful negotiations changed nothing of substance and the ultimate separation was, in fact, the delayed effectuation of the original flawed decision. In other words, the question of reintegration only arose because the applicant's contract was unlawfully not renewed and in the result the re-integration having been agreed to, was not effected. Therefore the separation – whatever the reasons for it – was a direct consequence of the original unlawful decision, the legal consequences of which are clearly within the jurisdiction of the Tribunal in respect of the case referred by virtue of the transitional provisions. Accordingly, there is no need for the applicant to seek management evaluation of that decision to separate him – it was the consequence of failed negotiations to settle the original application which remained on foot during those negotiations and is still outstanding.

35. Accordingly, the Tribunal has jurisdiction to decide the original application and determine (the issue of liability being conceded or, at least, in

light of what has occurred, the respondent now being estopped from maintaining otherwise) the question of what consequential orders should be made by way of relief under art 10.5 of the Tribunal's Statute.

Conclusion

The application for summary dismissal is dismissed.

(*Signed*)

Judge Adams

Dated this 16th day of April 2010