



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/016
UNDT/NBI/2011/023
Judgment No.: UNDT/2013/023
Date: 18 February 2013
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

IGBINEDION

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Nyaberi Omweri Samson, Ombeta and Associates
Dominic Osoro, Osoro Advocates

Counsel for Respondent:

Saidou N'Dow, UN-Habitat
Nana Kariuki, UN-Habitat

Introduction

1. The Applicant was, at the time of his application, a P-3 Editor in the Governing Council Secretariat of the United Nations Human Settlements Programme (UN-Habitat). He held a Fixed-Term Appointment.
2. The Applicant is contesting the decision not to renew his Fixed-Term Appointment, which expired on 18 April 2011.

Facts and Procedural History

3. The Applicant joined UN-Habitat in 2001, as a consultant, and was later on appointed on a Fixed-Term contract in January 2004.
4. On 1 December 2010, the Applicant's Fixed Term appointment, which was due to expire on the 19th of that month, was renewed for a further four months through to 18 April 2011.
5. On 21 February 2011, the Executive Director of UN-Habitat (ED), Dr. Joan Clos, sent a memorandum to Division Directors of UN-Habitat directing that

due to financial constraints on the UN-Habitat budget... it has been necessary to implement the following changes to recruitment policies and procedures, effective immediately: No recruitment or extension of contracts for temporary staff members.

6. On 18 March 2011, the Applicant was informed by Mr. Chris Mensah, Secretary to the Governing Council of UN-Habitat, that his contract would not be renewed beyond 18 April 2011. Mr. Mensah wrote in a further email to the Applicant on 31 March 2011 that his

understanding of the ED's memo which refers to the non-extension of all temporary (non-regularised) staff members is that the one year contract extension therefore only refers to regularized staff members who ordinarily had two year contract extensions.

7. On 9 April 2011, the Applicant requested management evaluation of the decision not to extend his appointment beyond 18 April 2011.

8. On 11 April 2011, the Applicant filed a motion for suspension of action with the United Nations Dispute Tribunal in Nairobi seeking a suspension of the same decision. The Applicant's motion was served on the Respondent on 12 April 2011 with a deadline for any submissions in response to be filed by 13 April 2011.

9. On 15 April 2011, on the basis of the written submissions of the Parties, the

14. Following the hearing, the Parties were directed to file their respective closing submissions by 10 May 2011.

15. On 10 May 2011, the Applicant's request for Management Evaluation was rejected on grounds of receivability. The MEU determined that the Applicant's

This is in light of the decision of the MEU dated 10 May 2011, which supersedes the UNDT's Order of 12 May 2011 on your application for suspension of action. Please be advised that UN-HABITAT has directed Staff Administration, HRMS, UNON to proceed with the formalities to separate you from service based on the non-extension of your appointment.

21. The Tribunal finally received the substantive Application in its entirety on 16 May 2011.²

22.

Applicant's submissions

28.

individual or group of individuals or otherwise abuse the power and authority vested in them.”

34. The Applicant is seeking the extension of his Fixed-Term contract for one year, effective 19 April 2011. He has been on a roster since 2009, and also seeks intensified efforts to regularise his contract for 20 months. Alternatively, the Applicant seeks 20 months’ net base salary compensation. In either case, the Applicant finally asks that 20 months’ net base salary be imposed as “punitive damage” against the Respondent.

Respondent’s submissions

35. Within his reply to the Applicant’s original application on contempt, filed on 15 June 2011, the Respondent submitted that the original application was not receivable for the same reason as that given by the MEU. The Applicant did not contest the disputed administrative decision (namely the four-month renewal of his contract) within the sixty day deadline, instead choosing only to write to the ED of UN-Habitat. The Respondent argues that the application is not receivable *ratione temporis* in accordance with staff rule 11.2(c) and article 8(3) of the Tribunal’s Statute.

36. The Respondent also submits that “there is nothing in the UN General Assembly Resolution [63/250] and the applicable Staff Rules which states that a fixed term appointment can only be extended for 1 year and that transitioned staff members should be granted a mandatory two year term of appointment.” The Respondent uses staff rule 4.13(a) to claim that the Applicant’s expectation of a two-year reappointment is unsubstantiated.

37. The Respondent adds that the non-renewal of the Applicant’s contract stems from “organisational need and acute financial constraints” faced by UN-Habitat and the Organisation as a whole, and that there was neither an improper motive nor an improper exercise of discretion behind the Applicant’s non-renewal.

38. With regard to the extraneous motives alleged by the Applicant, the Respondent submits that the Organisation acted in good faith throughout the Applicant’s tenure with UN-Habitat, seeking to employ him wherever and whenever posts became

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barred renders the application for suspension of action before the court equally time-barred and therefore moot.

46. The Tribunal dealt with this issue exhaustively in Judgment UNDT/2011/110 in this very case. But the Respondent has chosen to raise the issue again, both in his Reply to the substantive Application and in his closing submission filed in July 2012.

47. On the issue of receivability, the Tribunal must determine two issues:

- a) Whether the Tribunal, based on the Respondent's reading of staff rule 11.2 (c)

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

51. *Subject to Article 8.3 of the Statute*, Article 35 further affords the Tribunal (President, or judge or panel hearing a case) the authority to “shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require.”

52. What then, does Article 8 of the Statute say with regards to receivability of an application? Article 8(1) (d) (i) and (ii) essentially mirrors Article 7(1) of the Rules of Procedure. Article 8 (3) of the Statute provides

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

53. The second sentence of Article 8 (3) appears to form the thrust of the Respondent’s argument in respect of receivability. Citing the UNAT judgments in *Costa*, *Samardziz*, *Sethia*, and *Adjini*, the Respondent submits

[T]hat the Applicant’s substantive application is not receivable by the Dispute Tribunal as it did not comply with the time limits required by Staff Rule 111.2(c) [*sic*] and Article 8(3) of the Dispute Tribunal Statute and moreover since the MEU has determined that it is time-barred such a deadline should not be suspended or waived.

54. The MEU took the position that the impugned decision in the present matter was that of 1 December 2010, when the Applicant’s contract was extended for four (4) months. Counting sixty (60) days from that date, it decided that the request for management evaluation is time-barred.

55. The submission by the Respondent that this finding by the MEU binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word ‘deadline.’

56. Article 8 (3) of the Statute is clear. It prohibits the Tribunal from waiving or suspending deadlines *for* management evaluation. It does not bind the Tribunal to findings of timelines made *by* management evaluation.

57. Put very simply, the Tribunal would be acting in excess of its jurisdiction if it allowed a litigant to seek management evaluation *after* the sixty (60) day deadline. It would also be exceeding its jurisdiction if it ordered the Management Evaluation Unit to consider a request by a staff member outside of the time-limits prescribed for such a request.

58. The MEU made a

According to the procedure explained by Mr. Antoine King, the recommendation then went to the Certifying Officer who on 28 September 2010 certified as follows: Certified Extension through date: 18/12/11 and Remarks: S/M (Staff Member) charged against vacant post for budgetary purposes only.

In an email dated 1 December 2010, two months after the Certifying Officer had processed the Extension of Appointment document, Mr. Antoine King wrote the following to Mr. Chris Mensah:

After our discussion, I am now confirming that we can extend his contract for another 4 months. This is to take him to just after the GC, (the Governing Council of UN-Habitat) i.e. 19/4/2011 and will help you out as you approach the GC. Please inform him urgently. This should also be in writing afterwards.

Much later, on 18 March 2011 Mr. Mensah informed the Applicant in an email that his contract will not be renewed after 18 April 2011. This is what Mr. Mensah wrote:

Dear Mr. Igbinedion,
With reference to my discussion with you on 14 March 2011 and following the Memo to (sic) the Executive Director of UN Habitat to all Directors dated 21 February, this is to **confirm**, with pain that your post is among those that we will not be renewed (sic) when your contract expires on 18 April 2011. A formal letter to that effect will be coming from the relevant office. (Emphasis added).

In an email dated 31 March 2011 Mr. Mensah wrote to the Applicant and stated:

As you may recall from our discussions in December 2010 when the duration of your contract extension arose, you were informed that the organization was only able to extend your contract on an exceptional basis to cover the Governing Council by four months (up to 18 April 2011) with no expectation of further extension.

The issue that arises from the above is the date the Applicant was officially informed that his contract would not be renewed. The Respondent cites financial constraints as the principal reason for the decision not to renew his appointment. As at December 2010, when Mr. King decided on a four month extension, the issue of financial constraints had not been mooted. It is only on 21 February 2011, that the Executive Director brought the financial difficulties of the Organisation to the fore.

Further, if a final communication had been made to the Applicant in December about the decision of the administration on the fate of his contract for financial reasons why would there have been a need for a discussion with the Applicant by Mr. Chris Mensah as is mentioned in the email dated 18 March 2011?

The Tribunal finds that the Applicant found himself in a situation comprising a continuum of events, beginning with the decision to significantly shorten the recommended period of extension from twelve months to four, attempts to clarify the situation and the eventual decision to not renew that four month appointment.

The Tribunal finds that the impugned administrative decision is the decision which was communicated to the Applicant on 18 March 2011.

61. The Tribunal sees no reason to review that decision, and continues to hold that the impugned decision is that dated 18 March 2011.

62. Under the specific circumstances of the present Application, the Tribunal accepts that the Applicant attempted to file his brief on 8 May 2011, and that technical glitches led to it eventually reaching the Tribunal on 16 May 2011. As the MEU decision was issued on 11 May 2011, the Applicant technically had 90 days from that date within which to file his papers.

63. The Respondent's motion to have the Application dismissed on grounds of

members as at 30 June 2009,⁵ the Applicant submits that he falls under the category of staff governed by the following provision: “[...] one year of cumulative service in the last 2 years will be transitioned to a fixed-term appointment limited to the Department/Office and lever for up to two years.”

66. The Respondent contends that the Applicant has misunderstood the General Assembly Resolution and the Transitional Measures. Neither of these documents creates an expectancy that a staff member in the Applicant’s position will be provided with an extension for a maximum of two-years. This decision was informed by an organisational need and carried no expectancy of renewal.

67. The Applicant in this case found himself in the peculiar situation of being ‘in-between rules,’ as it were. As the human resources system morphed from the old into the new, on 30 June 2009, the Assistant Secretary-General for the Office of Human Resource Management (ASG/OHRM) approved the *Interim Guidelines For Implementation Of Transitional Measures For The United Nations Contractual Reform For Currently Serving Staff Members Other Than Those Serving In United Nations Peacekeeping And Political Missions* (Guidelines/Transitional Measures).

68. These *Guidelines* were issued pending the promulgation of the new Staff Rules to guide managers and human resource officers in matters pertaining to staff appointments and renewals.

service as of 30 June 2009 will be governed under the new Staff Rules” and that the Guidelines “describe transitional arrangements for staff members serving ...as of 30 June 2009.”

71. The Administrative Instruction on Temporary Appointments was, at the time, ‘under preparation.’

72. The Tribunal finds that that legislative vacuum forms, in significant part, the genesis of the issues that plagued the Applicant’s appointment.

73. As at 14 December 2009, the Applicant was on a continuous fixed-term appointment for 13.5 months. He was then made to take a mandatory break in service, following which, on 18 December 2009, he was given a 12 month fixed-term appointment.

74. The Applicant was on a *fixed-term* appointment. Nothing in his conditions of service suggested to him that his was an appointment that was in some way

In response to a question from the Bench, Mr. King stated that the approval by the Certifying Officer in September 2010 meant that there was funding for the post. When pressed upon to explain how the funding had deteriorated so dramatically in those two weeks, Mr. King tried to rely on the case of 23 other staff members who were axed or on the point of being axed. He was at pains to give a rational and coherent explanation.

The Tribunal considers that the issue of UN-Habitat's finances became live when the Inter-Office Memorandum of February 2011, signed by the Executive Director, was sent out. The Tribunal cannot but state in no uncertain terms that the financial crunch was used as a colourable device to get rid of the Applicant. This is made more compelling by the fact that the Respondent did not rebut any of the allegations of countervailing circumstances which the Applicant argued motivated the impugned decision.

78. On the basis of those findings, the Tribunal held that the decision not to renew the Applicant's appointment was *prima facie* unlawful.

79. Having heard the testimony of Ms. Creavalle, the Finance Management Officer at UN-Habitat, the Tribunal is persuaded that there was neither the money nor the post for the continued employment of the Applicant with the Organisation.

80. The certification she provided as to the availability of funds did not change the fact that the Applicant's entire employment at UN-Habitat saw him being placed against one post or another, none of which he competed or was properly recruited for.

A combination of both. It came back from the director's office to me because the director realised that the post was going to be filled sooner than I expected. And then he asked me to find another post, but at the same time we knew that the Executive Director had arrived and we were thinking about he was instructing us to start looking at posts to earmark for freezing to save funds.

So at the same time when he said to find a solution, he said, "Well, you have to be aware of the future operation of Habitat, and you have to only, you know, be aware of that." So we his advice was not to extend well, yeah. We had to envision at that time that the Executive Director was thinking about freezing many posts that were currently vacant.

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(Signed)

Judge Vinod Boolell

Dated this 18th day of February 2013

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

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi