Facts

4. The applicant was employed under a 300 series Appointment of Limited Duration (ALD) contract as a Disbanding, Disarming and Reintegration (DDR) Officer with the United Nations Development Programme/Afghanistan New Beginning Programme (ANBP/UNDP) in Kabul. He commenced work on 23 August 2005 and his contract had been initially extended for two periods of six months until 28 February 2007. The applicant worked at first with the Ammunition Survey Team (AST) 4. He was then transferred to AST 9 as team leader. When the ammunition work was handed over to the Afghan government in November 2006 it was proposed that AST 9 would be disintegrated. The applicant, as well as other team members, had occasionally replaced the Operations Manager of ANBP/UNDP when he was away from his duty station. The Operations Manager does not recall having made any statement assuring the applicant of any future work prospects in the event of his being assigned to another position. The programme was long-term and continued past the expiry of the applicant's fixed-term contract.

5. On 12 October 2006 an explosion occurred in the applicant's room at his place of residence, causing him severe injuries. There is little doubt that the explosion was caused by a mortar shell. The applicant was first treated in local medical facilities and then, on 14 October 2006, was evacuated to India for further treatment. On 26 October 2006 the UN Office of Internal Oversight Services (OIOS) commenced its investigation into the circumstances of the explosion.

6. The applicant maintained from the time he was first spoken to at the hospital about the matter that he had not brought the shell to the residence and suggested that one of his co-workers had done so. The first report by UN authorities was made on 26 October 2006 by the Special Investigation Unit of the Department of Safety and Security which, in substance, exonerated the applicant but implicat

cause of the explosion. The investigation was taken over on the following day by the UNDP Office of Audit and Performance Review (OAPR). I characterised this report in my earlier decision as thorough, objective and careful. Nothing since said has led me to change this conclusion. On 14 November 2006, before the investigation was completed, the Assistant Administrator and Director of the Bureau of Management (AAD/BOM) of UNDP, advised the co-worker initially implicated that the OAPR investigators "did not find evidence corroborating [his] implication in this explosion" and that the suspension from service he had been under pending further investigation was lifted.

7. In the meantime, as I have mentioned, a decision had been made to hand the Khairabad ammunition depot was to the local authorities so that AST 9's tasks at the depot would be completed by 30 November 2006. It was the view of the Chief of Staff and the Programme Director of ANBP/UNDP that the applicant's position had therefore become redundant, with the consequence that his contract should not be renewed. In a statement tendered to the Tribunal, the Programme Director, whose decision it was, categorically denied that the decision had anything to do with the circumstances of the explosion or the investigation, the report of which he did not have to hand until January and the contents of which he had not been earlier informed.

8. On 19 December 2006 the applicant emailed the Chief Protection Officer, ANBP/UNDP, to ask for any report on the explosion that might have been prepared so that he could pass it to his lawyers to consider. The Officer forwarded this message to the Programme Director and the Country Director with the suggestion that the applicant be informed that an internal investigation was being carried out, which has not been released and the content of which was unknown and that UNDP was unaware of any other reports. The Programme Director and the Country Director agreed. There is no reason to suppose that mepoi725 Tw28 Febr untiis lawyeral renewed. Innt(inform)8(eET/Artifhat .)TAttachDe[/Bottom]/BBox [0.00.1 35the 9 339-0.0050.8.00]/Subt

of 3 November 2009 tendered to the Tribunal by the respondent, he averred that the Programme Director was not influenced by the continuing investigations into the circumstances surrounding the explosion. (It may be worth noting that it is evident from contemporaneous documents that the Programme Director was most sympathetic to the applicant and, I rather think, thought he was innocent of wrongdoing.) This is corroborated by the tendered statement of 23 October 2009 of the former Chief of Staff of ANBP.

10. As it happened, various extensions of the contract were later given to the applicant. However, it is clear that those extensions simply delayed implementation of the decision of 21 December 2006 not to extend it. A crucial question in the case is whether the Programme Director was aware of the conclusions of the investigators when he decided not to renew the applicant's contract. On 14 January 2007 the applicant wrote to the Programme Director referring to the letter of 21 December and commented –

> I would prefer to be honest with you and my self telling you that I had no intention to come back to Afghanistan even if my contract would have been extended … But I had always thought that ANBP would offer an extension of my contract at least until I would feel fully recovered and until doctors would certify that.
>
> …
>
> In this condition, as I had an accident while being under contract with ANBP, I would like to ask you to support me by considering two alternatives:
>
> 1. Extension of my contract at least for additional three months if doctors would recommend additional period of sick leave after Feb 2007.
>
> 2. Requesting UNDP/ANBP for a financial support (in form of compensation) which would cover my health expenses for certain period of time until I would be capable physically and physiologically [*semble* psychologically] to do other work.

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13. On 24 April 2007 a second OAPR investigation report was submitted to the applicant for comments. Further enquiries had been made in response to the applicant's criticisms, which were to my mind convincingly answered. This second report concluded (for good reason, in my opinion), *inter alia*, that –

> [T]he evidence strongly suggests that this was an unfortunate accident, caused by the partial detonation of a mortar contained in Mr. Sina's black bag that he had brought into his room.

14. The applicant again commented extensively on this report, again denying any responsibility for the explosion. It was decided to request OIOS to comment on the available evidence in order to permit, if possible, a conclusive determination as to the matter. On 17 July 2007, following a review of the material to hand, OIOS informed the AAD/BOM of UNDP that –

> …in the absence of first hand and critical evidence, which could have been obtained from the scene of the explosion, that is, if proper investigative steps were undertaken from the outset, OIOS cannot ascertain the origin of this explosion.

15. By letter dated 30 October 2007 the respondent extended the applicant's contract until 30 November 2007 because there was no final determination on his outstanding medical claim with the UN Claims Board, also informing the applicant –

> OIOS could not ascertain the origin of this explosion … We then carefully reviewed all the material available, i.e. the two OAPR reports, your comments thereon and the OIOS position, and we conclude that absent definitive evidence as to the origin of the explosion, no one can be held liable for it.

In the same letter, the respondent urged the applicant to follow up on the status of his claim and to provide an update of his medical condition, with supporting certificates,

16. By letter dated 6 December 2007, in response to a request from the applicant to suspend the decision not to extend his appointment beyond 30 November 2007, the Deputy Secretary-General suspended the decision until 31 January 2008, stating –

> [The] Secretary-General believes that, on an exceptional basis, you should be given one final opportunity to fulfil your obligation to submit the information necessary for a determination of your administrative and medical status. He has therefore decided to suspend action on the decision not to renew your contract until 31 January 2008. This suspension, however, is subject to the UN Medical Service in New York receiving from you, *no later than 4 January 2008*, all necessary documentation that would allow it to determine your medical status, in particular with regard to your sick leave after 6 March 2007 …
>
> … For the avoidance of any doubt, I would like to stress that the responsibility for submitting, within the stipulated timeframe, all records required to establish your

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applicant from 12 October 2006 until 5 December 2007 and that there was "no medical reason to extend the sick-leave further". This information was not conveyed to the applicant. On 8 April 2008, MSD confirmed that the medical documents reviewed indicated that the applicant did not qualify for disability benefits and that he was fit for work, though they would not recommend he return to Afghanistan. This information was not passed on to the applicant.

23. On 15 April 2008 the applicant's former counsel informed him that the ABCC was still uncertain about whether his injuries were job-incurred and that his case would be returned to the Board on 23 April 2008, although the volume of cases to be considered might require a further meeting to consider his case. He had requested a further one month's extension of the applicant's contract. The applicant forwarded this email on 17 April 2008 to the Director, LSO, with a tirade of complaints about his treatment and added –

> I am not much interested in getting another extension of my contract as much as I am to have the ABCC making a decision and then I could be separated from UNDP asp [*semble*, as soon as possible]. So, I would be grateful if you would be able to push the ABCC in making a decision on my case.

The letter concluded with a request for advice.

24. On 18 April 2008 the Director, LSO, replied, informing the applicant that UNDP was extending his contract "through end May, as the ABCC is meeting end April to review your claim", expressing the "hope that there will be a final decision at the meeting, taking into account the additional information you submitted and also that we submitted at ABCC's request". She reiterated the point that UNDP had "continued to extend your contract during this period whilst ABCC was reviewing [whether the injuries were job-incurred]".

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Case

(a) A reasonable inference can be drawn as to the probability that the investigation had an impact on the contested decision, as occurred in *Al-Khatib* (2000) UNAT 951 and *Mbarushimana* (2004) UNAT 1192.

(b) The applicant being named as the "subject" of the ensuing investigation showed that he was believed to be the culprit. The inference should be drawn that the decision was motivated by the suspicion that he was responsible for the explosion.

31. On the issue of whether the applicant was afforded due process and fair dealing with regard to notification of medical status and notice of separation, the applicant submitted –

(a) It was unfair and procedurally improper for the applicant not to receive notification of his status with regard to sick leave, namely that his entitlements had ended and that he was medically fit to return to service. With such information, the applicant could have returned to work with potentially further benefits, including enabling him to get a new job. It would have also given him the opportunity to challenge any findings. There was a general obligation of fairness for the administration to have informed him of his status before they relied upon the expiry of his last extension.

(b) There is an established practice not to separate any staff member while they are on sick leave and the contract must be continued as it affects a staff member's rights to social security benefits (unemployment, disability, etc).

(c) The applicant did not know his sick leave entitlements had expired until after he was separated. MSD did not remind him that further documents were required.

Respondent's case

32. On whether there existed a legitimate expectancy of renewal, the respondent submitted –

(a) The applicant would have had to apply for an actual post or be a longer-term staff member for staff regulation 4.4 to be applicable ie, the applicant is not treated as an internal candidate.

(b) The Operations Manager does not recall having made any statement assuring the applicant of any future work prospects and was not, at all events, authorised to do so. Even on the applicant's evidence, what was said went no further than a prediction of likelihood.

(c) In a number of statements the applicant either asserted that he did not intend to continue his employment or that he was expecting separation at the end of the contract extensions, when the ABCC made its recommendations. Accordingly, he at least had no expectation of renewal after that point.

33. On whether the decision-maker had taken inappropriate matters into consideration when deciding not to renew the contract, the respondent submitted that the decision to end AST 9's work by 30 November was a *bona fide* operational decision having nothing to do with the applicant. There was no obligation to renew his contract, except for special reasons connected with the investigation and his sick leave. The statements of the then Programme Director and Chief of Staff to this effect should be accepted. They are supported by the statement of the relevant investigator to the effect that the investigators did not keep UNDP management informed of the course of the investigation: except for informing them of the exoneration of the first suspect, they never discussed the substance of the investigation.

Case

that there was more than a mere reasonable suspicion of the applicant's responsibility. In light of the material as a whole, it seems to me that it cannot be sensibly maintained that the respondent had a positive legal obligation to renew the applicant's contract. Whether such a suspicion would be sufficient to terminate a current contract or refuse to renew where there was otherwise a legal obligation to do so is a different question upon which it is not necessary to presently decide.

42. The test of responsibility for problematic conduct in disciplinary proceedings is very different from the test that is applicable in considering whether to renew a contract. In the latter case, the decision-maker is entitled, indeed bound, to take into account all relevant matters providing they are not merely speculative but founded on a reasonable apprehension of the material facts, in order to make the decision in question. In such a case, an appreciable *risk* that a significant problem, say of serious carelessness, misjudgment or lack of integrity, is present in relation to a matter that directly affects the work to be performed is not to be dismissed simply because the fact itself might not be established to the level of probability. There can be no bright line, of course, given the manifold potentially applicable circumstances but, providing the decision-maker acts reasonably and rationally, having regard to the question in issue, there will be no error of law.

43. Here, it is not too much to say that life and limb were at stake and I have no hesitation in concluding that, if my finding that the Programme Manager was not influenced by a suspicion that the applicant was responsible for the explosion be mistaken, the outcome of this part of the case would have been the same: in short, he would have been both entitled and bound to take that suspicion into account and, doing so, the decision not to renew would have been justified.

44. Counsel for the applicant referred to *Al-Khatib*, a case in which an appellant was accused of rape but on trial was found to be innocent. It appeared that a payment of compensation had been made under Jordanian custom by the appellant's family to the complainant's family, which the appellant said was done without his knowledge or consent and was, at all events, repaid following his acquittal. The applicant's

contract was terminated "in the interest of the Agency", the decision-maker (mistakenly and irrationally as the Administrative Tribunal found) concluding that the payment amounted to an admission by the appellant of his guilt. It will be seen that this decision concerns circumstances very far from those in the instant case. First, there was no material which showed anything more than that the appellant had been the subject of an unproved allegation. In the instant case, the Organization has itself undertaken an investigation from which it is reasonable to draw adverse findings, at least to the level of appreciable risk directly related to the danger of the applicant's work, in respect of which it gave the applicant a right to comment. Second, the appellant's contract was terminated rather than not renewed. There is no requirement that non-renewal must be "in the interest of the Organization".

45. *Mbarushimana* is also a case very different from the present. The appellant had been accused of genocide and other appalling crimes. It was held by a court considering extradition that there was insufficient evidence even to demonstrate a reasonable suspicion of guilt. Furthermore, the Prosecutor of the International Criminal Tribunal for Rwanda dismissed the case against the appellant, which had been brought to that Tribunal, for lack of evidence. This meant, of course, that the appellant would not get any opportunity to clear his name. The respondent declined to renew the applicant's contract, although there was a legal expectancy of renewal, on the grounds of the interests of the Organization without itself examining any of the evidence. Thus the decision not to renew (there being a legal obligation to do so) rested solely upon mere allegations and the possibility of a trial. With respect, the decision of the Administrative Tribunal that the decision not to renew was fatally flawed was undoubtedly correct but, equally undoubtedly, does not inform the issue here.

The significance of the extensions of contract

46. It will have been noted that the applicant's contract was first extended pending the completion of the investigation. It appears that extension of fixed-term contracts for this purpose is conventionally done within the UN and it is reasonable to

infer that it is so common that it has become an implied condition of the contract or, at least, has given rise to a legitimate expectation that a staff member's contract will be renewed (circumstances justifying summary dismissal aside) until investigations of possible misconduct have been completed. However, such an entitlement, if it exists, should not be left to implication. If, on the other hand, contracts are extended where there is no legal obligation to do so, it is difficult to see how this can be justified if the staff member is not actually performing any duties. The cost of extension in such a case can be considerable and one naturally asks how payments can be justified where there is no legal obligation to make them and no legal entitlement of the employee to them since he or she is not performing any work to receive them. This is not to say that there will be no exceptional circumstances in which these contracts should not be extended. But, to my mind, the circumstances must be truly exceptional or otherwise can be shown to be in the interests of the

48. In this respect, I note that the first letter from the respondent of 23 February 2007 granting the extension to 31 May 2007 relied on both the pending investigation and the continuing incapacity of the applicant due to his injuries. The letter also, as it happened, explicitly denied that the Organization was legally obliged to extend the contract and thus, implied that the extension was *ex gratia*. Although what I have already said about this question raises doubts about the legal basis for making such an *ex gratia* provision, the case was argued throughout on the basis that such a provision was appropriate and I therefore say no more about it. This qualification was not repeated in later extensions.

49. I simply wish to bring the Organization's attention the desirability, if not (as it appears) the necessity, for providing explicitly in some appropriate instrument its obligations to staff members in these or cognate circumstances together with the considerations that might justify, in any particular case, the making of *ex gratia* payments. If it is not already clear, I should emphasise that extending a contract in circumstances where the staff member is still working does not involve an *ex gratia* element. I should also mention that this

requirement of good faith, necessarily inconsistent with a consequential concealment of entitlements which the Organization is obliged to provide.

51. It is not an answer in the present case to say that the applicant should have

53. It is clear that the applicant was aware that his contract was on foot to 31 May 2008 unless extended and that it would not be extended if the ABCC made its recommendation in the meantime. He was also aware that it was hoped, if not exactly expected, that the ABCC would make its recommendation in April 2008. He might have inferred from the fact that he was not informed of any proposal to further extend his contract that, at last, no further extension would be made but, since it is known that an extension would have been made had the ABCC in fact not handed down its recommendations by the end of April, it is scarcely fair to attribute to the applicant knowledge that he could not have possessed.

54. I am prepared to accept that the Director, LSO, was unaware before 27 May 2008 of the recommendations of the ABCC and the decision of the Secretary-General. That delay was unfortunate because it led to the applicant being advised of the outcome of the process and his separation on the same day. I can understand the reasoning that led to the conclusion that, in the circumstances, it was unnecessary to grant the applicant any further extension, despite the shortness of notice. But I do not accept its fairness or its correctness. It is true that fixed-term contracts may expire without notice and that the applicant's contract had already been extended several times but it is not only the almost universal practice in the UN to provide notice of non-renewal, in this case he was always given timely notice of the extension. In the particular circumstances here, there was undoubtedly a legitimate expectation of renewal whilst the ABCC consideration was outstanding, a fact which the applicant could not know until he was informed of it. Hence, this is not a case where he could have expected separation as at 31 May 2008 when he had heard nothing until that very day, since the effect of the agreement about the ABCC process was that the date was provisional only: it was only final if the ABCC process had ended earlier. In my view, it was completely unreasonable to se