



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/022/
JAB/2008/037

Judgment No.: UNDT/2010/091

Date: 11 May 2010

Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ISLAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

(one way or another), it seemed just to permit participation. In the result, therefore, the respondent was given leave to participate in the present proceeding.

3. I wish to make it clear, however, that I have not at all resiled or qualified my opinion that the respondent should not be permitted to participate in *any* proceeding whilst he is in defiance of an order of the Tribunal, since it is plain that to approach the cases piecemeal is simply to encourage the respondent to pick and choose which orders will be obeyed and which will not. The practice of the UN Administrative Tribunal was to permit the respondent to take this course and it has evidently been insufficient to induce obedience when he sees the interests of management conflicting with those of the administration of justice. The Tribunal cannot concede that such a conflict is possible, let alone that it justifies disobedience of its orders. At all events, it is fundamental that any such conflict is resolved by the Tribunal and not unilaterally by the respondent. For the present, however, in this case (and others) I have granted a stay of the order of exclusion.

Background

4. The applicant, having previously worked for various United Nations entities in the field of IT support, joined UNAMI in September 2004 as a P-3 level IT Officer on a 100 series fixed-term appointment, initially for six months, until 23 March 2005. On 28 September 2004 the applicant was appointed to the post of Chief IT Officer, reporting to the Chief of the Communications and IT Services (CITS) until January 2005. His performance was rated as “very good” at that time. On 11 January 2005 a new Chief of CITS joined UNAMI and remained in that post until the applicant’s separation from the Organization.

5. On 9 March 2005 the applicant received a document entitled “Request for extension of Appointment/Assignment/Secondment of International Staff Members”. The request was signed on 6 March 2005 by the Chief Civilian Personnel Officer (CCPO) and the applicant’s supervisor (Chief of CITS) and indicated that the applicant was rated as partly meeting performance expectations.

The request contained hand-written remarks by the CCPO and the Chief of CITS, stating –

One-month extension only [until 30 April 2005] due to the planned abolition of the function of Chief of IT as per budget authorization for May–Dec. 2005.

The post of Chief of IT (P-3) will be realigned to cover the functions of Budget, Planning and Logistical Support [and called Budget, Planning and Logistics Officer (BPLO)].

6. The new post of BPLO was created as part of the reorganization in UNAMI (including CITS), and was designed to cover IT, administrative, budgetary, and logistical functions. The applicant testified that prior to receiving the March 2005 form he was not advised that there would be a restructuring

of the review of the applicant's case. The review process was completed on 21 February 2007. By memorandum dated 22 February 2007, the CAO informed the applicant as follows, quoting the Review Board's recommendations (emphasis in the original):

1. Rebuttal Panel [ie Review Board] which reviewed your case has concluded its deliberations and made the following recommendation:

“As a result of the investigation, the Board recommends the following in relation to the case:

– The ambiguity surrounding the contractual status of the staff member be ended and that the staff member, in view of the Fully Satisfactory Evaluation, be given a contract extension. The duration of said to be in line with the current mission standard.

– The staff member is re-incorporated back into the CITS section as IT Officer.

– The staff member and supervisor(s) utilize the E-PAS [electronic performance appraisal] system of evaluation from April 2007.[”]

2. I have accepted the recommendation of the Panel under para. 1 above and decided that your contract be extended for six months effective 1 March 2007. In this regard, you will be reincorporated into the CITS, and your title will be IT Officer.

3. By copy of this memo, I am requesting Chief CITS to implement this decision, to prepare terms of reference for [the applicant] as IT Officer not later than 1 March 2007, and to utilize the e-PAS system effective 1 April 2007.

12. The applicant was subsequently provided with a draft work plan and asked by his supervisors to finalise it so that performance evaluations could in due course be done. However, the work plan was not finalised and performance reports were never submitted for reasons about which the parties disagree. The applicant submits that his supervisors failed to give him terms of reference and work plan that provided adequate basis for initiating the performance evaluation process. The respondent, on the other hand, submits that the draft work plan and terms of reference were sufficient to carry out the performance appraisal process.

13. The applicant subsequently served on a number of successive short-term appointments on a variety of projects. By memorandum dated 29 October 2007, the applicant was notified by the new CCPO that his contract would not be extended beyond 30 November 2007. The memorandum stated –

1. Please be advised that under Instructions and in consultation with UNHQ New York, CITS implemented a re-organization of the section and the changes included re-classification of two P-3 posts, formerly Chief Communications and Chief Information Technology which were reclassified as Operations Officer and Budget/Planning Officer. The mission no longer requires the post of Information Technology officer.

[2]. In line with provisions of fax 2006-UNHQ-080774 dated 20 December 2006 from . . . Director, DFS on extension of appointment of mission personnel affected by outsourcing; discontinuance or replacement of a staff member's functions, your appointment will be extended for a further one month through 30 November 2007. This will give you time to apply for advertised posts commensurate with your qualifications and experience in other missions.

[3]. Please note that there will be no further extension of your appointment beyond 30 November 2007 and FPD will be advised accordingly.

14.

was used as a pretext to separate him”. The applicant now submits that the reasons provided for the non-renewal of his appointment – ie the restructuring of CITS and the creation of the new post – were (though proper) not the true reason for the non-renewal of the contract and the contested decision was based on untrue allegations of performance failures and suggestions of a lack of a constructive attitude with respect to his performance evaluations. Accordingly, the Tribunal should infer that the contested decision was vitiated by failure to disclose the true (and principal) reason and was thereby unlawful.

16. The applicant contends that no competitive selection process was followed for the post of BPLO as it appears that the position was not advertised on Galaxy and in the end only one candidate was interviewed. The Administration failed to follow the rules governing recruitment of staff as laid down in ST/AI/2002/4 (in force at the time) and, as a consequence, the applicant was denied full and fair consideration for the post. Section 4 of ST/AI/2002/4 required that posts approved for one year or longer be included in the compendium of vacancies whenever a new post was created. The Administration was required to include the new post in the compendium. Had the standard recruitment procedures been followed, the applicant would have been eligible for the post of BPLO as he was fully conversant with drafting budgetary submissions and logistical matters and would have applied.

17. The applicant was not told to apply for the post of BPLO and the evidence to the contrary adduced at trial lacks credibility. Had he been informed of the vacancy he would have applied. He was also not considered for or offered other posts that were available at the time in UNAMI and other missions although he had relevant qualifications and experience.

18. The applicant’s supervisors failed to implement the recommendation of the Review Board to incorporate the applicant back into CITS and to utilize the e-PAS system from April 2007. The applicant was prevented from completing his

performance appraisal reports as he was not provided with mutually agreed work plan, terms of reference, and required resources.

Respondent's submissions

19. The applicant's claims of discrimination, abuse of power, and harassment have been disproved. The applicant was separated due to operational requirements dictated by the restructuring of the section to which he was assigned. The reorganization of CITS was part of UNAMI's revised budget submission and was implemented for operational reasons. The applicant was aware of the proposed reorganization. The post of BPLO was not advertised through the Galaxy system but there was a competitive selection process with pre-cleared rostered candidates being considered for the position in accordance with the rules of the Organization. The applicant was given every opportunity to apply but refused to do so. The applicant's rights with respect to his performance evaluation reports were fully respected and the applicant was himself responsible for this process not being undertaken.

Discussion

Non-renewal

20. The concession of the applicant that the restructuring was properly done was correctly made. It is unnecessary to deal with this issue further. The applicant contends, instead, that the true reason for his separation was the purported dissatisfaction with his performance and his alleged lack of cooperation with respect to his performance evaluations. This submission is largely based on the evidence given by the Chief of CITS that, in his view, the reasons for the non-extension of the applicant's appointment also, and rightly, included dissatisfaction with his performance and failure to cooperate with regard to his performance evaluations. Although the Chief of CITS was certainly not satisfied with the applicant's performance and with the ~~level~~ **level** of his cooperation on performance

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funds for the applicant to continue his functions. It was theoretically possible that he may have been appointed to them but this cannot mean that the Organization was required to do so, absent a legal right vested in the applicant, which was not the case.

BPLO selection exercise

23. I am satisfied that the applicant was aware of the creation of the new post and that he was both informed of his ability to apply and encouraged to do so. In the circumstances, the reasons for his not applying do not need to be determined. I am satisfied they had nothing to do with any inappropriate conduct on the part of the CCPO or the Chief of CITS. The extent to which this matter is relevant to deciding the application is rather doubtful but in fairness to the parties I should make my view of the evidence known.

24. The initial vetting of the candidates for the position was made by DPKO in New York, which went through its existing roster of candidates and identified potential candidates with relevant experience and then proposed short-listed candidates for further consideration by UNAMI in accordance with usual practice. The Chief of CITS testified, and I accept, that, although he was familiar with the successful candidate, his inclusion in the list of short-listed candidates was a recommendation made in New York in the usual way. Although four candidates were selected by the mission for interview, three of them stated that they were not interested and only the remaining (and ultimately successful) candidate was

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some reason or other, he found himself unable to finalise them. It is possible that the applicant sincerely felt that the work plan and the terms of reference provided to him were not sufficient (although, objectively speaking, I think they were), but, in that case, he should have engaged in a constructive dialogue with his supervisors. Instead, the applicant appears to have adopted the general stance that the information shared with him was not sufficient and took no active steps to attempt to resolve the problem, which, after all, he had identified. In short, my view is that his supervisors acted reasonably and the applicant did not.

Conclusion

28. The application is dismissed.

(Signed)

Judge Michael Adams