



UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Ebrahim-Carstens

Introduction

1. The Applicant disputes the administrative decision dated 30 June 2010 of the United Nations Children's Fund (UNICEF) not to renew her fixed-term contract beyond 31 July 2010. In essence, the Applicant contends that she was not provided any proper reason for her non-renewal, while the Respondent submits that, albeit under no obligation to do so, at the management evaluation stage UNICEF did provide the Applicant such explanation being her past performance and the needs of the [hiring] unit to effectively discharge its mandate, with the best interest of the Organization in mind."

Background

2. The Applicant included a chronology of the relevant factual events in her application, to which the Respondent, in his reply, indicated that he consented. The parties thereafter agreed that no hearing was necessary, and the Tribunal proceeded to determine the matter on the papers before it. Consequently, the following background facts are based on the information provided by the Applicant in her application and, where necessary, supplemented by the written record before the Tribunal.

3. The Applicant joined the United Nations in 1994. On 11 July 2006, she was reappointed with UNICEF at the G-4 level, on a fixed-term appointment of two years, expiring on 31 July 2008, renewed for one year until 31 July 2009, and thereafter renewed for another year until 31 July 2010, when she was separated from service.

4. In the Applicant's performance evaluation report (PER) for the period 1 January to 31 December 2008, which she signed on 12 June 2009, her supervisor rated her performance in the areas of 'quality of work,' 'quantity of work,' 'team work' and 'communication' with a rating of 3 on a scale of 5, which meant that she

was fully meeting expectations.” The Applicant received a rating of 2 in the area of technical knowledge” indicating that she met most expectations, however, there is room for improvement.”

5. In the narrative sections of the PER, in her general comments, the Applicant’s supervisor described her performance as [she] has worked hard during 2008 and been very supportive and enthusiastic.” In her comments to a range of specific key assignments, the supervisor was positive overall and praised the Applicant for her contributions during the year, stating that she had handled some travel arrangements very well and very professionally” and that she was very capable and competent in organizing meetings.” Regarding job-related training, the supervisor noted that it was really important” that the Applicant undertook some training on UNICEF systems. As for additional major assignments, the supervisor observed that the Applicant was very supportive of all events and activities held throughout the year.” However, the supervisor’s specific narrative comments to the ratings given to the Applicant in relation to the five areas mentioned in para. 4 above were more critical. For instance, the supervisor stated that there is a need ... for [the Applicant] to ensure she keeps herself updated;” that she must remember to give time to reading things properly and thoroughly understanding before responding and finalizing;” that she works hard but can easily be distracted;” that although she likes to work in a team environment,” she must strive to ensure that this continuously happens; and that while communicating well both [in writing] and verbally [she] needs to listen and read things a little more closely before responding.” In the general comments on her performance discussion/work plan review,” her supervisor further indicated that:

The Applicant has worked hard during 2008 as the work load and number of people of the team increased. However, [the Applicant] needs to take more time to focus on the details and quality of the work she undertakes rather than speed and quantity.

Taking time to understand and attend

[The Applicant] enjoys working with people of different levels and across sections, but needs to find the balance with her professional/personal relationships with people and understand that work related activities should not be seen as personal issues.

6. The second reporting officer stated that: "I am familiar with [the Applicant's] work and agree with the comments and ratings in this PER. I urge [the Applicant] to take note of [her supervisor's] recommendations in order to improve her performance."

7. The Applicant did not contest the PER for 2008 through the established rebuttal process.

8. On 1 August 2009, the Applicant was offered a further renewal of her appointment for one year until 31 July 2010.

9.

15. By her request for management evaluation dated 9 August 2010, addressed to the Executive Director of UNICEF, the Applicant challenged the decision not to renew her fixed-term appointment to. In support of her request, she submitted that

whereas no reason for the decision has been provided, even though a specific request to that effect was made, [the decision not to renew her contract] is in violation of [her] terms of appointment as it amounts to an improper and disingenuous attempt to evade the internal system of justice established with the promulgation of [General Assembly resolution 53/253].

16. In the management evaluation dated 8 September 2010, the Deputy Executive Director of UNICEF concluded that:

Regarding the non-renewal of the expired fixed-term contract, a thorough review of the matter leads to the conclusion that the contested decision was properly made. The contested decision was based on the analysis made by the hiring unit of [the Applicant's] past performance and the needs of the unit to effectively discharge its mandate, with the best interest of the Organization in mind.

...

Bearing in mind that every effort has been made to facilitate improving [the Applicant's] performance, and considering that, unfortunately, this improvement has not materialized as the hiring unit had hoped, the decision not to renew [the Applicant's] contract however painful can only be considered as a good managerial decision, made with the best interest of the Organization in mind.

Applicant's submissions

17. The Applicant submits, *inter alia*, that when she was initially informed of the contested decision, no reasons for it were provided to her. The Applicant submits that the reason subsequently given for the non-renewal of her contract—i.e., her poor performance—is not supported by the facts and is not in compliance with CF/AI/2010-001 (Administrative instruction on separation from service). The Applicant submits that sec. 10.2 of CF/AI/2010-001 requires, as a standard for performance-based non-renewal, that either half or more performance ratings be

Applicable law

19. The principal administrative instruction governing the non-renewal of the Applicant's fixed-term contract is CF/AI/2010-001, dated 10 March 2010, of which sec. 5 provides as follows:

Section 5

Expiration of a temporary or fixed-term appointment

5.1 A ... fixed-term appointment expires automatically, without prior notice, at the close of business on the expiration date stipulated in the letter of appointment (see United Nations staff rule 9.4). As specified in that letter, a temporary or fixed-term appointment does not carry any expectancy of renewal or conversion, irrespective of the length of service. Separation upon expiration of appointment is not regarded as a termination.

5.2 Notwithstanding the provisions of paragraph 5.1, a temporary or fixed-term appointment may be extended, subject to organizational needs, satisfactory service and availability of funds, and in accordance with the provisions of CF/AI/2009-005 on Types of Appointment and Categories of Staff, section 4.

20. In a footnote to sec. 5.2, aligned to the mention of 'satisfactory service,' is indicated See section 10 for a definition of 'unsatisfactory service.' Of relevance, sec. 10.2 provides that:

Section 10

Termination of appointment for unsatisfactory performance

The performance of a staff member is considered unsatisfactory for the purposes of this instruction if he or she receives,

- (a) in cases where the paper-based PER is used,
 - (i) half or more PER ratings of 1 (met few expectations) in a given reporting cycle; or
 - (ii) half or more PER ratings below 3 (fully met expectations) over two consecutive reporting cycles[.]

Consideration

Scope of the case

21. The issue in the present case, that is the propriety of the non-renewal of the Applicant's fixed-term contract, and the contentions of the parties, raise three principal questions:

- a. Was UNICEF under a legal obligation to provide the Applicant with a reason for not extending her fixed-term contract?
- b. What reason did UNICEF provide the Applicant with?
- c. Was the provided reason (i) properly made as a matter of law and (ii) correctly based on facts?

UNICEF's obligation to provide the Applicant with a reason for her non-renewal

22. It is trite law that once the Respondent advances a reason for the non-renewal of a contract, such reason must be shown to be supported by the facts (see, e.g., United Nations Appeals Tribunal in *Islam* 2011-UNAT-115). However, as the Respondent is insisting that no reason needed to be provided, and that in any event it did so at the management evaluation stage, the Tribunal will deal with this matter briefly.

23. Sec. 5.1 of CF/AI/2010-001 expressly provides that a fixed-term appointment carries no expectancy of renewal (see also the Appeals Tribunal in *Syed* 2010-UNAT-061). Prior to the decision in *Obdeijn* 2012-UNAT-201, this generally led the Respondent to contend that he was therefore under no obligation to provide any reason for the non-renewal of a staff member's fixed-term appointment. Assumedly, this is why this submission is reiterated in the present case. However, when affirming this Tribunal's judgment in *Obdeijn* UNDT/2011/032, the Appeals Tribunal ruled that, to ensure proper access to justice, the Administration "cannot legally refuse to

state the reason for a decision that creates adverse effects on the staff member, such as a decision not to renew [a fixed-term appointment], where the staff member requests it”(see *Obdeijn* 2012-UNAT-201, para. 37).

24. The Tribunal therefore finds that the UNICEF was obliged to provide the Applicant with a reason for non-renewal of her fixed-term contract when she requested it.

Discretion to renew

25. Although sec. 5.1 of CF/AI/2010-001 explicitly stipulates that a fixed-term appointment expires automatically at the end of the contract, it follows from sec. 5.2 that a UNICEF staff member’s fixed-term appointment may be extended and that a factor to be considered is whether the staff member’s performance has been satisfactory. However, this does not mean that just because a UNICEF staff member has performed satisfactorily she or he has secured a renewal of the fixed-term appointment.

26. The Tribunal finds that UNICEF is provided with a significant degree of latitude when deciding whether or not to renew one of its staff member’s fixed-term appointment. In line herewith, in both *Abdallah*

31. According to the ratings provided by the Applicant's supervisors in her PERs for 2008 and 2009, and the system outlined in secs. 5.2 and 10.2 of CF/AI/2010-001, her performance, as a matter of law, cannot be regarded as unsatisfactory. As submitted by the Applicant, this follows from the fact that none of the conditions outlined in sec. 10.2 for doing so are satisfied. The Applicant received neither (a) half or more PER ratings of 1 in a give

the words of the Deputy Executive Director of UNICEF, in the best interest of the Organization not to employ her any longer.

37. As stated above, the Applicant was not given any warning that her employment was in jeopardy. When dealing with the separation of a long-serving staff member, she or he should be informed and warned that her or his performance has reached such an inferior level that the staff member risks not being renewed. In this regard, several ways for communicating such message are available, including through the established performance appraisal and reporting mechanisms.

38. Consequently, the Tribunal finds that