

UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. On 20 May 2013, the Applicant, a former staff member of the United Nations Human Settlements Programme (UNHabitat), filed an application before the

4. On 25 November 2013, further to Orders No. 240 and 254 (NBI/2013), the Parties separately filed their respective statements of facts and lists of legal issues for determination.

Disclosure

5. On 25 November 2013, the Applicant sought disclosure of documents by the Respondent. The Respondent replied to this request. On 13 December 2013, the Applicant repeated his request for disclosure and asked the Tribunal to order the Respondent to “provide comprehensive and unequivocal responses to the requests ... and deriving followup requests”.

6. The documents sought by the Applicant were:

a) documents to show whether or not the Office for Internal Oversight Services (OIOS) had carried out an investigation addressing the reported misconduct and prohibited activities in the Libya programme and so, the reports of that investigation and

b) if the Tribunal finds that the administration had reassigned the Applicant to a P4 post at the main duty station, he seeks answers to a number of questions concerning the reassignment post and its funding.

7. In response to these requests, the Respondent referred to a memorandum dated 25 March 2013 from the Director of the Investigation Division of OIOS to the Executive Director of UN-Habitat stating that the matter would be best handled by UN-Habitat. Secondly, the Respondent reaffirmed its previous submissions and elaborated on the questions raised by the 00199.36 174.48 Tm [(UN)] TJ ET Q q BT /174.48 Tm

there is no OIOS report for the Respondent to disclose. Any documentation or evidence relating to the reassignment to Amman is not relevant to the four decisions being challenged by the Applicant in this case.

9. The Tribunal holds that the Respondent has sufficiently responded to the Applicant's requests for disclosure. The relevant evidence which it was able to and did disclose forms part of the considerations of the Tribunal which follow.

10. Neither party has sought a oral hearing of this matter. They both rely on the written submissions and documentary evidence they have filed with the Tribunal. The Tribunal has determined that this case may be decided on the papers.

Facts

11. The following facts are based on the Parties' written submissions. The specific facts relating to the Ethics Office claim are set out later in the judgment.

12. The Applicant joined UN-Habitat on 13 September 2011. He was recruited against a project post to serve as a Technical Officer at the P4 level at the UN Habitat Regional and Technical Cooperation Division (RTCD)'s office in Tripoli, Libya. His appointment was for a fixed term of 1 year, funded by the Government of Libya to support the Urban Planning Authority (UPA).

13. The Applicant's letter of appointment dated 15 September 2011 which he signed on 19 September 2011 stated that he was being offered a fixed term appointment of one year. It was to expire without prior notice on 12 September 2012. The letter further stated that "a fixed term appointment, irrespective of length in service, does not carry expectancy, legal or otherwise, of renewal or conversion to any other type of appointment in the Secretariat of the United Nations"

Case No. UNDT/NBI/203/021

Judgment No.UNDT/2014/057

allowed to “continue his current position, even if outside Libya, until the end of his term”.

20. The AD added that “UN

25. On 6 June 2012, the Applicant was verbally informed that the renewal of his contract was dependent on his ability to generate “serious donor commitments to fund new projects”⁸. The Applicant was also informed that funds had been set aside for the re-engagement of the Senior Human Settlements Officer/OIC ROAS, and the Applicant’s “first supervisor”.

26. On 27 June 2012, the Applicant’s first reporting officer (FRO) evaluated the Applicant’s performance as “successfully meets performance expectations” in all categories of the cycle 1 April 2011 to 31 March 2012 and commented that it had been a difficult year and he appreciated the Applicant’s stamina.

27. On 16 July 2012, the Applicant’s RAS for the period 2011-2012 was signed off on by the second reporting officer (SRO). Although there was no objection to the evaluation, the SRO commented that the Applicant’s was “an overall good but mixed performance”. He also noted that the Applicant needed to be more diplomatic and collaborative and less conflictual with colleagues and partners. In response, Applicant queried the basis for the “deviating evaluation” by the SRO and did not sign off on this evaluation.

28. On 31 August 2012⁹ the Senior Programme Management Officer for the Regional and Country Office (SPMO), wrote to the Applicant to inform that his contract was due to expire on 12 September 2012. She also advised him that an extraordinary project allocation had been approved for an additional three and a half months so that his appointment could be extended through to 31 December 2012. She stated that this budgetary move was being made to assist in the materialisation of the project portfolio that the Applicant had initiated since April 2012. She stressed that this was a project funded post with no expectation of renewal and that any extension of appointment would be dependent on the availability of funds.

⁸ Applicant’s Annex 43.

⁹ Respondent’s Annex 13.

29. The terms of reference attached to this letter stated that the duration of the contract was from 13 September to 31 December 2012. The Applicant was required to report to the Branch Coordinator as his First Reporting Officer (FRO) and work

35. On 9 November 2012, the Applicant wrote to TS, copying the Chief/SDTU, querying his decision to finalise the process without discussion or comments from himself.

36. On 18 November 2012, TS told the Applicant that the new PAS system on INSPIRA was complicated and needed improvement, and that as the system informs staff members when the midpoint review starts, the Applicant should have his comments then. TS added that “since [you] told me before that you received a notification and I did not see any comments afterwards it was closed”¹¹.

37. On 20 November 2012¹², the Chief/SDTU told the Applicant and TS that his FRO can “roll back the midpoint to [him] so that [he] can insert [his] comments without losing any comment they have already inserted”. She added that:

An exchange of emails or comments in the performance document is not a midpoint review. The comment placed in the performance document are the result of discussions between the FRO and the staff member.

38. The Applicant was provided with his finalised performance evaluation for 2011-2012 on 15 November 2012¹³.

39. On 26 November 2012, he was advised by email to liaise with his superior concerning the necessary separations which needed to be completed by 31 December 2012.

40. On 4 December 2012, the Applicant requested reasons for the renewal of his appointment.

¹¹ Applicant's Annex 59.

¹² Applicant's Annex 59.

¹³ Applicant's Annex 3. The Applicant was assessed as having successfully met performance expectations. His FRO said: “it must have been a difficult first year and I appreciate the stamina you showed in surmounting the tasks. Thank you”.

41. The SPMO replied on the same day. She explained that the decision was to the “exhaustion of the funds which were exceptionally approved” for the duration of his extended appointment only. She reiterated the contents of her letter dated 31 August 2012 which informed the Applicant that his “project post” will expire at the end of the project and created no expectancy of renewal.

42. On 6 December 2012, the Applicant had a lengthy telephone conversation with the Policy and Strategy Advisor, Office of the Executive Director, who reiterated that the basis for the decision not to renew his appointment was lack of funds.

43. On 27 December 2012, the Applicant made a request to the Ethics Office for protection against retaliation.

44. The Ethics Office reported on 2 February 2013. It found that 7 of the communications cited by the Applicant did not constitute reports of misconduct pursuant to the requirements of ST/SGB/2005/21 (Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duty Authorised Audits of Investigations). The other 6 reports, which raised concerns about the management chain, did not contain evidence to support a reasonable belief that misconduct had been committed by a United Nations staff member.

45. On 9 January 2013, the Applicant requested management evaluation of three decisions: the decision of his second reporting officer to finalise his PAS for 2014 2012 in an arbitrary and unfair manner; the decision of his first reporting officer to deprive him of the right to provide his comments in the midpoint review in PAS for 2012-2013; and the decision not to renew his appointment and to separate him from service.

46. In his request to the Management Evaluation Unit (MEU), the Applicant stated that the date of the non-renewal decision was 26 November 2012.

47. On 15 February 2013, the Applicant requested management evaluation of the decision of the Ethics Office. On 21 February 2013, MEU found the request to be not receivable.¹⁴

48. On 7 March 2013, following the intervention of the Ombudsman and a reminder from the Applicant, the legal officer for UN Habitat informed the Ombudsman (copied *inter alia* to the Applicant) of official confirmation that the Applicant's ePAS had been rolled back for him to change his first reporting officer and to enter his self-evaluation. He invited the Applicant to enter his functional title and do his self-evaluation.

49. On 18 March 2013, MEU rejected the Applicant's first request (9 January 2013) for management evaluation on the basis that it was made out of time and was not receivable.

50. The Applicant filed his Application to the Tribunal contesting the decision of the Ethics Office on 20 May 2013.

Considerations

51. Before dealing with the merits of each claim, the Tribunal will determine if they are receivable. The Respondent made no submissions on the receivability of the Applicant's claims.

E-Pas 2011-2012

52. The Applicant's ePAS for the period 2011-2012 was signed off by the SRO on 16 July 2012. The Applicant made his comments on 22 July 2012.

¹⁴ Annex 10, Applicant's request to MEU.

53. Completion signatures were placed on the ePAS on 5 November 2012, and the Applicant was provided with his finalised performance evaluation on 15 November 2012.

54. The Applicant did not request rebuttal of the ePAS but sought management evaluation of this decision on 9 January 2013, within the 60 day period prescribed in staff rule 11.2(c).

55. Section 8.5 of ST/AI/2010/5 (Performance Management and Development System) provides that the rebuttal process cannot be initiated “unless the staff member has signed off on the finalised evaluation”.

56. The section also states that:

If an ePAS is submitted for signature to a staff member and the staff member does not sign, the ePAS is considered to be signed by the staff member after 14 days of its receipt by the staff member. A staff member who does not sign his/her ePAS shall be so informed and the 14 day period for submission of a rebuttal statement by the staff member pursuant to section 15.1 below shall commence as of the date of notification to the staff member.

57. Section 15.1 of ST/AI/2010/5 explicitly provides that “staff members receiving the rating of ‘consistently exceeds performance expectations’ or ‘successfully meets performance expectations’ cannot initiate a rebuttal.”

58. Section 15.7 of the ST/AI further states that:

allege that the performance evaluation was related to the decision not to renew his contract.

60. The Tribunal may review only those administrative decisions that have a direct and negative impact on the staff member's rights.¹⁵

61. As the Applicant was rated as having met the performance expectations set for him there were no direct and negative impacts on his conditions of service as a result of the 2011-2012 ePAS. The decision not to renew his contract was not an administrative decision "stem[ming] from [this] performance appraisal".

62. The Tribunal holds that the Applicant had no right of appeal against the 2011-2012 ePAS. That claim is therefore not receivable.

63. Finally, in his claim relating to this performance evaluation the Applicant also challenges the MEU decision that the issue of the Second Reporting Officer's comments in the Applicant's ePAS was time barred. This part of his claim is not receivable as MEU decisions are not reviewable by this Tribunal.

E-PAS 2012-2013

64. The Applicant claims that he was deprived of his right to provide his comments during the midpoint review of the 2012-2013 cycle.

65. Section 7 of ST/AI/2010/5 provides:

7.1 During the course of the year, the first reporting officer and the staff member should hold conversations and dialogue, formally and informally, and may have exchange of emails and/or other written communication on the progress of the performance goals set for the year. These conversations or written communications should

¹⁵ Judgment No. 1157 (2003) *Andronov*; *Hamad* 2012-UNAT-269; *Andati-Amwayi* 2010-UNAT-58; *Warintarawat* 2012-UNAT-208.

address recognition for good performance and any shortcomings as they become apparent at any time during the cycle.

7.2 The first reporting officer should conduct a midpoint review, usually six months after the creation of the work plan, after discussing with the staff member the progress to date of the goals/key results set in the work plan. The review should indicate the progress made, and justify any updates to the work plan goals/key results. The first reporting officer should also note the progress made in demonstrating the competencies and the progress on the personal development plan. Staff members may note the progress made on the goals set in the work plan.

Case No. UNDT/NBI/203/021

Judgment No.UNDT/2014/057

74. There is no evidence that the Applicant asked for an extension of his contract at any time after the advice of expiry given to him on 31 August 2012 and there is also no evidence that a new decision concerning the expiry of the Applicant's contract was made after that date. The Tribunal finds contrary to the Applicant's assertion that it was made on 26 November 2012, the decision not to renew his appointment beyond December 2012 was made on 31 August 2012.

75. The time for requesting management evaluation of the 31 August 2012 decision expired on 30 October 2012. The Applicant requested management evaluation of the non-renewal decision on 9 January 2013, well out of time for it to have been properly receivable by MEU.

76. Timelines stipulated in article 7.1(a) of the UNDT Rules of Procedure and article 8.1(d)(i) of the Statute must be strictly observed. The United Nations Appeals Tribunal (UNAT) has consistently held that

Strict adherence to filing deadlines assures one of the goals of a new system of administration of justice: the timely hearing of cases and rendering of judgments.¹⁸

77. As the Applicant did not submit a timely application for review of the non-renewal decision, this part of his Application cannot be received by the Tribunal.

Ethics Office Claim.

78. The Tribunal finds that as the Applicant sought management evaluation and brought this claim within the required time frame it is receivable.

79. The Applicant claims that the Ethics Office erred when it failed to find that his report was a protected act pursuant to ST/SGB/2005/21 and that he was subjected to retaliation for having done so. In his application the Applicant "requests the

¹⁸ *Cooke* 2012 UNAT-275 referring to *Mezoui* 2010 UNAT-043 and *Tadonki* 2010 UNAT-005.

Tribunal to consider the circumstances of the present case and to express its view as to whether or not there had been retaliation¹⁹.

80. It is the Applicant's case that he made 6 alleged reports of misconduct between 14 January 2012 and 7 February 2012.

81.

was also the project's National Coordinator²¹ the Applicant wrote to the AD, the OIC of the Regional Office of Arab States in Cairo and the Inter Regional Advisor (IRA) in Nairobi pointing out the "obvious legal implications given that there is no validly appointed National Coordinator in place".

86. On 26 January 2012, the Applicant wrote an email to the Project Manager of the Cairo Office and the Project Manager's Assistant at the Libya Office pointing out the need to follow the United Nations procurement rules and regulations.

87. On 30 January 2012, the Applicant repeated his concerns that the UPA Chairman was also the National Coordinator of UN-Habitat's programme. He requested the project office for its legal understanding of the matter and the need for the procurement procedure to comply with United Nations rules.

88. On 31 January 2012, the Applicant emailed the IRA to inform him that the status of the UPA Programme needed to be taken into account in mission planning.

89. On 7 February 2012, the Inter Regional Advisor (IRA) wrote to the AD and others about the UPA Chair's role and the irregularities and potentially negative consequences for UN-Habitat. The IRA also requested the immediate freezing of any further funding authorizations²².

90. The Applicant told the Ethics Office that no investigation followed his complaints. He gave a detailed description of the retaliation he alleged he suffered as a result of his whistleblowing. He said it made his life in the Organisation difficult and led to a hostile work environment. He cited his reassignment from Libya to Jordan as an example.

91. The Applicant described the link between the protected activity and the alleged retaliation as follows:

96. The Ethics Office also noted that an established internal mechanism for the reporting of misconduct includes the head of department or office concerned. In the case of UN-Habitat this was the Executive Director (ED) of UN-Habitat.

97. The Ethics Office said that reports of misconduct must relate to staff members and that one of his complaints was that the Chairman of the UPA held a contract with UN-Habitat under which he served as National Coordinator for the Habitat supported project.

98. The Ethics Office reported that as of October 2010, before the Applicant's employment with UN-Habitat in Libya, the Organisation had stated that the engagement of the former Chairman of the UPA was subject to his confirmation that he was no longer engaged with the UPA on a full basis.

Respondent's Submissions

99. The decision of the Ethics Office correctly determined that the reports of misconduct relied on by the Applicant did not constitute protected activities.

100. The Ethics Office was also correct in determining that the decision not to renew the Applicant's appointment due to lack of funds was not within its purview.

Applicant's submissions

101. The Applicant submits that the wrongful rejection of his request for Protection against Retaliation by the Ethics Office as well as the decision of the Management Evaluation Unit that this fell outside its purview, the consistent harassNo

102. The Applicant cites the IRA's recommendation, based on the Applicant's reports, to freeze all payment requests by the Chairman of the beneficiary to substantiate the veracity of the report he made to the Ethics Office.²⁵

103. The failure of the Ethics Office to recognise that he had reported prohibited activities precluded any review of the question whether the subsequent actions by the Respondent in removing the Applicant from his post, reassigning him and declining to renew his contract were influenced by his reports and allegations.

104. Consequently UN-Habitat has never had to explain its actions leading up to the "unfair dismissal of the Applicant that cannot be justified on programmatic grounds."²⁶

105. The absence of a credible and convincing reason for the non-renewal of the Applicant's contract creates a presumption of personal prejudice and retaliation to his reports of misconduct. While UN-Habitat justifies the non-renewal as having been due to a lack of funds a renewable fixed term contract entailing the duties and responsibilities of the Applicant's post was advertised shortly after his separation

Issues on Ethics claim

Considerations

The scope of the Tribunal's review of the Ethics office Decision

106. In *Hunt Matthes* UNDT-2013-085, it was held that the Tribunal's role is to review the actions taken and decisions made by the Ethics Office in its preliminary evaluation of the Applicant's complaint in the light of the legal obligations of the Ethics Office and the relevant and factually available information that it had in its possession

²⁵ Applicant's Annex 26.

²⁶ Applicant's Annex A.

107. It is not within the powers of the Tribunal to express its view as to whether or not there had been retaliation sought by the Applicant.

108. The legal obligations of the Ethics Office set out in ST/SGB/2005 arise upon the receipt of a report of retaliation.

109. Protection against retaliation applies to any staff member who, pursuant to section 2.1(a), "reports the failure of one or more staff members to comply with his or her obligations under the Charter of the UN, the Staff Regulations and Staff Rules or other relevant administrative issuances".

110. Such a report must be made "as soon as possible and not less than six years after the individual becomes aware of the misconduct". It must be made in good faith and be supported by information and evidence to support "a reasonable belief that misconduct has occurred".

111. Section 3 relevantly provides that reports of misconduct should be made "through the established internal mechanisms". These are specified as the OIOS, Assistant Secretary General for Human Resources Management, and the head of department or office concerned. The purpose of this section is to ensure that properly authorised bodies within the United Nations system, with the power to take appropriate action, have the opportunity to consider and if necessary take action on complaints of misconduct made by concerned staff members.

112. Sections 2.1(a) and 3 establish the necessary requirements of a report of misconduct for the purposes of ST/SGB/2005/21

113. Section 5.1 states that “individuals who believe that retaliatory action has been taken against them because they have reported misconduct [...] should forward all information and documentation available to them to ~~report~~ their complaint to the Ethics Office as soon as possible”.

114. The functions of the Ethics Office include the conduct of “a preliminary review of the complaint to establish: (a) if the complainant has engaged in a protected activity; and (b) if there is a prima facie case that the protected activity was a contributing factor” in causing the alleged retaliation²⁷.

Did the Ethics Office follow correct procedure in evaluating the Applicant’s request?

115. On receipt of the Applicant’s request the Ethics Officer ~~ied~~dr out a preliminary review to establish if the Applicant had engaged in a protected activity. It examined the evidence supplied by the Applicant to support his claim that he had made reports of misconduct. It concluded that he had not.

116. In this case, ~~to~~ Applicant did not report specific complaints of misconduct against a staff member to the established internal mechanisms specified in ST/SGB/2005/21 and therefore did not avail himself of the opportunity to have his complaints of misconduct investigated by a competent body and to exhaust all internal remedies before making his complaint to the Ethics Office.

117. The Tribunal finds that the Ethics Office correctly concluded that none of the allegations of misconduct reported by the Applicant between 14 January and 7 February 2012 was properly brought before an established internal mechanism as required by Section 3.

²⁷ Section 5.2 (c) ST/SGB/2005/21.

- d) The Applicant's claim in respect of UNahitat's decision