



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/012/
UNAT/1599

Judgment No.: UNDT/2011/141

Date: 11 August 2011

Original: English

Background

1. This case concerns the non-renewal of a fixed-term appointment for a reason relating to performance, in that the Applicant had two consecutive performance ratings of “partially meets performance expectations”. Such a rating may lead to the non-renewal of a fixed-term contract under the performance appraisal system (“PAS”).

2. On 9 June 2008, the United Nations Administrative Tribunal received the Applicant’s appeal against the decision of the Secretary-General who had accepted the unanimous conclusions and recommendations of the Joint Appeals Board (“JAB”) report and findings against the Applicant’s appeal.

Facts

3. The Applicant joined the United Nations Economic and Social Commission for Asia and the Pacific (“ESCAP”) on 20 November 1999 as a statistician on a fixed-term contract at the P-3 level. After several renewals of his contract, his employment ceased on 31 December 2005, when the contract was not renewed.

4. In the period 6 November 1999 to 31 March 2003 the Applicant had received three consecutive performance evaluations in which he was rated as “fully meets performance expectations”. However, for the period 1 April 2003 to 31 March 2004 he received an overall rating of “partially meets performance expectations”. He submitted a formal rebuttal of this rating and this was considered by the Rebuttal Panel over six days. The first Rebuttal Panel unanimously found that “the staff member’s performance could be described as having met some goals but not all goals of the work plan, which must be translated to rating [partially meets performance expectations]”, and concluded that there were no grounds upon which to recommend a change in rating.

5. For the period 1 April 2004 to 31 March 2005 the Applicant again received a rating of “partially meets performance expectations”. He submitted a formal rebuttal and the majority in the (second) Rebuttal Panel concluded, following a detailed consideration lasting four da

constituted a denial of due process. Such a formulation of his case indicates a recognition on the Applicant's part that the JAB did not have jurisdiction to examine issues of substance which are matters for the PAS process and, absent a denial of due process, the JAB could not interfere by substituting its assessment of the Applicant's performance for the assessment of the Rebuttal Panels. He argued that the issues related to a lack of due process as well as the substance of the PAS ratings and that therefore, the JAB should have made a recommendation in his favour and the Secretary-General ought in consequence to have set aside the decision and should have directed that the Applicant be retroactively reinstated and be awarded two years' net base salary as compensation.

11. The Respondent's contentions are that the Applicant's appointment did not carry a legal expectancy of renewal and that his poor performance justified non-renewal. The Respondent added that it was not open to the JAB to review substantive questions regarding performance appraisal that had gone through a rebuttal process, and that the JAB may only consider whether or not the Applicant was accorded due process.

12. To this extent both sides are in agreement that the core issue is whether the Applicant was accorded his due process rights during the rebuttal process and whether, in consequence thereof, the decision not to renew his contract, based on erroneous and unfair performance ratings, was fundamentally flawed and in breach of his fundamental right to fair and unbiased treatment. It should be noted that any such treatment would be inconsistent with the principles enshrined in the Charter of the United Nations.

Outcome of JAB and appeal

13. In its Report No. 1895 the JAB Panel concluded that the Applicant had received the benefit of due process in his two rebuttal procedures and that there was insufficient evidence to conclude that the decision not to renew the Applicant's contract was arbitrary or that it violated his rights as a staff member. However, the

Panel recognized that, given his previous satisfactory performance ratings, the two most recent PAS reports did raise questions to be answered. Having considered this matter the JAB Panel concluded that, in the absence of any indication that the rebuttal process was tainted in some way, it could be assumed that both reporting officers examined his performance on merit, but that there was a valid difference of view on the part of the two supervisors in evaluating the Applicant's work. A question arose as to the procedure for the 2005–2006 PAS evaluation. However, since that aspect of the claim was not receivable the Panel decided that it was not appropriate to express a view on the disagreements surrounding that PAS evaluation. The Panel confined itself to considering the 2003–2004 and 2004–2005 PAS evaluations which were fundamental in the decision not to renew the Applicant's appointment. The JAB Panel concluded that there was adequate evidence which emerged in the course of the rebuttal processes to enable the Panel members to consider the question whether there was any material irregularity or lack of due process. The JAB Panel decided that the Applicant was accorded his rights to due process and therefore to make no recommendation in relation to his appeal to the JAB.

14. By a letter dated 20 August 2007, from the Under-Secretary-General, Department of Management, the Applicant was informed that the Secretary-General, having examined his case in the light of the JAB Report and all the circumstances of the case, and noting that his appointment did not carry any expectancy of renewal, and having noted the JAB's conclusions and recommendations, decided to take no further action in respect of the appeal.

15. On 9 June 2008, the Applicant filed his appeal before the former United Nations Administrative Tribunal. That Tribunal was unable to consider his appeal

has also upheld the principle that an expectancy of renewal may be created by countervailing circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration. These principles have subsequently been affirmed by the Dispute Tribunal in a number of cases.

20. The Dispute Tribunal has, in a number of cases, applied the principle as stated by the former UN Administrative Tribunal, that when the Administration chooses to give reasons for its decision not to renew a fixed-term contract, the validity and acceptability of these reasons are subject to judicial review (see for example *Abdallah* UNDT/2010/049 and *Larkin* UNDT/2010/108, referring to Judgment No. 1191 *Aertgeerts* (2004) and Judgment No. 1003, *Shasha'a* (2001)).

Consideration

21. The questions to be considered in this case are:

a. Whether there is a sufficiency of evidence to show that there was a material irregularity in the proceedings, or irrationality in the conclusions, of

Panels and the JAB Panel. The jurisprudence of the former UN Administrative Tribunal and several judgments of UNDT and UNAT have affirmed the well established principle that it is not the function of the Tribunal to substitute its judgment for that of a properly constituted assessment panel, including on issues concerning the performance of staff members. The internal mechanisms are designed to perform that review function. However, it is right and proper for the Tribunal to intervene if it considers that there was a lack of due process in the manner in which the internal processes operated, including, as noted above, the question of the apparent irrationality of the conclusions reached.

23. Having examined the documents and submissions of the parties the Tribunal finds that there is no evidence to show that there was a material irregularity in the proceedings before either Rebuttal Panel or the JAB. The Applicant was given the opportunity to put his contentions in writing and to be heard before the Panels to explain his arguments regarding why the performance ratings were not warranted. The Rebuttal Panels also met with other witnesses and reviewed documentation relevant to the PAS evaluations, in accordance with sec. 15 of ST/AI/2002/3. The fact that the Rebuttal Panels, and, ultimately the JAB, found that the evidence given to justify the management decisions, which was contrary to the Applicant's, as more persuasive than his, is not of itself an indication of irregularity.

24.

Panel could have come to such conclusions. The same applies as regards the conclusion contained in the JAB Report.

25. As the initial decision not to renew the Applicant's appointment was made on 17 June 2005, one and a half months after the end of the 2004–2005 PAS evaluation cycle, the Tribunal does not consider that it is relevant to examine the Applicant's contentions regarding the finalization of the 2005–2006 PAS, in the context of the non-renewal decision.

26. The Applicant has not discharged the burden of proof showing that his rights to due process had been breached. Therefore, the Secretary-General acted properly within his broad discretion in deciding to take no action in relation to the Applicant's appeal against the non-renewal of his fixed-term appointment.

Conclusion

27. The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 11th day of August 2011

Entered in the Register on this 11th day of August 2011

(Signed)

Santiago Villalpando, Registrar, New York