



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/001/
UNAT/1563
Judgment No.: UNDT/2011/210
Date: 9 December 2011
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

PHILIPPI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Natalie Boucly, UNDP

Introduction

1. On 11 September 2007, the former United Nations Administrative Tribunal received Ms. Philippi's application appealing against the decision by the United Nations Development Program ("UNDP") not to renew her fixed-term appointment as the Resident Representative in Chile.

2. In presenting her application, the Applicant raised a preliminary issue, requesting the Tribunal to order the production of two documents. The first document was a three-page summary from Ms. Françoise Noquet, the then Senior Legal Adviser, Office of Legal and Procurement Support, UNDP. The second document was an e-mail from Mr. Brian Gleeson, the then Director, Office of Human Resources, UNDP. These documents were sent to the Applicant unsolicited and without an explanation. The Applicant had previously sent these documents to the Joint Appeals Board ("JAB"). The Respondent objected to the production of these documents on the grounds that they were a confidential, attorney-client work product to which privilege was attached. The JAB refused to admit those documents into evidence.

3. The former United Nations Administrative Tribunal did not consider this case before its abolition on 30 June 2009. The case was transferred to the Dispute

The claim

4. The principal claim of the Applicant is that the decision of the Respondent not to renew her appointment after a single term of two years was unlawful. She requested an order for reinstatement, retroactive to 5 January 2006, either in Chile or another duty station with payment of full salary, allowances and benefits for the five-year period which she was initially offered, less any emoluments received in that period. She also requested that any damaging material in her personnel file should be expunged.

Issues

5. The legal issues in this case are:
- a. Did the Applicant have a legally enforceable expectation of renewal of her fixed-term appointment?
 - b. If she did, would that expectation extend to a further period of one or more years, and if so, how many?
 - c. Was the decision not to renew the Applicant's contract arrived at as a result of a denial of due process?
 - d. If the application succeeds, what is the appropriate compensation to be awarded to the Applicant?

Law

6. It is settled law that the terms and conditions of employment of the staff member are not limited to those set out in writing. They may be expressed or implied, and may be gathered from correspondence and surrounding facts and circumstances, see the former United Nations Administrative Tribunal Judgment No. 142, *Bhattacharyya* (1971).

7. Fixed-term appointments do not carry any automatic right of renewal. However, the specific facts and circumstances of a case may create a legal expectancy of renewal, producing rights for the staff member concerned. Staff members serving under fixed-term contracts have no contractual right to renewal of their contracts and their employment ceases automatically without prior notice on the date of expiry of the fixed-term contract unless, of course, there are, in the circumstances of the particular case, what have been described as “countervailing circumstances”. Such circumstances may include an abuse of management discretion or an express promise by the administration, thereby creating a legal expectancy that the appointment will be extended (see former United Nations Administrative Tribunal Judgment No. 885, *Handelsman* (1998) and Judgment No. 1170, *Lejeune* (2004)).

8. With respect to the allegation that the decision was arbitrary, or that there were extraneous motives, the jurisprudence of the former United Nations Administrative Tribunal and of the current United Nations Appeals Tribunal have affirmed the principle that the burden of proof of arbitrariness, prejudice or other improper motive rests with the Applicant.

9. In an appropriate case, the Tribunal will be required to consider the principles governing the precise means by which this burden is to be satisfied, bearing in mind that it is the decision-maker who is best placed to know the true reason for the decision and whether this reason is innocent of extraneous factors.

Facts

10. The Tribunal finds the following facts proven on a balance of probabilities, having regard to the oral evidence and the documents, including the JAB Report No. 1883 for Case No. 2005-080.

appointment, which was to expire on 4 January 2006. It is the circumstances in which the decisions were made, both in respect of the duration of the appointment and its non-renewal, which are central issues in this case.

12. By letter dated 27 November 2003, Ms. Torres, Business Advisor, UNDP,

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by Mr. Gleeson, that her contract would not be renewed. On 11 August 2005, Mr. Malloch-Brown sent written confirmation to that effect.

19. Nothing further would appear to have been either discussed or clarified regarding the terms or duration of the Applicant's appointment prior to the receipt of the letter from Mr. Malloch-Brown, informing her that her contract would not be renewed beyond its expiry by letter dated of 4 January 2006.

20. The Applicant submitted a request for administrative review in accordance with the applicable procedures at the time. Following a hearing on 23 September 2005, the JAB considered that, notwithstanding the fact that the Applicant had signed a two-year contract, the surrounding circumstances had led her, as a reasonable person, to expect that she would receive a two-year extension of the fixed-term appointment in January 2006, but that there would be no guarantee of another extension beyond 4 January 2008. The JAB recommended that the contested decision be suspended until the merits of the appeal were reviewed by the JAB.

21.

photograph of the Applicant over the caption “The Questioned One”. The article included the comment:

a worse than terrible evaluation conducted in New York, of the internal management and the exterior positioning of the local UNDP office in Chile, decided the exit of the representative of the United Nations Development Program, UNDP, the Argentine economist, Irene Philippi

Under a picture of the Applicant was the caption “the case of the missing millions”. The Applicant was extremely distressed by the publicity, which appeared the day before she was due to have a final meeting with the French company *Sodexo*, which was at the point of offering her a job. The Applicant alleged that as a result of the adverse publicity she lost the opportunity of being employed by *Sodexo*. It is not surprising that the Applicant was distressed by this article and furthermore, that she believed that the article caused damage in terms of loss of reputation, and most significantly, loss of the opportunity of being employed by *Sodexo*. However, the issue for the Tribunal is whether it would be correct in law to allow the Applicant to add this allegation to the existing claim, bearing in mind that under the procedures at the time the Applicant, who had appealed unsuccessfully to the JAB, could have, if she so wished, lodged a separate appeal to the former Administrative Tribunal. She did not do so.

23. In a joint submission of the parties in response to Order No. 75 (NY/2010), the Applicant indicated that she wished to add to the existing claim the failure on the part of the Respondent to correct the defamatory article that appeared in *El Mercurio*. This issue had been the subject of proceedings before the JAB in Case No. 2005-61, in which the Applicant alleged that the Respondent’s failure to correct the defamatory article caused further loss and damage. The Respondent did not consider that this issue was an integral part of the case and objected to the Applicant’s attempt to introduce this additional matter.

24. The Tribunal refuses the application to add this issue to the existing claim on

Informal resolution

27. In their joint statement responding to Order No. 75 (NY/2010), the parties indicated that they were willing to consider an informal resolution of the dispute, possibly through mediation. At the case management hearing on 23 September 2011 and the hearings on the merits that took place on 5 October 2011 and 21 October 2011, the Tribunal provided the parties with the opportunity to have further discussions with a view to resolving their differences. Regrettably, they have not been able to do so. However, their joint endeavors in this regard are commendable, and entirely in line with the underlying purpose be

29. Not surprisingly, the Applicant strongly asserts that she had a reasonable and legitimate expectancy of renewal based on the representations that were made to her both orally and in writing. In particular, the Applicant relies on the initial offer of a five-year appointment which she had accepted in writing. The Applicant further relies on the fact that it was made clear to her that, although the initial appointment was for two years, the assignment itself was subject to renewal, based on satisfactory performance and the availability of funds, and that the only assessment of her performance rated her as being successful and was, in fact, signed by the UNDP Administrator. She considered that the Administrator's decision, shortly after having approved her performance appraisal, is indicative of the existence of some ulterior motive behind the decision. The Applicant is seeking compensation for all losses attributable to what she considers to be the unlawful decision not to grant her a further extension of appointment. However, the Applicant has produced no evidence that even begins to get this contention off the ground. Suspicion alone is not enough.

30. Although the Tribunal gave the parties the opportunity to reach agreement on the formula for calculating any losses and had agreed to hear from the Applicant's witness, Mr. Hirmas, regarding her application for an appointment with *Sodexo*, it was evident to the Tribunal that the Applicant was raising several grounds for compensation, and that the complexity being introduced by the Applicant would make it impossible for the Tribunal to arrive at any sensible calculation of loss. Unfortunately, the Applicant persisted in overwhelming the Tribunal with several documents and submissions on compensation. These issues are not relevant to the primary purpose of determining liability and will not be dealt with.

31. Thus, whilst it was the Tribunal's original intention to deal with both liability and compensation in the present Judgment, in light of the various communications from the Applicant, it would be unwise to do so. The Tribunal has therefore decided to issue a judgment on liability and to give the parties sufficient time to settle remedy.

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contract, which ended at the end of its term and that, therefore, reasons were not required. It is noted that the grounds for renewal were specified as being satisfactory performance and the availability of funding. In the circumstances, absent these grounds, the Respondent is under an obligation to provide a reason for non-renewal, which it did not do.

Conclusion

34. The Tribunal finds that the circumstances appertaining at the time of recruitment of the Applicant created a legal expectancy of renewal.

35. The decision not to renew the Applicant's contract was arrived at in breach of her rights to due process.

36. The Applicant is entitled to compensation for losses incurred as a direct consequence of the non-renewal of the contract subject to the duty to mitigate.

37. The Tribunal will hear any further argument and submissions in relation to the Applicant's contention that her loss of the opportunity of employment with *Sodexo* is either directly or indirectly attributable to any act or omission of the Respondent.

38. The Tribunal is hopeful that the parties will wish to explore a mutually acceptable compromise agreement in relation to compensation in order to bring this long-running saga to a close. A period of four weeks is granted to this end. The Tribunal indicates that, on the basis of current information and submissions, it does not appear that this is an appropriate case for exceeding the limit of two years' net base salary as compensation. The Applicant will be expected to give credit for the sum of money already received. The Applicant is entitled to an award for anxiety and distress

39. The Tribunal wishes to make it clear that these comments are offered as guidance to the parties for the sole purpose of being helpful to them in any

discussions they may decide to have and not to be regarded as expressing a concluded view.

40. The parties are to notify the Tribunal within four weeks of the date of this Judgment if they have reached agreement to settle remedy failing which the Tribunal will decide on what further Orders, if any, to issue to dispose of this case.

(Signed)

Judge Goolam Meeran

Dated this 9th day of December 2011

Entered in the Register on this 9th day of December 2011

(Signed)

Hafida Lahiouel, Registrar, New York