



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/018

Judgment No.: UNDT/2015/123

Date: 31 December 2015

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KHALAF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. The Applicant has challenged the decision by the United Nations Assistance Mission for Iraq (UNAMI) dated 27 October 2013 and communicated to him on 5 November 2013 not to renew his fixed-term appointment beyond 31 December 2013 (Contested Decision).

Procedural history

2. Following case management orders the parties advised the Tribunal that they did not request a hearing of the case and that it could be decided on the papers.

3. The parties were unable to produce a statement of agreed facts and issues and submitted separate statements instead. The Respondent sought leave to make submissions on the statement of facts submitted by the Applicant. The Applicant made comments and submissions of facts on matters raised in the Respondent's reply.

4. Having considered both statements of facts, the Tribunal finds that such facts as are in dispute between the parties are not material to the issues before the Tribunal and therefore further submissions on the facts were not required.

Facts

5. The Applicant was locally recruited to the Kirkuk duty station of UNAMI in 2009, to serve as an Associate Political Affairs Officer (APAO) in the Office

situation in Iraq required OPA to engage in mediation efforts in western Iraq and UNAMI to assist the Iraqi government in dealing with the outstanding issue of missing Kuwait and third country nationals and property. Accordingly, the workload of OPA increased.

7. At that time there were six National Professional Officers (NPOs) in Baghdad and four in Kirkuk. Three of the NPOs in Kirkuk (the Applicant, D and MC¹) were encumbering posts allocated to Baghdad. In order to respond to the increased operational demand on OPA within its existing human resources, the Mission proposed returning the posts previously on loan to Kirkuk to Baghdad or deployed in the field as part of the Baghdad office's governorate liaison network.

8. In his Application, the Applicant stated that following this directive all Kirkuk office staff attended a meeting hosted by the Chief of Staff and a meeting hosted by the Head of Office. The Applicant stated that: "In none of these meetings were the staff informed that we should be deployed, let alone our contracts will not be renewed". He also stated that there was more than one meeting to discuss the 2013 budget where the staff was informed that there would be no changes to the Office's political section.

9. On 7 January 2013, following the approval of the UNAMI budget for 2013, the Director of OPA (the Director), sent the following email to the Applicant and the two other NPOs in the Kirkuk office:

Dear All,

Following the approval of the 2013 UNAMI budget, I am writing to advise you that from 1 January 2013 the post you encumber has been redeployed to Baghdad under the supervision of the Chief of Political Affairs. As such, steps are being taken to fill these positions locally in Baghdad.

As the current incumbent of the post you are given priority to express your interest to be reappointed at your current level in Baghdad. Please note that any expenses against the movement/reappointment will be borne by you.

In the event that you are not interested in the reappointment in

¹ MC is the applicant in Case No. UNDT/NBI/2014/017.

Baghdad, the posts will be advertised for Baghdad duty location on 1 February 2013 and suitable candidates willing to work in Baghdad will be selected.

Please let me know your decision by 6 of February if you are interested.

10. On 14 January 2013, the Applicant wrote to the Director asking for clarification of certain issues before he responded. He sent follow up emails on 21 and 22 January 2013. On 28 January 2013, the Applicant sent the Deputy Special Representative of the Secretary-General (DSRSG) an email asking for his assistance after receiving no response from the Director to his reminders.

11. On 28 January 2013, a Political Affairs Officer wrote to the Applicant on the Director's behalf. He apologised for his delay in responding due to his absence. He explained that UNAMI had received directives from DPA/DFS on the Mission's posture and activities in Iraq and the need to rationalize staffing and realign functions to reduce resources. There was an increase in the workload

the clarifications that the Applicant asked for, as he promised. He told the Director that he had reason to believe that the decision was not related to the budget. The Applicant reminded the Director that there were still two pending issues to be resolved:

- a. His uncompleted ePAS; and
- b. His call for investigation of the former Head of Office.


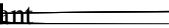
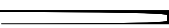

14. On 7 February 2013, in an email to the Director, the Applicant noted that the deadline for him to express his interest in being reappointed at his current level in Baghdad passed the day before without him receiving the clarifications he had asked for. He said he was determined to continue his career in UNAMI but still had questions which he listed in regards to redeployment to Baghdad. The email stated:

The deadline passed yesterday and we have not received the clarifications we asked for yet. We would like to inform you that we are really determined to proceed with our careers in UNAMI. However, we still have few unanswered questions in regard to your decision of redeploying both of us to Baghdad. Hereunder, we list those questions wishing that you have time, this time, to make them clear to us:

- i. As you may know, Kirkuk is our home town and we are settled here, we have our children at schools beside many other involvements. Accordingly, we need few months before we can practically move out.
- ii. Due to the severely bad security situation in Kirkuk, we can never leave our families behind.
- iii. All political affairs officers in Baghdad are holding NO-B while we are still NO-A. If we are signing a new contract, we want to be upgraded.
- iv. Being relocated to a duty station away from home, we will be faced with different channels of spending like rent, travels, schools..etc. We will be entitled to be paid for these extra spendings.
- v. We reiterate on our original inquiries, mentioned in our below email to you, which are not yet answered.

15. On 10 February 2013, the Applicant sent the Director an email informing him that he had contacted the Ombudsman's office to ask for third

party mediation.

16. On 24 February 2013, the Applicant sent the UNAMI Chief of Staff an email explaining the issue following their meeting with him a few days earlier during his visit to Kir    

27. On 10 November 2013 the Head of Office sent an email to the Director, copied to the Applicant and the other affected staff members, reminding him that the program manager not the Head of Office should inform staff members about the status of their contracts. He informed him that the three staff members were waiting for his message to clarify their status beyond 31 December 2013.

28. On 12 November 2013, the Applicant submitted a request for management evaluation.

29. On 14 November 2013, the Director advised the Applicant and other APAOs in Kirkuk that due to operational requirements to strengthen OPA's functions by consolidating the field liaison network in the governorates, and because only one APAO post would remain in Kirkuk, a written assessment would be held for the purposes of establishing which APAO would remain in Kirkuk. The Applicant was invited to participate but did not take the test. The option of keeping a second post in Kirkuk was possibly to be considered.

30. On 17 November 2013, the Applicant replied to the Director's email requesting clarification on the criteria adopted to conduct

Issues

34.

challenge the decision leading up to the non-renewal decision have either been met with a lack of response or produced further actions in retaliation against him.

42. In support of his allegations of ill motivation the Applicant referred to the following events at paragraphs 20 to 25 and 36 of his application:

- a. Being interviewed by investigators without notice in January 2011. The allegations were unsubstantiated and no actions were taken against him on that investigation.
- b. The failure by the previous SRSG to investigate his complaint against the Head of Office and his supervisor.
- c. The non-completion of his 2011 ePAS because of a disagreement about midpoint comments made by his supervisor.
- d. A proposal in July 2011 by the then Head of Office to introduce grading of NPOs which the Applicant and others objected to. The proposal was not implemented.
- e. Six days after the first reply by affected staff members to the redeployment decision he received a call from an unidentified number at 3am. Nobody spoke on the line. He reported this call.
- f. The Applicant raised concerns about the exam offered by the Director of OPA and did not participate in it because of concerns about its legality. He questions the timing of the offer as it came after UNAMI already decided not to renew his contract and after he filed a complaint to MEU.

43. The Applicant further submitted that the improper motivation can be clearly noticed in the state of confusion the UNAMI administration demonstrated dealing with his case. Through the course of 2013 they issued four different decisions, each decision followed a contradictory-3(c)-24(h) 0 1 418.56 131.25101

- a. The redeployment email on 7 January 2013 followed the discussions on 2013 budget in which senior managers of UNAMI underscored that there will be no changes in the Kirkuk political section.
- b. The six month extension on 8 May 2013 followed a request from the Kirkuk Head of Office for an extension for all four APAOs in Kirkuk.
- c. The non-renewal decision on 27 October 2013 followed the 2014 UNAMI budget proposal sent to The ACABQ and the 5th Committee in NY.
- d. The written assessment offer on 14 November 2013 came up two days after he and a colleague filed an application to MEU requesting a management evaluation.

Respondent's Submissions

44. The Applicant was consulted prior to the deployment of the post. The reasons for the deployment of the post were fully explained to him. He was given

53. The Tribunal finds that the Applicant was made aware on 28 January 2013 that the post he encumbered was on loan from Baghdad.

54. On 8 May 2013, he was advised that his contract, which was due to expire on 30 June 2013, would be extended to 31 December 2013. This was subject to the budget proposal which was to be submitted in June 2013.

55. The evidence also shows that the Applicant was invited to attend at least one meeting to discuss the extension of his contract. Although he could not attend, a letter summarising the meeting was sent to him. At that stage, a final decision had not been made as it was dependent on the decision of the General Assembly on the budget proposal.

56.

59. However in certain circumstances this presumption of non-renewal can be rebutted. One such circumstance is when the staff member has acted in reliance on an express promise that his or her contract will be renewed.³

60. The Applicant's claim to a legitimate expectation of renewal is based on the DSRG's narrative in the 2014 budget proposal sent to the ACABQ and the 5th Committee in New York and forwarded to him. In his mind that amounted to a clear explicit promise for renewal.

61. The correspondence shows that the Head of Office was supportive of the need for the NPO posts in Kirkuk to be continued in view of the workload and that he communicated this to the Applicant.

62. While these factors may have given the Applicant some cause for hope that the status quo would be maintained in Kirkuk, neither the budget proposal nor any views expressed by the Head of Office can be interpreted as an express promise that his contract would be renewed.

63. The Tribunal holds that the Applicant had no legitimate expectation of renewal

Issue 3

Was the decision of the Administration ill motivated or made in bad faith?

64. In Rolland 2011-UNAT-122, UNAT held that there is a presumption of regularity of administrative decisions. This presumption may be displaced. The person alleging ill-motivation bears the burden of proving it.

65. Such proof should include a demonstrable causal nexus between the proffered evidence of ill motivation and the contested decision. Any evidence of ill motivation must logically pre-date the decision. Events which occurred after the decision are generally irrelevant to the issue of the motivation of the decision maker.

³ Hepworth2015-UNAT-503.

66. The official reason given by the Administration for the non-renewal of the Applicant's fixed-term

73. In 2013 the Applicant reported a silent phone call six days after he