



JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by the Secretary-General of the United Nations against Judgment No. UNDT/2011/032 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 10 February 2011 in the case of *Obdeijn v. Secretary-General of the United Nations*. Mr. Hans Obdeijn submitted an answer on 13 May 2011.
2. The Secretary-General appeals the UNDT Judgment on the grounds that the UNDT erred on a question of law and exceeded its competence in requiring the Administration to give reasons for its decision not to extend Mr. Obdeijn's fixed-term appointment (FTA) beyond its agreed date of expiry.
3. The Appeals Tribunal notes that where the applicable Staff Regulations and Rules provide that an FTA does not carry an expectancy of renewal and is ipso facto extinguished on expiry, a non-renewal is a distinct and challengeable administrative decision.
4. The obligation of the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Staff Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.
5. Whereas, normally, the staff member bears the burden of proof of showing that the non-renewal decision was arbitrary or tainted by improper motives, the refusal by the Administration to disclose the reasons for a contested decision shifts the burden of proof, so

7. In view of the foregoing, the fact that the Administration did not discharge the burden of proving that its decision was neither arbitrary nor tainted by improper motives, we affirm, on the principle, the UNDT's finding that this decision must be deemed unlawful.

8. The appeal is allowed in part. We affirm the award for moral damages, but set aside that awarded for economic loss as none was proven.

Facts and Procedure

9. Effective 3 October 2005, Mr. Obdeijn joined the United Nations Population Fund (UNFPA) as UNFPA's Representative in Sana'a, Yemen, at the P-5 level on a two-year FTA. His Letter of Appointment specified that a rise in his salary was "subject to satisfactory service" and "[s]ubject to extension of appointment". It also contained the following clauses: "The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment on the Staff of the United Nations Population Fund. Staff members specifically recruited for the United Nations Population Fund have no entitlement for consideration for posts outside that Fund."

10. Mr. Obdeijn's FTA was subsequently extended on two occasions, first for one year (3 October 2007 to 2 October 2008) and then for six months (3 October 2008 to 2 April 2009).

11. In a letter dated 13 February 2009, the Director of the Division for Human Resources, UNFPA, notified Mr. Obdeijn that his FTA would expire on 2 April 2009 and that he would be contacted in due course regarding separation formalities.

12. By letter dated 15 February 2009 to the Director for Human Resources, UNFPA, Mr. Obdeijn requested the reasons for his non-renewal.

13. On 9 March 2009, Mr. Obdeijn requested administrative review of the decision not to renew his FTA beyond 2 April 2009.

14. On 12 March 2009, the Officer-in-Charge, Division for Human Resources, UNFPA, replied: "[A] fixed term appointment does not carry any expectancy of renewal of the appointment. Rather, the appointment expires automatically and without prior notice on the expiration date specified in the letter of appointment...."

15. On 27 March 2009, the Executive Director, UNFPA, replied to Mr. Obdeijn's request for administrative review, stating: "Given that you have been serving with UNFPA for a period of less than five years ... the Administration of UNFPA was permitted, in accordance with section 5.2 of the policy and the established jurisprudence of the [former Administrative] Tribunal, not to renew your appointment, without having to justify that administrative decision." (Underline in original)

16. Mr. Obdeijn's appeal to the former Joint

Secretary-General and required him to prove that the non-renewal decision was not arbitrary or improper.

19. The UNDT erred on a question of law in creating a new obligation on the part of the Administration to provide reasons for not ex

25. The UNDT correctly held that the Administration's refusal to provide reasons for the contested decision permitted it to draw an adverse inference. The requirement to disclose reasons for an administrative decision not to renew an FTA does not alter the rights and obligations that flow from the Letter of Appointment.

26. The UNDT did not overturn the contested decision on the basis of a legal expectancy or renewal. Rather, the UNDT overturned the decision based on its finding that the non-renewal decision was unlawful. Therefore, whether or not there was a legitimate expectancy of renewal is not relevant to the present case.

27. Compensation for moral damages in the amount of USD 8,000 is entirely reasonable. It is in line with the amount awarded by the UNDT and the Appeals Tribunal in several other cases. In fact, this amount falls closer to the lower end of the spectrum where moral damages have been awarded.

Considerations

28. The primary issue for consideration is the submission by the Secretary-General that the UNDT erred on a question of law and exceeded its competence in requiring the Administration to give reasons for its decision not to extend Mr. Obdeijn's FTA beyond its agreed date of expiry.

29. The Secretary-General relying on the jurisprudence of the former Administrative Tribunal refused to comply with the UNDT's order to disclose the reasons for the contested administrative decision not to renew Mr. Obdeijn's appointment.

30. The Appeals Tribunal recalls its decision in *Sanwidi*¹ that the jurisprudence of the former Administrative Tribunal, though of persuasive value, cannot be a binding precedent for the new Tribunals to follow.

31. The Appeals Tribunal notes that where the applicable Staff Regulations and Rules provide that an FTA does not carry an expectancy of renewal and is ipso facto extinguished on expiry, a non-renewal is a distinct administrative decision that is subject to review and appeal.

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39. However, if the Administration does not comply with a Tribunal's order to disclose the reasons for an administrative decision as such, the Tribunal cannot automatically conclude that the decision was arbitrary. But it is entitled to draw an adverse inference from the refusal.

40. In view of the foregoing, considering that the Secretary-General refused, relying on the jurisprudence of the former Administrative Tribunal that we depart from, to comply with the UNDT's order to disclose the reasons for the contested administrative decision not to

Judgment

46. The appeal is allowed in part. The UNDT Judgment is affirmed, subject to variation of compensation.

Original and Authoritative Version: English

Done this 16th