



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/065/
JAB/2009/012
Judgment No.: UNDT/2009/073
Date: 11 November 2009
Original: English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

WYSOCKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:

to the Kon Tum province with a team consisting of the applicant, the DCD and the programme officer of UNDP Vietnam.

5. On 12 May 2008 a meeting was held between the applicant and the DCD. According to the applicant, the latter expressed disappointment with the applicant's performance as he had not produced enough "deliverables" such as documents, workshops and speeches. The DCD described the meeting as simply a regular meeting for the purpose of providing feedback, both encouragement and criticism, and conceded, in substance, that the issue of "deliverables" was raised. The meeting was followed by an e-mail on 20 May 2008:

"I hope that you'll soon be able to send the paper on district at least in draft form. We had talked about it in early April even before the retreat. As I expressed to you when we met one week ago, I am concerned about the lack of actual deliverables from you. While conceptual proposals can be useful at an early stage, and lack of data are a constraint, it is important to see actual results from your work after several months in the position."

The DCD explained that the production of these "deliverables" was required as part of demonstrating to the funds provider the work which was being done.

6. On 5 June 2008, following a number of discussions with the applicant, the programme officer informed him that there were three different financial lines on local governance funded by AECID, namely Local Governance Policy, Local Governance Adviser and research on local governance and economic development, and requested the applicant to provide a paper on the third item, together with comments and feedback.

7. In an e-mail of 10 June 2008 to the applicant, noting that a meeting scheduled for that date had not taken place, the DCD stated:

"As mentioned in our last conversation, I remain concerned about the lack of progress in your work at a juncture when there is a clear expectation to see results and impact after 6 months in the position. Our meeting...would have been an opportunity to review this together and see how we can support you."

8. The DCD explained that the lack of progress mentioned in this e-mail was not a criticism of the applicant but an objective description of the state of the programme. He said that he had understood that there were constraints caused by the attitude of the Vietnamese authorities. It seems to me that the last sentence of the e-mail is some support for this evidence. On 17 June 2008 a meeting was held between UNDP and AECID. According to the minutes of the meeting, the Kon Tum project was among the agenda items, and during the meeting it was mentioned that an AECID monitoring visit would take place

of the DCD, the doubts about funding were not determinative; rather, the applicant's work had not had the impact that UNDT hoped for and it was decided that focus would move away from local governance, hence the decision not to renew the applicant's contract. The DCD thought it was only fair that adequate notice be given to the applicant. The applicant said that he was told by the DCD that the reason for non-renewal was "poor performance". Several hours following the meeting the applicant sent an e-mail to, amongst other UNDP staff, the DCD in which he wrote that he had been informed at the meeting that his contract would not be renewed and that "the reason given was poor performance" with no "analysis or details" being provided.

12. The DCD, as I understand his evidence, conceded that he had said that the reason for non-renewal was poor performance but that he intended by this to refer not to the personal performance of the applicant but to the failure to make progress on the programme. He said that he mentioned that "things had not worked out as we expected". He said that the applicant reacted very strongly and left the meeting. The DCD responded to the applicant's e-mail within a few minutes by pointing out, in order to "clarify and avoid any misrepresentation", that the "meeting followed a number of earlier conversations and correspondence" and that he had said to the applicant that there would be several opportunities in the coming days "to reflect and discuss further". He concluded by saying, "I remain fully available for more information and details." This response could not be regarded as an attempt to refute the claim that it was the poor performance of the applicant which explained the non-renewal but the DCD explained that the e-mail was sent to those to whom the applicant's e-mail was addressed and it was not appropriate, he thought, to go into further detail. It will be recalled that the applicant's e-mail simply referred to "poor performance" and this is quite capable of being read as a reference to the programme rather than the applicant. It seems to me that the mention by the DCD of avoiding "misrepresentation" does not make much sense if it were the applicant's nonperformance which was the issue, an interpretation which is reinforced by the last sentence of the e-mail set out above. The decision was stated as having been made,

the indicator “Contribute to the Kon Tum project”, which was “not achieved”. The assessment for “Key Result 4” was, again, the score of “3” denoting “met expectations”, with two out of three indicators having been “achieved” and one “partially achieved”. Again, the “not achieved” outcome for the indicator concerning the Kom Tum project and the “partially achieved” indicator in “Key Result 4” reflected difficulties acknowledged to be outside the applicant's control. “Key Result 5” was similarly assessed as the others, with one of the two indicators “not achieved again because of problems outside the applicant's control. The supervisor’s assessment essentially set out in narrative form what I have stated above and specifically pointed out, in respect of the Kon Tum programme, in substance, that the applicant was prevented from playing the role that was anticipated for him. The assessment concluded:

“While the impact in terms of project and policy may not have been what was hoped for, the individual performance fully met expectations.”

On the applicant's competency assessment he was held to be “successful” in respect of the 25 indicators and as having “exceeded expectation” in respect of another. The final overall rating was “3 – met expectations”. The applicant (with some irrelevant qualifications) and the DCD agree that the RCA was fair and accurate.

14. On 23 September 2008 a meeting including the applicant and the DCD was held to further discuss the non-renewal of the applicant’s contract in which the applicant proposed the compromise that he would continue working but focus on another aspect of the local governance problem. He says that this proposal was not accepted but that there was no discussion of funding difficulties. The DCD pointed out that no formal decision had yet been taken by AECID so that it was not appropriate to raise this issue. On 2 October 2008 the applicant met with representatives of AECID, who expressed concern regarding planning documentation for the Kon Tum project.

15. On 20 November 2008 a meeting was held between the applicant and the DCD to discuss the applicant’s RCA. During this meeting, the applicant was told that

renewal of his position depended on funding for the Kon Tum project from the Spanish Government. According to the DCD, the Spanish Government had previously indicated that it was not willing to extend the funding for his position. As mentioned before, on 25 November 2008 the DCD finalized the applicant's RCA in which his overall performance was rated at a "3" for "fully meets expectations".

16. On 2 December 2008 UNDP submitted a request for funding from the Spanish Government, including (despite its doubts) for the applicant's position. On 5 December 2008 this request was refused and the position was therefore abolished. Nobody has since been hired to replace the applicant.

The submissions of the parties

17. The applicant submits that the RCA shows that what he was told in the conversation of 8 September 2008 (ie, that his performance had been poor) was not true. He therefore alleges that there must be some other reason for not renewing his contract which was not disclosed to him and that this raises the suspicion that the reason was improper. On the other hand, if indeed the reason for not renewing his contract was incompetence, he should have been given the opportunity to correct any such understanding before the decision was taken.

18. The respondent submits that the RCA reflected the honest and actual opinion of the DCD about the applicant's competence and the context in which he was required to work which made achievement of several important indicators difficult, if not impossible. The emphasis given to the Kon Tum programme arose because the Spanish funders regarded it as particularly important. However, the applicant was substantially prevented from having an impact on it because of the approach taken by the Vietnamese authorities. The realities of the situation were always understood by the DCD and his superiors and were not laid at the hand of the applicant. Accordingly, the decision not to renew the contract did not arise from any adverse view of the applicant's competence but simply because the hoped for outcomes from the applicant's work had not occurred. Moreover, it was expected with a high degree

of likelihood that AECID would not continue funding that part of the programme for which the applicant was responsible, a prediction that the events proved correct. In short, the RCA reflected UNDP's position, there was no reason to criticise the applicant's performance, his performance was in fact not criticised and the non-renewal of the contract was caused by other factors.

19. The applicant also submitted that it appeared that there was in fact ample funding for his work programme available from other sources, so that lack of funds was not a sufficient or, at least, a truthful reason for non-renewal.

Discussion

20. I think that both the applicant and the DCD believe that they are telling the truth about their conversations. It is simply that their different perspectives have led them to a different understanding of the substance of what was said. There was a very real potential for misunderstanding, the applicant taking as personal criticism what was intended to be an objective description of the outcome of the programme. I accept that the DCD did not make the matter clear beyond the possibility of ambiguity as, in my view, he should have done, since he was fully aware of all the facts and potential for misunderstanding was evident. On the other hand, what I take to be the combative approach adopted by the applicant was not conducive to calm and dispassionate exchange.

21.

Conclusion

22. The application is dismissed. In the circumstance, it is only fair to the applicant to emphasize that the evidence established the non-renewal of his contract was not due in any sense to any supposed shortcomings in his work. To the contrary, he was highly competent and his work was entirely satisfactory under the difficult conditions.

(Signed)

Judge Adams

Dated this 11th day of November 2009

Entered in the Register on this 11th day of November 2009

(Signed)

Hafida Lahiouel, Registrar, New York