



Case No.: UNDT/GVA/2009/33
UNDT/GVA/2009/40
Judgment No.: UNDT/2010/108
Date: 22 June 2010

Introduction

1. By application filed on 8 September 2009 and registered under case No. UNDT/GVA/2009/40, the applicant contested the final decision by the Secretary-General on an appeal before the Geneva Joint Appeals Board (JAB) against the decision not to renew his fixed-term appointment beyond 30 November 2007. The Secretary-General's decision, notified by letter dated 6 May 2009, endorsed the JAB conclusions that "the reason alleged for not extending the [applicant's] fixed-term appointment ha[d] not been duly established, and that on that ground [he] was entitled to reparation", and awarded the applicant compensation of three months' net base salary.

2. On 12 May 2009, the applicant filed an appeal before the Geneva JAB challenging the "[d]ecisions taken by the Appointments, Posting and Promotions Committee (APPC) to conceal from [him] communications concerning [his] employment submitted by the Representative of the United Nations High Commissioner for Refugees (UNHCR) at the Branch Office London (BO London) ... and also the fact that such submission had been made".

3. As the case remained pending at the time of the JAB abolishment, the case was transferred to the Tribunal as of 1 July 2010, in compliance with section 2.3 of ST/SGB/2009/11. It was attributed case number UNDT/GVA/2009/33.

Facts

4. The applicant entered service at the United Nations in September 2006, as Finance Assistant at the UNHCR BO London on the basis of a fixed-term appointment at the G-6 level, which was extended twice, namely in December 2006 and March 2007.

5. In March 2007, the Office of Internal Oversight Services (OIOS) conducted an audit in the BO London.

6. In April 2007, the applicant was granted a six-month probationary appointment as Administrative and Financial Assistant, under an assignment of the APPC. This contract expired on 30 September 2007. The Representative of the

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High Commissioner at BO London (the Representative), who was the applicant's

in the framework of the applicant's Career Management System (CMS)/Performance Appraisal Report (PAR).

11. A note for the file on that meeting reported that the applicant had not completed the self-assessment component before the meeting, contrary to what the Representative had expected. It was further noted that he had previously been advised that the completion of the PAR was essential "in view of the fact that confirmation of his appointment by the APPC to his post [was] subject to satisfactory performance during a six-month probationary period". The note for the file elaborated on several shortcomings of the applicant related to his attendance (starting work late), his management competence (failure to set priorities, leading to delays and missed deadlines), his technical knowledge (despite coaching and training, not yet able to handle HR matters autonomously; lack of interest in becoming operational; and ignoring directions and advice from supervisors and other senior colleagues).

12. By email dated 11 September 2007, the applicant sent the Representative his comments for a response to the Audit Report established by OIOS.

13. According to the applicant, on 20 September 2007, the Representative e-mailed him the note for file on the meeting of 7 September 2007.

14. On 24 September 2007, a meeting took place between the applicant and management of the BO London, during which the applicant gave his views on various issues related to his attitude at work and his performance and the preparation of his PAR. A note on this meeting was drafted and signed by the Representative on the same day.

15. By memorandum dated 5 October 2007 and sent on the same day, the Representative informed the applicant that she had approved a new fixed-term appointment running from 1 October to 30 November 2007, which included a one-month period of prior notice required for separation. It was specified that this contract would not be extended. It was further stated that the decision not to recommend to the APPC the extension of his probationary appointment was due to concerns about his performance which had been shared with him on various occasions, prior to and during the series of recent meetings to discuss his PAR.

She stressed her disappointment that the applicant had not yet sent her his self-assessment in the context of the PAR or any written response to the feedback provided to him at and after the meeting of 7 September 2007. The Representative expressed her view that his attitude over the last months had been “sometimes bordering on insubordination”. She invited the applicant to use the two-month fixed-term appointment to complete any responses he might have on his PAR.

16. On 26 October 2007, the Representative sent to the APPC a memorandum dated 12 October 2007. She recalled that the applic

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to be not receivable, as it was not directed against an administrative decision, inasmuch as the concerned documentation took the form of internal communications submitted on a strictly confidential basis.

30. On 12 May 2009, the applicant lodged an appeal against this decision

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f.

exceptions provided in paragraph 31 of the APPC Rules of Procedure in this case. None of the APPC Rules and Regulations provide for the disclosure of information communicated by managers under paragraph 43 of the APPC Procedural Regulations. The memorandum clearly stated that the applicant had been advised of the decision to separate him from service for unsatisfactory performance by memorandum of 5 October 2007;

- j. In this regard, the APPC Rules and Procedures do not provide staff members on fixed-term appointments with a right to submit their comments to the APPC when their appointment will not be renewed after probation. Paragraph 79 of the APPC Procedural Regulations relate to the termination of indefinite appointments;
- k. Paragraph 43 of the APPC Procedural Regulations on fixed-term appointments provides that:

“...Before the end of the six-month probationary period,

5 October 2007, whereas, in case No. UNDT/GVA/2009/33, he questions the fact that his supervisor having communicated the non-renewal decision to the APPC by letter of 12 October 2007, the latter failed, upon receipt of this letter, to inform the applicant of its existence and content.

46. Being the subject of case No. UNDT/GVA/2009/33 as identified above, this case must be deemed irreceivable, as falling out of the Tribunal's jurisdiction *ratione materiae*. Under the terms of article 2.1 (a) of the UNDT statute, the Tribunal's competence is strictly limited to review the legality of "administrative decisions". This notion was authoritatively defined in judgement No. 1157, Andronov, (2003) of the former UNAT as:

"a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order".

47. This definition, which has been subsequently adopted by UNDT (see UNDT/2009/077, Hocking, Jarvis, McIntyre; UNDT/2009/086, Planas; UNDT/2010/085, Ishak) and United Nation Appeals Tribunal (see judgments 2010-UNAT-013, Schook v. Secretary-General; 2010-UNAT-030, Tabari v. UNRWA), makes clear that only a decision creating direct legal effects is to be considered as an "administrative decision" for the purpose of its formal contestation in front of the Tribunal.

48. Against this background, the Tribunal notes that paragraph 43 of the Rules

50. As a matter of fact, the decision not to renew the applicant's appointment was made before the APPC received the 12 October 2007 letter; in fact, by the time APPC was informed of the non-renewal decision, the applicant had already been notified thereof, by memorandum dated 5 October 2007.

51. In these circumstances, the APPC omission to share the letter of 12 October 2007 with the applicant could not, by and in itself, have affected in any manner the legal situation of the latter. This letter appears as no more than an internal communication. At the highest, the sending of this letter may be regarded as one step within a composite procedure. In this connection, the UNDT has previously recognized that such procedural steps do not constitute "administrative decisions" within the meaning of article 2.1 (a) of its statute (see UNDT/2010/085, Ishak).

52. Turning to case No. UNDT/GVA/2009/40, there is a fundamental discrepancy between the parties on the motives behind the decision not to extend the applicant's appointment. Whereas the reason explicitly given for it was the unsatisfactory performance of the staff member, the applicant claims that this decision was based on extraneous factors; specifically, that it was prompted by the applicant's support to the OIOS audit conducted in the BO London and to the resulting report, which was considerably critical of the Office's management.

53. It is appropriate to recall, at the outset, that the applicant held a fixed-term appointment. This type of appointment does not carry any expectancy of renewal or conversion and "expire[s] automatically and without prior notice on the expiration date specified in the letter of appointment", in accordance with former staff rules 104.12 (b) and 109.7.

54. The foregoing does not imply, nonetheless, that the Organization has unfettered power. The decisions of the administrative authority "must not be arbitrary or motivated by factors inconsistent with

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that the applicant served the Organization for the relatively short period of