Case No.: UNDT/NY/2010/057/ UNAT/1576

Judgment No.: UNDT/2011/182

Date: 26 October 2011

Introduction

1. The Applicant appealed to the former United Nations Administrative Tribunal ("UNAT") on 28 January 2008 against three administrative decisions: a) the non-renewal of his fixed-term contract beyond its expiry date of 12 March 2005; b) the denial of payment of his salary and entitlements for the last two months of his employment when he was on sick leave; and c) the placement of an adverse note ("Note") on his Official Status File ("OSF") on 13 July 2006.

2. The case was transferred to the United Nations Dispute Tribunal on 17 March 2010. The case has been through a case management process during which

d. To compensate the Applicant in the amount of 3 years' net base salary for the abusive decisions placing the adverse Note in his OSF, for the 12 March 2003 wrongful termination and non-renewal of the Applicant's contract, and for the subsequent loss of employment resulting from adverse work references by his former employer, the Respondent;

e. To reinstate the Applicant's medical coverage for the January/February 2005 sick leave, in order for him to claim that period's medical expenses;

f.

8. As this evidence concerns the job applications made by the Applicant since his separation, it is not relevant to the Applicant's substantive claims. Although it may have some relevance to the Applicant's claims for remedies, the Tribunal is satisfied that there is sufficient evidence before it to enable a decision on remedies to be made without any further evidence

9. The Applicant also alleges that evidence should be called to rebut some findings by the Office of Internal Oversight Services ("OIOS"). He refers to a hotel manager who he says would confirm that the Applicant was a guest at a particular hotel despite OIOS' statement to the contrary, and to diplomats in Jordan who were witnesses to the Applicant's supervisor's state of "ebriety (sic.)". These last three items of evidence would be relevant to a review of the OIOS investigation but it is beyond the scope of the issues before the Tribunal. That evidence is not relevant to the three substantive issues of the case.

10. Having considered the Applicant's request to call evidence additional to that referred to in the JAB report, the Tribunal holds that this case can be determined on the extensive papers filed and that a hearing is not required to do justice in this case.

Facts

11. The Applicant was a former P-4 level Political Affairs Officer with the United Nations Assistance Mission for Iraq ("UNAMI"). He held fixed-term contracts from October 2003 which were renewed for three or six months. The last renewal was for two months until 13 March 2005. The reasons given for non-renewal were given to the Applicant at the time. There is no evidence that the non-renewal related to performance issues.

12. The Applicant was absent from duty from 24 December 2004. On 5 January 2005, the Applicant took a holiday in Morocco. He says he became sick and was hospitalised. Once he was advised by doctors that he could travel, the Applicant contacted the Special Representative of the Secretary-General for Iraq

("SRSG") to inform him that he had received and would be returning to his post in Iraq. He was told instead to travel to New York and wait for further instructions. He provided a medical certificat

24. On 18 October 2006, following an unsuccessful administrative review of the decisions not to renew his fixed-term appointment beyond 12 March 2005, to deny him payment of his salary and entitlements and to place a Note on his OSF in connection with the findings of OIOS, the Applicant filed a statement of appeal with the JAB.

25. The JAB rejected the Applicant's claim that the non-renewal violated his rights and his claim for compensation, but found that the retention of the Note on his file without an opportunity to review and respond to the allegations against him would be a violation of his rights.

Haiti and Congo, a Human Rights Officer post in Jordan with the UN Office for Project Services and unspecified positions with the United Nations Development Programme in Jordan and Lebanon. He suggests that he made at least ten applications for employment with the Organization between 30 April 2005 and 18 August 2006. He says that since the termination of his contract he has been left without work and revenue. He has been compelled to sell his house. He produced a mortgage default document and a notice of foreclosure sale of a property which are not in his name, but their authenticity has not been challenged by the Respondent.

30. In 2007, the Applicant and the Respondent corresponded about his entitlements upon separation. By letter dated 22 May 2007, the Applicant was informed that, upon processing his final pay upon separation, it was determined that he had been overpaid USD9,687.02. This was because he had been placed on leave without pay from 2 to 23 February 2005.

33. The Respondent also produced work sheets showing the calculation of overpayment as well as his final statement

Adverse Note on file

37. The Applicant maintains that it is common knowledge that OIOS has been discredited for the way it conducted earlier investigations. He cooperated with the OIOS investigation but it was not conducted objectively or in accordance with General Assembly resolutions. The report's contents were not communicated to him at the time of its release and he had no opportunity to comment on it.

38. OHRM did not give him advance notice before inserting the adverse comments in his OSF.

39. The OIOS investigation and the OHRM follow-up were in direct relation to the Applicant's terms of appointment, his non-renewal of contract and work relations at UNAMI.

Entitlements claimed by the Applicant

40. The Applicant alleges that he had not received a number of payments which were due to him. In the view of the Applicant, he has received no valid rebuttal of these claims from the Respondent

Respondent's submissions

Non-renewal of contract

41. The Respondent submits the application is time-barred, as it was made outside

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48. In addition, the Respondent submits that these amounts have been "paid in full".

Consideration

Non-renewal of contract

49. The deadline for the Applicant to have sought an administrative review of the decision not to renew his fixed-term contract expired on 12 May 2005. His request for administrative review was therefore 15 months out of time.

50. Under Article 8 of its Statute, the Dispute Tribunal is competent to hear and pass judgment on an application if the applicant has previously submitted the contested administrative decision for management evaluation within the appropriate deadlines. This article has been interpreted by UNAT to include requests for administrative review under the former system of internal justice (see *Costa* 2010-UNAT-036). The Tribunal has no power to extend the time limits by which a request for administrative review can be sought.

51. For these reasons the Tribunal has no jurisdiction to consider the Applicant's claim against the non-renewal of his fixed-term contract.

Adverse Note on file

52. It is important to note that the OIOS investigation was not of the Applicant's behaviour but of the SRSG he had complained about. To that extent there was no obligation on the Organization to disclose the results of the investigation to the Applicant. It was the placement of the Note on his OSF arising from the interpretation of the Respondent of the OIOS comments on the Applicant's behaviour, as the complainant during the investigation, which gave rise to the obligation.

53. The power to file adverse material in the personnel records of a staff member is conferred by ST/AI/292. This Administrative Instruction was promulgated in 1982 52.

for the express purpose of implementing the then Secretary-General's statement that anything that is adverse to a staff member should not go on a confidential file unless it has been shown to the person concerned. The purpose of ST/AI/292 is to ensure fairness to the staff member whilst retaining the Administration's control over its records.

54. ST/AI/292 does not refer to former staff members, but it is a logical, fair and reasonable implication that, in the interests of maintaining the integrity and completeness of files, the Organization should not be precluded from placing adverse material on the file of a former staff member for future reference, should that become necessary. With that right and duty, however, comes the responsibility of ensuring that the affected former staff member is afforded the fundamental rights set out in ST/AI/292. This is because the prejudicial effect of the adverse material continues as long as it remains on the former staff member's file and will have a bearing on the future prospects of that former staff member should they wish to be reemployed by the Organization or even by outside employers if they become aware of the adverse Note.

55. ST/AI/292 recognises three potential sources of adverse information: from outside the Organization; from Member States; and, as in this case, material that relates to an appraisal of the staff member's performance and conduct. ST/AI/292 acknowledges that all performance reports, special reports and other communications pertaining to a staff member's performance are a matter of record and are open to rebuttal by the staff member. Both the report and the rebuttal are to be placed in the OSF. This file constitutes the sole repository of the documents relating to the contractual status and career of the staff member.

56. In order to ensure fairness, there are some fundamental principles of fair-dealing which must be met:

a. The Note should be accurate. This requirement is unwritten but was recognised in *Applicant* UNDT/2010/069. This is to ensure that the

his employment, an outcome at least as damning—if not more so—than a summary dismissal.

60. This decision was made without him seeing the OIOS report. This is a breach of his fundamental right to be fully informed of the allegations made against him and

65. Paragraph 18(f) of ST/SGB/273 states:

> No action may be taken against staff or others as a reprisal for making a report or disclosing information to, or otherwise cooperating with, the Office.

66. In spite of the OIOS disavowal which was not disclosed to the Applicant and without hearing from him, the Organization imposed what was effectively a disciplinary outcome: a punitive ban on his whole UN career because he made a report which was subsequently found to be without sufficient foundation. If this type of response is permitted this would act as a disincentive to people coming forward with complaints. A situation that the paragraphs in ST/SGB/273 was designed to prevent.

67. In addition, the Respondent's actions towards the Applicant were in stark contrast to the treatment accorded the SRSG about whom he complained. Although the SRSG was found wanting in two respects he did not receive any disciplinary action apart from the repayment of moneys wrongfully claimed. The treatment of the Applicant was disproportionate, unfair and not in accord with the standard of seriousness set by ST/AI/371 nor with the protective policy of ST/SGB/273 towards persons making complaints.

68. At two stages through the process which followed the placing of the Note in his OSF, the Applicant was given the opportunity to provide a response to the summary in the Note and much later, following the JAB recommendations, to see a redacted version of the OIOS report and make comments on it. He did not take up these opportunities but chose, instead, to take action through the internal justice system. Although that was his right, and in so doing that he was limited in his ability to respond until he could see the report, he was unwise in the meantime not to take advantage of the opportunity to mitigate the effects of the Note placement, while still pursuing his remedies.

69. The Tribunal holds that the actions of the Respondent in placing the inaccurate, adverse Note in the OSF of the Applicant before the Applicant had had a

chance to comment on it, and the failure to provide him with the full details relating to the adverse comments in the Note were in breach of the requirements of ST/AI/292 and of the duty of the Respondent to protect the rights of the Applicant to due process.

Claim for reimbursement of salary and entitlements

70. The Respondent has provided full records of the calculation of the entitlements due to the Applicant upon separation as well as documented evidence of his leave entitlements and the way in which these were used.

71. The Applicant disputes these records but has provided no evidence, except his own opinion, to refute the Respondents submissions on this issue. The Applicant's claims for reimbursement are not substantiated and therefore must fail.

Conclusions

72. The Applicant's claim relating to the non-renewal of his contract is not
71. 72.4

77. The adequacy of a remedy may be measured by the extent to which it places the successful party in the same position as he or she would have been but for the breach (*Mmata* 2010-UNAT-092). In this case, the breach was non-compliance with ST/AI/292 following the non-renewal of the Applicant's contract. Until the Note was placed on his file some 17 months after his contract ended he was in a position to apply for and be considered for other positions.

78. The placement of the adverse Note indicating that the Applicant should not be employed by the Organization in the future meant that whatever steps he took to obtain a new position from that time were likely to be unsuccessful, even if he was able to provide a reference. The Note clearly states that he should not be employed.

79. To place the Applicant in the position he would have been in but for the breach, the adverse Note should be removed from the Applicant's OSF.

80. The amount of compensation awarded should also be referable to the breach. Only in exceptional cases should the compensation exceed the equivalent of two years' net base salary.

81. It is also necessary to take into account the actions of the Applicant to ascertain whether he contributed to the harm he has suffered or failed to mitigate his losses.

82. As noted above, the Applicant twice did not take up the offer of the Respondent to place a rebuttal note on his OSF, once after it had already been placed there and again, in August 2007, when the Secretary-General decided to release to him a redacted version of the OIOS report. Only the second opportunity was realistic as only then was the Applicant in possession of all the facts needed to make a proper rebuttal. It is also the case, however, that the Applicant was actively pursuing his remedies at that time so cannot be accused of sitting on his hands.

83. The final factor to be taken into account is the length of time it has taken for the case to be concluded. This is because it was commenced under the old system of

internal justice and had to be transferred to the Dispute Tribunal to await a decision. It is not the fault of either party.

84.

IT IS ORDERED THAT:

88. Pursuant to Article 10.5(a) of the Statute of the Dispute Tribunal, the