



5. Ms. Charles thereafter took Mr. Nkurunziza to her office and it was established that he was not a holder of an ALD contract and hence not entitled to leave days. Ms. Charles then accused the Applicant of forging leave requests for persons not entitled to leave and informed him that she

10. On 28 June 2006, two days to the expiration of his contract, the Applicant filed a request for administrative review and suspension of action of the decision not to renew his contract pending investigation which involved him so that he could have the opportunity to respond to the investigatory findings. From his said application, it is evident that the Applicant was unaware of the fact that an investigation had already been conducted, completed and a report issued dated 25 May 2006.

11. On 30 June 2006, the Applicant was separated from the Organisation. Not having received a response to his suspension of action application or request for administrative review, the Applicant on 6 October 2006 filed an appeal to the Joint Appeals Board ("JAB").

Joint Appeals Board Review

12. The Panel issued a report on 30 July 2007 where it found that the ONUB Administration had engaged in an investigative process that was ultimately unsatisfactory and unfair and that the Applicant's non-renewal of contract was in fact discipline by stealth. While rejecting other claims, it recommended that the Applicant be compensated:

- a. For the abuse of his due process rights in the amount of six months net salary at the time of his separation and;
- b. For having been a casualty of improper administrative procedures by the ONUB Administration in the amount of six months net salary at the time of his separation.

13. The Secretary-General in part disagreed with the conclusion and recommendations of the JAB. In a decision of 27 August 2007, the then Under-Secretary-General, Department of Management Services of U/TT6 19.(cknn .0004n).2(e)-.gthe Applicant

g. He was discriminated against in that Mt. Nkurunziza whose attempts to obtain leave documents to which he was not entitled prompting the administrative decision against the Applicant continued in the service of the Organisation despite the recommendations of the Chief Civilian Personnel Officer and the investigation panel.

Respondent's case

17. The Respondent's case is that:

- a. The Application was time barred;
- b. The Applicant held an ALD contract and therefore had neither the right nor legal expectancy of renewal of his contract;

19. From the case presented by both parties, the Tribunal finds that the main issues for determination are:

a.19.a.

report, there is no mention of any other staff member having been investigated in relation to the matter of falsification of ONUB documents apart from the Applicant. This Tribunal finds it questionable that the investigation conducted was a general fact-finding exercise. It is easy to draw an inference in the circumstances that the Applicant was the sole subject of the investigation.

23. In his submission, Counsel for the Respondent had argued that the recommendations of the report were not taken into account but the facts were and that the Respondent was entitled to take the facts established into account when considering whether or not the Applicant's contract should be renewed.

24. In their testimony, both Ms. Gagnon and Mr. Herrel dissociated themselves from the investigation report. Ms. Gagnon stated that "it was not what I had envisaged" while Mr. Herrel stated that;

"In my view the report as produced by Ms. Lettice Myrie was faulty in several respects. First it did not respond to what I had requested. Furthermore, it over-stepped the scope of the fact-finding investigation in recommending disciplinary action against an individual. Finally, in my view its conclusions were vague and were not supported by sufficient evidence. I therefore did not rely on it in reaching the conclusion that [the Applicant's] contract should not be renewed."

25. It is curious that the Respondent's Counsel would submit that the facts established by the investigation were taken into account in deciding that the Applicant's contract should not be renewed. It must be noted that action had been taken to reassign the Applicant to another section even before the fact-finding investigation was requested. In evidence both the CCPO and the CAO told the Tribunal that the investigation was faulty, departed from its terms of reference and unduly recommended disciplinary action against the Applicant.

26. In other words, the CAO who made the administrative decision not to renew the Applicant's contract had his testimony before the Tribunal disowned and discredited the findings and recommendations of the investigators, upon which the Respondent's Counsel submits that the said CAO relied to make the impugned decision. There is no

Archive Unit with the post he had encumbered in Personnel following as a result of the leave request incident for which he had apologised.

30. To separate him from the Organisation barely ten weeks after moving him out of the Personnel Unit which was said to be unaffected by any downsizing exercise, only served to show that the Applicant was targeted for non-renewal of his contract. In other words, the Applicant was deliberately transferred out of the Personnel Unit in order to make it possible for the downsizing axe to fall on him.

Expectancy of renewal

31. The Respondent's Counsel had also submitted that the Administration had broad discretion in deciding whether or not to renew a contract. He argued that the CAO was entitled to rely upon the Applicant's apology to his supervisors and colleagues with regard to the leave request incident not to renew his contract. Such a position, without more, is untenable especially since no disciplinary process had been instituted against the Applicant. This Tribunal agrees with the views of the JAB that the separation of the Applicant amounted to disciplinary action by stealth and finds that the Applicant had a legitimate expectancy of renewal of contract considering that the Personnel Unit in which he was working was unaffected by any downsizing process.

32. The Appeals Tribunal has on occasion affirmed the position in UNDT Judgments that the Administration's discretionary authority is not unfettered and that the Administration must act in good faith and respect procedural law and its decisions not based on erroneous, fallacious or improper motivation. The actions of the CAO in this case, leave no one in doubt that his personal judgment of the leave request incident, the outcome of whose fact-finding investigation he had strongly condemned for several shortcomings, had provided the singular basis for the non-renewal of the Applicant's contract.

¹ See 2011-UNAT-12 Bertucci, 2010-UNAT-021 Assad

33. When the matter was before the JAB, the Panel found it puzzling that, the daily paid worker; Mr. Nkurunziza, who had initiated the alleged fake leave request in order to obtain documents to which he was entitled from ONUB, had actually been retained and even promoted by the Organization. If as the Respondent's Counsel argued, the Applicant's conduct regarding the fake request incident constituted 'gross negligence,' it indeed defies reason that Mr. Nkurunziza would not only be retained in employment but awarded a promotion.

Decision

34. For the foregoing reasons, the Tribunal finds that the Applicant has made out his case against the Respondent.

35. The Respondent failed to initiate the necessary processes to determine any misconduct on the part of the Applicant but rather relied on his own personal judgment not to renew the Applicant's contract. The explanation by the CAO that the non-renewal was based on 'administrative reasons' and downsizing exercise are puerile and only intended to justify his arbitrary and unlawful decision.

36. The Respondent admitted the violation of the Applicant's due process rights.

Compensation

37. The Tribunal Orders compensation as follows:

a. For the unlawful and improper non-renewal of the Applicant's contract in the amount of eight months net base salary at the time of his separation plus interest at the applicable US Prime Rate until the date of payment.

b. The Respondent admitted the violation of the Applicant's due process rights but rejected the JAB recommendation for an award of six months net base salary for the said violation. Instead the Respondent paid one month net base salary to the Applicant. The Tribunal finds this compensation inadequate and

