



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/19,
UNAT/1632

Judgment No. UNDT/2012/192

Date: 6 December 2012

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Introduction iaJ ET Q q 12 Tf 0 0 0 rg 0.9981 0 0 1 261.12 548.16 Tm [(110(a)-296.)-2(i)1 12 Tf 0

1. The Applicant joined the United Nations on 22 July 2002 for a probationary period of three months as Programme Analyst in the United Nations Development Programme (UNDP) Kigali, Rwanda. This probationary period was extended on 22 October 2002 for two months through to 31 December 2002.

2. On 1 January 2003, his contract was converted to a fixed term appointment and extended through 31 December 2003. At the expiration of Applicant's contract in December 2003, he was offered a fixed contract to run from 1 January 2004 to 31 December 2004.

3. In a letter to the Applicant and to all UNDP Rwanda staff members dated 21 May 2004, Mr. Macharia Kamau, the UNDP Resident Representative (RR), terminated the Applicant's employment effective immediately. From that date the Applicant was not allowed to access the UNDP Rwanda offices but he continued to work at his

6. In early 2004, Mr. Kamau informed UNDP staff that the involvement of the Staff Association in the RG would be discontinued. On 28 February 2004, the Applicant wrote to Mr. Kamau on behalf of the Staff Association disputing this decision.

7. In May 2004, the Applicant's immediate

11. On 8 June 2004 the

confidence that staff had put in him especially in promoting their interests which was disturbing to the senior management because he did not allow management to manipulate him. The Applicant stated that he was not aware of any written or signed memorandum addressed to him regarding the allegations of misbehaviour as was required by the United Nations Regulations and Rules. He rejected the allegations as unfounded.

17. On 9 December 2004, the RCA Rebuttal Panel submitted its report concluding inter alia, that:

Kamau's information on behavioural issues.

18. On 9 December 2004, the RCA Rebuttal Panel forwarded reports to Mr. Brian Gleeson, Director, Office of Human Resources and Bureau of Management UNDP.

19. On 15 December 2004, Mr. Kamau informed Applicant, who was still not allowed into the UN premises that the RCA Rebuttal Panel's recommendation to upgrade his overall rating did not change the basis on which the decision to terminate his contract was made and that his contract would therefore expire on 31 December 2004 as had previously been informed.

Joint Appeals Board (JAB) Review

20. By email dated 20 December 2004, addressed to Mr. Mark Malloch Brown, then Administrator, UNDP, the Applicant sought administrative review of the decision to allow his appointment to expire on 31 December 2004.

21. On 27 Jf 0 0 0 rg 0 0 1 90 367.41 12648 Tm [(b)19(e(a)-16(i)17(F1 5(e)3()-301120(a)-16(n

Respondent had put forth a reasonable basis for the decision not to renew the Applicant's fixed term appointment and that there had been no due process failures in the making of that decision.

23. On 17 May 2007, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to accept the recommendation of JAB. The Applicant was also informed that he could appeal the decision directly to the former UN Administrative Tribunal.

24. On 4 September 2008, the Applicant submitted the present application to the former UN Administrative Tribunal while the Respondent filed his Reply on 11 March 2009. The case was subsequently transferred to this Tribunal in January 2010 in accordance with the transitional measures related to the introduction of the new system of administration of justice in the United Nations.

25. The Tribunal heard the case on 16 and 18 May 2011 and from 16 to 19 November 2011. During the hearings, the Tribunal received live evidence from the following witnesses for the Applicant:

- a. The Applicant;
- b. Mrs. Faby Ngeruka;
- c. Mrs. Donnah Kamashazi;
- d. Mr. Gana Fofangand;
- e. Mr. Francis Gatara.

26. Ms. Faby Ngeruka's evidence is summarized above.

27. She was employed as a Gender Specialist for six months in UNDP's Rwanda office in 2002. She knew the Applicant when she worked in Rwanda in his capacity as the President of the Staff Association. She had served as a Vice

President of the Staff Association. She knew the Applicant as a frank, honest and straight talking person.

28. She noticed that the Applicant and Mr. Kamau had problems getting along and that the Applicant's role in the Staff Association caused him problems with Mr. Kamau. She formed these impressions as a result of email exchanges between Mr. Kamau and the Applicant which were copied to other members of the Staff Association. Mr. Kamau had also informed the Staff Association that the Applicant's behaviour was unacceptable.

29. The Applicant's relationship with his colleagues was good and he was voted by all staff in the UN Agencies in UNDP Rwanda to be the President.

30. Ms. Donna Kamashazi's evidence is summarized as follows:

31. She has worked as a Consultant and as a Senior Programme Officer with UN Women (which was 3(z)-16(i)17(' 0.998()190(r)-7(e)-19(f)19(e)3(r)-5(r)-7(e)3(d)-10((s)8(o)-20

She knew the Applicant in ' 0.998 h-7(w)-70(a)3(s)8()-79

memorandum was thereafter sent out ~~My~~. Kamau to all staff members informing them that the Applicant was not allowed to access the premises.

35. Mr. GanaFofang's evidence is summarized below.

36. He has been a UNDP staff member for the past 20 years and was Resident Coordinator for seven years.

37. He was the Applicant's immediate supervisor. He found the Applicant to be forthright in implementing his tasks and very reliable. ~~He~~ did not recall anything disagreeable in his working relationship with the Applicant. ~~He~~ knew the Applicant to be dedicated to the issues he handled.

38. He knew Mr. Kamau and had acted as the Resident Representative in Rwanda before his arrival. Mr. Kamau was not the Applicant's first reporting officer.

39. The procedure for completing a staff member's RCA was as follows. The staff member was given their job performance, the supervisor then provided comments and the report was sent to CRG Committee which is chaired by the head of office. The head of office is also the Resident Representative. The Committee could revise the comments of the supervisor. The staff member could request a rebuttal if he did not agree with the final report from the CRG Committee.

40. He had appraised the Applicant's performance as "fully met expectations". He noted in his appraisal that the Applicant had made progress in the 2002/2003 cycle. His assessment of the Applicant was altered by the CRG. He was not present at the time and was not contacted about ~~He~~ had informed UNDP

that his appraisal of the Applicant's performance had been changed without reference to him

41. When contacted by UNDP's New York office about his views on the Applicant's performance, he stated that his views ~~remained~~ unchanged.

42. A summary of Mr. Francis Gatare's evidence ~~is~~ follows:

43. He used to be a staff member of UNDP, Kigali office where he headed the Strategy and Economic Policy Unit. He had also served as the President of the Staff Association of UNDP and associated agencies. The Applicant was ele.96 Tm [(41)] TJ 6

48. A summary of the Applicant's case as stated in his testimony and pleadings is as follows

49. In 2003, he was nominated by other staff members as a candidate for the Presidency of the Staff Association (SA) but he informed them that he could only accept the mandate after July 2003.

50. When the UNDP RR, Mr. Kamau was informed by some staff members that the Applicant might be the new candidate for Presidency of the Staff Association, he threatened him verbally with the termination of his fixed-term contract if he was elected President. This was because the UNDP RR preferred another candidate.

51. This situation resulted in the RR unsuccessfully pressuring the Deputy, UNDP Resident Representative (the Applicant's supervisor and former Acting Head of Unit) to evaluate the Applicant and terminate him during the January/February 2002-2003 RCA/CRG exercise.

52. An acting Head of Unit (who resigned few weeks later) was manipulated by the UNDP RR into evaluating the Applicant instead of his Supervisor.

55. After his election, Mr. Kamau started undermining him and verbally threatened to terminate his fixed term appointment. He was not happy with the Applicant because as President of the Staff Association, he would not take the side of management as represented by the RR himself on issues.

56. Mr. Kamau unsuccessfully attempted to gain the Applicant's support in the inappropriate and illegal recruitment of a number of Kamau's female friends. He then threatened that they would meet again during the next 2003/2004 UNDP RCA/CRG exercise.

57. Mr. Kamau arbitrarily and against established practice, removed the President of the Staff Association from the Committee in charge of recruitments and also from the CRG Committee in order to effectively manipulate the Committee for his own benefit and to end the Applicant's employment.

58. He then recruited his Ugandan girl friend who was living in Rwanda without advertising the post or conducting an interview. During the same period, the RR impregnated a Rwandese National. This case was reported to the Executive Director of UNICEF, Ms. Ann Venneman, former Representative of UNICEF Rwanda, Ms. Bintou Keita, Mr. James Lee, then Ombudsman, to the Panel of Counsel Office through Ms. Vijaya Claxton, to Marie-Cécile Nocquet, to the then Acting President of the UNDP Staff Association in Rwanda and some Senior staff at UN HQ.

59. During the 2003 RCA exercise, the Applicant's immediate supervisor had rated him as "fully met expectations", following which the UNDP RR downgraded his rating to "unsatisfactory", providing a basis for the latter's decision to terminate his appointment on 21 May 2004, one day after a General Assembly meeting of the Staff Association of UNDP Rwanda and all its sub-agencies. The UNDP RR had acted in retaliation as he was worried about strong recommendations and resolutions taken by the Staff Association at that meeting.

60. Mr. Kamau had waited for a few weeks to ensure that the Applicant's

immediate supervisor had left to assume his ~~posting~~ in Mozambique and that the Associate Human Resources Officer, Ms. Beatrice Uwimbabazi, was away in a meeting held in Brazzaville/Congo, to effect the ~~downgrading~~ of his performance

61. The Applicant had made an official request for rebuttal of ~~HR~~ ~~CA~~ rating which resulted in the rating being changed from “unsatisfactory” to “partially met expectations”. After receiving the findings and recommendations of the Rebuttal Panel, Mr. Kamau sent him a letter informing him of the ~~renewal~~ of his contract beyond 31 December 2004.

62. Between 2003 and 2004, ~~he~~ had

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- a. When Mr. Kamau communicated the email dated 21 May 2004 to the Applicant and the entire UNDP Rwanda staff, he clearly intended to bring the Applicant's fixed-term contract which still had over six months to run, to an immediate end.
 - b. The Applicant was locked out of UNDP premises from 21 May 2004 up until the end of his contract on 31 December 2004.
72. The actions of the Resident Representative against the Applicant amounted to abuse of authority.
73. The Applicant requested the Tribunal to order:
- a. his reinstatement/redeployment to another UNDP Country office or another UN Agency of his choice;
 - b. compensation for lost earnings, including salaries and all entitlements applicable to UN Staff members, from 21 May 2004 until judgment, and interest at the rate of 8 per centum per annum until the compensation is paid;
 - c. compensation

76. The Applicant's case is not a termination but a renewal of his fixed term appointment. This was contained in a letter to the Applicant on 15 December 2004 and was based on unsatisfactory performance in two consecutive performance review cycles.

77. If the Applicant's appointment was effectively terminated by Mamau's letter of 21 May 2004, it cannot be maintained by the Tribunal as the alleged administrative decision was not submitted for administrative review.

78. In view of two consecutive unsatisfactory performance evaluations, the Respondent legitimately exercised discretion not to renew the Applicant's contract in accordance with the applicable UNDP policies.

79. Fixed-term contracts carry no right or expectancy of renewal or conversion to any other type of contract. A legal expectancy of renewal cannot be created by efficient or even outstanding performance.

80. In taking the contested decision, the Applicant's performance was given full and fair consideration. The decision not to extend the Applicant's contract for underperformance was supported by the facts.

81. The Respondent, therefore, requests the Tribunal to dismiss each and all of the Applicant's pleas and to dismiss the Application in its entirety.

Considerations

82. Having reviewed the entire case record, the Tribunal finds that the following legal issues arise for consideration in this case:

- a. Whether the Resident Representative's termination of the Applicant's contract in May 2004 was proper
- b. Whether the non-renewal of the Applicant's contract after 31 December 2004 had sufficient basis under the Staff Rules and Regulation

separation from service do not amount to a termination. This, however, raises the question whether it was lawful to place the Applicant on SLWFP for the said period.

86. The then applicable staff regulation 5.2 of ST/SGB/2003/5, "Staff Regulations", provided that SLWFP could be authorized by the Secretary-General in exceptional cases. Further, the applicable staff rule 105.2 stated that special leave was normally without pay. In exceptional circumstances, special leave with full or partial pay could be granted.

87. In light of all the facts of the case, Mr. Kamau's email of 21 May 2004 purported to place the Applicant on SLWFP as a result of unsatisfactory performance. UNDP guidelines on RCA do not confer any power on the Resident Representative to place a staff member on special leave without pay for unsatisfactory performance! This does not constitute an "exceptional circumstance" as described by the then applicable staff rule. That decision was a breach of staff rule 105.2.

88. The clear answer is that the Resident Representative, Mr. Kamau had acted illegally in so doing since the placement of a staff member on SLWFP is properly provided for under the aforementioned staff rules. None of the conditions of these staff rules had been satisfied and the RR had acted outside the scope of his authority in barring the Applicant from entering the office premises or carrying out his duties whilst placing him on full pay at the expense of the Organization.

89. Not only were the actions of the RR illegal, they were a disguised disciplinary measure designed to humiliate and embarrass the Applicant to the greatest extent possible. What was the need to copy all UNDP Rwanda staff members in the email transmitting this decision? Why was the Applicant barred from reporting to work during this period? Was poor managerial practice the

extreme and an irresponsible and blatant waste of the Organization's resources to place a staff member on full pay for seven months for doing nothing.

Did the non-renewal of the Applicant's contract after 31 December 2004 have sufficient basis under the applicable UNDP legislation or case law?

90. The Respondent had submitted that in the letter of 15 December 2004, the RR had informed the Applicant that his contract would not be renewed beyond 31 December 2004 due to his unsatisfactory performance in two consecutive performance review cycles. He additionally submitted that it was a legitimate exercise of discretion on the part of the Respondent.

91. It was also the Respondent's case that fixed term contracts do not carry any right or expectancy of renewal or conversion to any other type of contract. Employment with the Organization ceases automatically on the expiration date of a fixed-term appointment and a legal expectancy of renewal would not be created by efficient and even outstanding performance.

92. The Respondent further submitted that there was no proof of improper motivation and abuse of authority on the part of the RR that the allegations on this score were without merit and ought therefore to fail.

93. The Applicant's case is that his performance rating for the 2002/2003 period by the CRG was manipulated by the RR, Ghana Fofang who was the Applicant's immediate Supervisor had given unchallenged testimony before the Tribunal that he rated the Applicant as "fully met expectations." This assessment was altered by the CRG hired by the RR in the absence of and without reference to Mr. Fofang. When contacted by officers in the UNDP headquarter offices in New York on the matter, Mr. Fofang stood by his assessment of the Applicant.

94. There is also evidence tendered that Manku had gone the extra mile of unilaterally removing the President of the Staff Association from membership of

Were there any due process violations in the Applicant's performance evaluations?

99. Having found that Mr. Kamau exhibited *animus* against the Applicant, his involvement in the latter's performance evaluation could no longer be considered objective. The undisputed facts of the case show that Mr. Kamau abused his position as Chairman of the CRG to downgrade the Applicant's performance evaluation from "fully met expectations" to "unsatisfactory" as evidenced by the following:

- a. The Tribunal received unchallenged evidence that on 28 February 2004, the Applicant wrote to Mr. Kamau disputing his decision to discontinue the involvement of the Staff Association in the CRG. The Applicant publically challenged this position. These provided motive on the part of Mr. Kamau to get back at the Applicant.
- b. Mr. Kamau was not in a position to directly assess the Applicant's performance. He, nevertheless, chaired the CRG committee meeting to discuss the Applicant's performance evaluation in the absence of the Applicant's immediate supervisor.
- c. Mr. Fofang, the Applicant's immediate supervisor, had the responsibility to directly assess the Applicant's performance. The RR Mr. Kamau disregarded the CRG guidelines by denying Mr. Fofang participation in the CRG committee that downgraded the Applicant's performance evaluation despite the latter's request to participate via telephone or video conference.
- d. The Applicant and several witnesses gave evidence that Mr. Kamau had problems with the Applicant in his capacity as President of the Staff Association. This claim about problems between the Applicant and the RR based on the fact that they found themselves representing management and staff remained unchallenged.

100. There is no gain

104. The RCA Panel also took into account information about the Applicant's "behavioral issues" from what they described as "other credible sources". These "credible sources" were not named and the information obtained from them was not disclosed. The RCA Panel therefore erred in taking them into account resulting in its decision to downgrade the Applicant's performance evaluation to "partially met expectations" which subsequently justified the decision to not renew his fixed term appointment.

105. The witnesses who appeared before the Tribunal gave evidence that is at odds with Mr. Kamau's allegations. Was it probable that a credible individual with poor interpersonal relationships was elected President of the Staff Association by all the staff of UNDP and its affiliated agencies? The live testimony received by the Tribunal paints a different, more positive picture of the Applicant as opposed to that described by Mr. Kamau. The Respondent failed to call evidence to prove any of Mr. Kamau's allegations.

106. UNDP rules provide clear procedures which must be adhered to in determining the veracity of any allegations of misconduct made against a staff member. Where these procedures have not been complied with, there can be no basis for concluding that such allegations have been substantiated.

107. The Tribunal finds that there were due process and procedural violations in the Applicant's performance evaluations leading up to the decisions to downgrade his performance evaluation from "fully met expectations" to "unsatisfactory" and in the RCA Panel's ET Q q BT /BT /F1f 0 0 0 rg 0b Tm [(do)-20(wn)19(gr)-7(a)3

UNDP's Policy on Workplace Harassment, Sexual Harassment and Abuse of Authority dated 2005 defines abuse of authority as follows:

The abuse of authority is the improper use of a position of

d. The Applicant failed to challenge the decision purportedly terminating him and barring him from access to his workplace. The application based on termination is therefore not receivable. The Tribunal's findings on this score, however, will assist in establishing the true reasons underlying the decision not to renew the Applicant's fixed term appointment.

e. Mr. Kamau abused his position as Chairman of the CRG to downgrade the Applicant's performance evaluation from "fully met expectations" to "unsatisfactory."

f. The RCA Panel erred in taking into account certain vague and unsubstantiated allegations made against the Applicant by the RR as the basis for downgrading his performance evaluation to "partially met expectations."

g. The RCA Panel also took into account information about the Applicant's "behavioral issues" from what they described as "other credible sources". These sources are unnamed and the information provided by them not disclosed in the RCA report. The RCA Panel erred in taking them into account in its decision to downgrade the Applicant's performance evaluation to "partially met expectations."

h. UNDP rules provide clear procedures which must be adhered to in determining the veracity of any allegations of misconduct made against a staff member. Where these procedures have not been complied with, there can be no basis for concluding that such allegations have been substantiated.

i. The Tribunal finds that there were due process and procedural violations in the Applicant's performance evaluations leading up to the decisions to downgrade his performance evaluation from "fully met expectations" to "unsatisfactory" and in the RCA Panel's decision to give

113. The Applicant is entitled to the payment of interest on the awards from the date this Judgment is executable at the US\$4,176,906.48. The interest shall be calculated at the rate of 7% per annum from the date of the award to the date of payment.