KELLIE

v.

COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Kelvin Kellie (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent), not to renew his fixed-term appointment.

Facts

2. Effective 14 September 2014, the Applicant was employed by the Agency as the Chief, Procurement and Logistics Division (“C/PLD”), P5, in Headquarters Amman (“HQA”) on a fixed-term appointment for two years.

3. On 4 August 2016, the Director of the Human Resources (“DHR”) sent an email informing the Directors within the Agency that the International Staffing Review (“ISR”) would be concluded in the last quarter of 2016. For each Director the email included a list of the international posts in his or her respective Departments. The DHR requested the Directors to provide a justification for the retention of the listed international posts.

4. On 21 August 2016, the DHR verbally informed the Applicant that his fixed-term appointment would not be renewed. By email to the DHR dated 22 August 2016, the Applicant complained about this verbal decision. On the same day, the DHR confirmed in writing the decision not to extend the Applicant’s fixed-term appointment. The letter indicated that the Applicant was given three months’ notice for the non-renewal of his contract.

5. In a “note for file” the DHR made a short summary of the 21 August 2016 meeting with the Applicant, noting that the reasons for the decision not to renew the Applicant’s contract were the restructuring of the Procurement and Logistics Division (“PLD”) and the ongoing ISR.

6. By letter to the Applicant dated 23 August 2016, the Chief, Human Resources Services Division wrote to the Applicant, confirming the extension of the
Applicant’s appointment for a period of three months. The extension served as a notice period for the non-renewal of his appointment beyond 13 December 2016.

7. On 10 September 2016, the Applicant submitted a request for review of the decision not to extend his appointment.

8. On 9 October 2016, the Advisory Committee on Human Resources (“ACHR”) recommended not to extend the Applicant’s appointment. The recommendation was approved by the Commissioner-General on 12 October 2016.

9. By letter dated 9 November 2016, the DHR informed the Applicant of a further renewal of his contract until 31 December 2016. The letter also stated that, as his post would be abolished following the proposal submitted to the ISR, he would be separated from service on the same date. The Applicant rejected the offer and was separated effective 13 December 2016.

10. On 5 December 2016, the Applicant filed his application with the UNRWA Dispute Tribunal (the “Tribunal”). The application was transmitted to the Respondent on 5 December 2016.

11. On 23 December 2016, the Respondent filed a “Motion for Extension of Time to file a Reply”. The motion was transmitted to the Applicant on 27 December 2016.


13. On 4 February 2017, the Respondent filed his reply. The reply was transmitted to the Applicant on 5 February 2017.

14. On 12 February 2017, the Applicant filed two motions. In one motion the Applicant requested to submit observations and supplementary evidence on the Respondent’s reply. In the other motion he requested the Tribunal to order the Respondent to produce certain documents.

15. On 13 February 2017, the Applicant’s two motions were transmitted to the Respondent.
16. By Order No. 033 (UNRWA/DT/2017) dated 27 February 2017, the Tribunal granted the Applicant’s motion to submit observations and supplementary evidence. With respect to the Applicant’s request for the production of documents, the Tribunal indicated that it needed time to examine the case file, and that the parties would be informed in due course with respect to the Applicant’s request for production of documents.

17. On 7 March 2017, the Applicant filed his observations on the Respondent’s reply. The observations were transmitted to the Respondent on 8 March 2017.


19. On 11 December 2017, the Respondent filed a motion for leave to submit comments on the observations of the Applicant. The Respondent also filed a motion for extension of time to respond to Order No. 167. The two motions were transmitted to the Applicant on 12 December 2017.

20. On 19 December 2017, the Applicant filed a motion objecting to the Respondent’s two motions. The Applicant’s motion was transmitted to the Respondent on 20 December 2017.

21. By Order No. 183 (UNRWA/DT/2017) dated 21 December 2017, the Respondent’s two motions were granted.

22. On 28 December 2017, the Respondent filed ex parte his response to Order No. 167.

23. On 4 January 2018, the Respondent filed his comments on the Applicant’s observations.

24. On 9 January 2018, the Respondent’s response to Order No. 167 was transmitted to the Applicant in redacted form, along with the Respondent’s comments on the Applicant’s observations.
25. On 16 January 2018, the Applicant filed a motion for leave to submit observations on the Respondent’s comments on the Applicant’s observations and supplementary evidence. The motion was transmitted to the Respondent on the same day.

26. By Order No. 013 (UNRWA/DT/2018) dated 21 January 2018, the Applicant’s motion was granted.

27. On 28 January 2018, the Applicant filed his observations and supplementary evidence. The Applicant’s submission was transmitted to the Respondent on the same day.

**Applicant’s contentions**

28. The Applicant contends:

   (i) International posts in the PLD were never part of the management review discussions or minutes, and they were not affected by the Post Harmonisation exercise;

   (ii) There was a legitimate expectation of renewal as in August 2016, the need for his post was confirmed by both the Deputy Commissioner-General (“DCG”) and the Director of Administrative Support Department (“D/ASD”). Also, on 15 August 2016, the Officer of the International Personnel Section of the Human Resources Department sent him an apology by email for the delay in processing the Applicant’s contract extension. Furthermore, the notice not to renew his contract was so short that at that point in time he could not have expected not to be renewed. Lastly, the DHR had sent emails to all Directors with information which confirmed the ongoing specific funding from the United Nations (“UN”) for his post;

   (iii) In the letter dated 22 August 2016, the DHR specified that the reasons for the non-renewal decision were twofold: funding and no further need for the post. This is different from the reasons which were stated in the meeting of 21 August 2016. This discrepancy shows an abuse of power and discrimination;
(iv) The DHR’s letter dated 9 November 2016 is an attempt to introduce a new administrative decision with different reasons. This letter was sent after the decision review request wherein the Applicant pointed out that there had been no recommendation from the ACHR for his non-renewal. It is clear that the decision not to renew his contract was taken before it was submitted to the ACHR. This constitutes an abuse of power and a procedural irregularity;

(v) The ACHR meeting minutes submitted by the Respondent are erroneous, inaccurate and invalid;

(vi) The DAS ISR Report provided four options. The Applicant’s experience and academic qualifications make him well suitable for a post in all of the four options. His post of C/PLD was reclassified at the P4 level. He should have been appointed directly to this position in accordance with the Agency’s framework. All international posts in the PLD, at the P4 level and in the Field Offices, with the exception of his, received their contract extensions based on the same post descriptions;

(vii) The Agency’s practice was not honoured as his supervisor was contacted only 28 days before the expiry of his contract. His supervisor’s recommendation for the extension of his contract was not accepted;

(viii) The UN General Assembly Funding Board’s rules and regulations regarding specific funded posts were not followed by the decision to divert the specific funding for his post;

(ix) He was discriminated against as he received unequal treatment, and he was personally targeted; and

(x) The DCG had a conflict of interest as she was both the Chair of the ACHR and his Second Reporting Officer.

29. The Applicant requests:

i) The rescission of the decision not to renew his appointment; and
ii) To be granted compensation for the three years of salary and benefits that he would have earned had the Agency followed the normal Agency’s practice and procedures.

**Respondent’s contentions**

30. The Respondent contends:

i) The decision not to renew the Applicant’s appointment was properly effected; the Applicant’s letter of appointment provides for the clause that the appointment does not carry an expectation of renewal;

ii) No legitimate expectation for renewal was created as only a firm commitment to renewal can create this expectation. Presentations and reports do not create such expectation;

iii) Separation can occur without prior notice and in the instant case, a three month notice was provided. DCG’s queries and responses by the D/ASD and confirmation of continued funding for a post do not per se create a legitimate expectation; neither do extensions of contracts of other PLD staff members, all of whom are at more junior levels;

iv) The procedural irregularity not to consult the ACHR was superseded by subsequent action. The ACHR recommended to the Commissioner-General not to extend the Applicant’s contract. The Commissioner-General approved the recommendation on 12 October 2016. The Agency was entitled to remedy the anomaly of prior ACHR’s consultation and there is no abuse of power;

v) The letter dated 22 August 2016 was superseded by administrative action of 9 November 2016; therefore, it is immaterial to consider the validity of the reasons proffered in the earlier communication;

vi) The Commissioner-General approved the recommendation not to extend the Applicant’s contract based on the proposal submitted to the ISR to abolish the post and the Agency-wide PLD review process, which were
included in the Post Harmonisation exercise. These reasons were reflected in the letter from the DHR dated 9 November 2016.

vii) It was not only the Applicant’s post that was proposed to be abolished; two other posts at the P5 and D1 level were also abolished; and

viii) There was no rule at the material time which obligated the Agency to find an alternative position for the Applicant.

31. The Respondent requests the Tribunal to dismiss the application in its entirety.

Considerations

Preliminary issue

32. In his application, the Applicant requested an oral hearing. The Tribunal considers that the facts are not disputed, that the evidence in the record is clear and abundant, and that there is no need for a hearing to be held.

33. On 22 August 2016, the Applicant was informed that his fixed-term appointment would not be renewed beyond 13 September 2016. However, by a subsequent decision his contract was extended until 31 December 2016. Therefore, even if the Applicant was separated on 13 December 2016, the Tribunal considers that the Applicant, in fact, is contesting the decision dated 9 November 2016 not to renew his appointment after 31 December 2016.

Merits

Expectation of renewal

34. The Applicant claims that he had a legitimate expectation of renewal of his fixed-term appointment. He claims that the Agency created a legitimate expectation for the extension of his fixed-term appointment as he was informed about the non-extension only three weeks before the expiry of his appointment. The Applicant claims that all the previous meetings, minutes, reports and written and verbal exchanges regarding his position and other PLD staffing arrangements for 2017 had established this expectation.
35. International Staff Rule 104.3 provides: “[t]he fixed term appointment does not carry any expectation of renewal or conversion to any other type of appointment”.

36. With regard to fixed-term appointments the UNAT has stated:

   It is well-established that a fixed-term appointment has no expectation of renewal or conversion to another type of appointment. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds the Administration has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive. The staff member has the burden of proving such factors played a role in the administrative decision.¹

37. As the Applicant’s letter of appointment provides that his appointment does not carry an expectation of renewal, the Applicant has the burden to prove that the decision not to renew his appointment was tainted by bias, discrimination or improper motive.

38. The Tribunal must consider whether the Applicant received an express promise from the Agency which could have led him to believe that if his contract was renewed, it would be under the same conditions.

39. The United Nations Appeals Tribunal (“UNAT”) in Igbinedion 2014-UNAT-411 held that only an express promise by the Administration to the staff member in writing can create an expectation of renewal. The Tribunal notes that the file is devoid of any express promise to the Applicant in writing that his contract would be renewed. The Tribunal agrees with the Respondent that presentations and reports such as those referenced by the Applicant do not create a legitimate expectation of renewal of the Applicant’s appointment. Furthermore, the option to disband the entire Administrative Support Department was on the table during the ISR.

¹ Pirnea 2013-UNAT-311; Badawi 2012-UNAT-261; Ahmed 2011-UNAT-153; and Syed 2010-UNAT-061.
**Bias and/or discrimination**

40. The Applicant submits allegations of bias and discrimination, claiming that other international staff members within the same Department were granted further contract extensions and were not separated from the Agency. However, the Respondent has clarified that other international staff members within the Department held different positions at different grade levels; therefore, a true comparison cannot be made. Furthermore, it is clear from the case file that some of these international staff members have since been separated from the Agency.

41. The Applicant raises that he should have been offered a post at the P4 level, as he claims that other staff members had been transferred to different positions. However, the Tribunal agrees with the Respondent that, at the time of the impugned decision, there was no obligation for the Agency to do this. Furthermore, there has been no evidence submitted regarding how certain staff members were appointed to other positions. Indeed, they may well have applied for other positions. The Tribunal agrees with the Respondent that there were no posts that were automatically available to the Applicant. Furthermore, it is clear from the case file that the Agency had told the Applicant that he himself could apply for other positions at the time when official recruitments were opened.

**Procedural irregularity**

42. The Tribunal acknowledges that the first decision not to renew the Applicant’s appointment for a period of three years was tainted by a procedural irregularity as the ACHR had not been consulted before the decision was communicated to the Applicant. It is established that, on 22 August 2016, when the Applicant was informed that his appointment would not be extended beyond 13 September 2016, the ACHR had not yet been consulted.

43. However, by subsequent decision, dated 9 November 2016, the Applicant’s contract was extended until 31 December 2016. At the date of that decision, the ACHR had been consulted and had recommended not to extend the Applicant’s contract. Therefore, the last decision is not tainted by any irregularity.
44. The Applicant also claims that the DCG had a conflict of interest when she recommended the restructuring of PLD, as she was the ACHR Chair while also being his second supervisor. The Tribunal finds that there is no conflict of interest for the DCG to chair a committee where the restructuring of a department is proposed, even if she is the second reporting officer of a staff member that would be affected. The DCG is the second supervisor to many senior staff members and, given her office, she has the duty to also address issues such as the restructuring of Agency Departments. As the Applicant’s evaluation of performance was not the cause of the restructuring, the Tribunal finds that the DCG did not have a conflict of interest.

45. It is clear from the case file that there had been several meetings, reports and presentations about the ISR. It is also clear that one of the options offered to the ISR called for disbanding the entire ASD. The Respondent has submitted documents establishing that, following the ongoing ISR, it was decided to restructure the PLD. Minutes of International Staffing Review Committee Meetings held on 21, 22 September 2016 and 8 December 2016 are clear; it was decided that the post of C/PLD would be disbanded and that the D/ASD would become a P5 Chief, Central Support Division. The Commissioner-General is in charge of the organization of all UNRWA Departments and in this capacity he has a large discretionary authority. The Applicant did not establish that the decision to abolish his post was discriminatory or motivated by improper reasons. The Tribunal concludes that the Applicant had not established that the decision to abolish his post was unlawful.
Conclusion

46. In view of the foregoing, the Tribunal hereby DECIDES:

The application is dismissed.

(Signed)  
Judge Jean-François Cousin  
Dated this 21st day of February 2018

Entered in the Register on this 21st day of February 2018

(Signed)  
Laurie McNabb, Registrar, UNRWA DT, Amman