BELLO

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Anna Segall
Introduction

1. This is an application by Hugues Bello (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 extend his fixed-term appointment.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (“JAB”) was abolished as of 1 July 2009. Effective 1 June 2010, as set out in International Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the JAB has been submitted to the Commissioner-General.

Facts

4. Effective 14 January 2006, the Applicant joined the Agency as Chief, Human Resources Planning & Development Division, P-5, at HQ Gaza, on a fixed-term appointment for one year. His appointment was extended for an additional year, subject to a probationary period.

5. On 4 December 2006, the Director of Administration and Human Resources (“DAHR”) completed the Applicant’s Performance Evaluation Report (“PER”) for the period of 14 January 2006 to 31 October 2006. On 7 December 2006 it was endorsed by the Deputy Commissioner-General. The Applicant’s overall performance was rated as “a satisfactory performance”. In Section III of the PER, the DAHR commented on various aspects of the Applicant’s work:
1. Professional/technical competence:

Hugues possesses HR skills and keeps up to date in his area. He has not however caught up with the required procedural and rules issues related to and apply [sic] to UNRWA’s work.

2. Quality of work accomplished:

The quality of work varied depending on the product. In the area of training the level was very good but in areas of implementing the HRM strategy and where writing input was required, quality was not up to the required standard.

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4. Speed of work:

Hugues acts quickly on issues but productivity suffers in many occasions because of the quality of the product; a lot of time is lost on revisions.

5. Initiative:

Came up with new constructive ideas but did not follow some of them to implementation though was asked and he committed to do so.

6. Ability to work independently or with minimal supervision:

Reliable in the area of training but in other areas his work frequently requires revisions and follow up.

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9. Written and oral expression in working language:

Expresses himself very well orally. His writing skills are yet to be proven. He needs to review material that he adopts from other sources critically and to make sure that all fit with each other.

6. Prior to completing the Applicant’s PER for the period 1 November 2006 to 30 November 2007, the Director of Human Resources (“DHR”), his direct supervisor at the time,¹ asked the Applicant’s two previous supervisors to provide

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¹ The Tribunal understands the Respondent’s use of the term “direct supervisor” to refer to the first reporting officer per former International Staff Personnel Directive No. 1/112.6/15, in effect at the material time.
input regarding his performance. By email dated 12 November 2007, the Applicant’s supervisor from 1 January 2007 to 28 February 2007 outlined the shortcomings of the Applicant and concluded by saying:

In a small department such as ours, a staff member at that level who is not self-reliant and multi-skilled and not able to move the work and the team forward without seeking constant direction or support is a drain on the department’s resources and reduces its effectiveness.

7. By email dated 15 November 2007, the Applicant advised the Commissioner-General of his difficulties and his deteriorating working relationship with the new DHR. He also considered that the recent PER (which was later finalised on 9 December 2007) did not reflect his contribution and that of the team.

8. By email dated 18 November 2007, the Applicant’s supervisor from 14 January 2006 to 31 December 2006 wrote:

... I recall that I had to review his [the Applicant’s] work extensively. I needed to follow up him [sic] closely to make sure that the work is done with high quality. I must say that after, the discussion I had with him when completing the PER process, he showed more activity in finishing the work in shorter periods but still the quality suffered…

As I said during our verbal discussion, at the time I gave him the benefit of the doubt when I completed his PER as he was on sick leave for quite a while. His work during his presence was not up to the expected standards from a P5.

9. The Applicant’s PER for the period 1 November 2006 to 30 November 2007 was completed by the DHR on 28 November 2007, and by the Deputy Commissioner-General on 1 December 2007. The Applicant’s performance was rated as “a performance that does not fully meet standards”. His performance was described by the DHR, inter alia, in the Section III of the PER:

2 It must be noted that the Applicant had three different supervisors, i.e. first reporting officers during the reporting period in question:

1. DAHR: 1 November - 31 December 2006;
2. OiC DHR: 1 January - 28 February 2007; and
2. Quality of work accomplished:

No significant innovations, policies or systems have been delivered (by the Applicant). The quality of work received by me is often such that it has to be re-done by others or by me;

3. Quantity of work accomplished:

As Chief of HR Planning and Development Division, (the Applicant) should spearhead the OD HR initiatives. In fact he involved himself in OD activities only to a very limited extent. With regard to other HR work, the productivity of the Division and of himself is far below of what should be expected;

4. Speed of work:

When given an assignment with a deadline, Mr. Bello delivers a product at the deadline, but the product is often not well thought through and the consultation with relevant stakeholders is often not done to the extent needed. As a result, while the product is delivered on time, the quality is below standard.

6. Ability to work independently or with minimal supervision:

Mr. Bello tends to wait for direction and needs very extensive guidance.

10. On 11 December 2007, the Human Resources Committee recommended the non-extension of the Applicant’s fixed-term contract. On 15 December 2007, the Commissioner-General approved the recommendation.

11. On 17 December 2007, the DHR advised the Applicant that his appointment would not be extended beyond its expiry date of 13 January 2008.
12. By email dated 31 December 2007, the Applicant submitted a rebuttal of his PER for the period 1 November 2006 to 30 November 2007 to the Human Resources Committee.³

13. By email dated 2 January 2008, the Applicant requested a review of the decision not to renew his fixed-term appointment.

14. Effective 13 January 2008, the Applicant was separated from service.

15. By email dated 18 February 2008, the Applicant filed an appeal with the JAB.

16. By memorandum dated 15 May 2008, the DHR submitted comments on the Applicant’s PER rebuttal to the Human Resources Committee.

17. By memorandum dated 20 July 2008, the Applicant was informed that the Human Resources Committee had reviewed his PER rebuttal, the comments of his reporting officers and other supporting documents and had recommended that no changes be made to his PER for the period 1 November 2006 to 30 November 2007.

18. On 20 June 2012, the Respondent filed his reply.

 Applicant’s contentions

19. The Applicant is contesting the Respondent’s decision not to extend his fixed-term appointment, however, without setting out the grounds of his appeal or asking the Tribunal to provide any relief. The Tribunal notes however, that in the Applicant’s 2 January 2008 request for decision review, the Applicant alleges the DHR’s potential conflict of interest in regard to the Human Resources Committee in charge of conducting his rebuttal process.

Respondent’s contentions

³ The Tribunal notes that while former Personnel Directive No. I/112.6/15, refers to the Periodic Reports Review Committee as the reviewing body of the PER rebuttal procedure, at this point in time the Human Resources Committee was in charge of the rebuttal process at the Agency.
20. The Respondent contends that the decision not to extend the Applicant’s fixed-term appointment was properly made, and requests that the Tribunal dismiss the application.

Case Management Hearing

21. On 25 June 2012, the Tribunal held a case management hearing in the main conference room at HQA, specifically to ask the parties if they had any new and relevant evidence to submit in this case. The correspondence leading up to the case management hearing between the Registrar and the Applicant is rather extensive and therefore requires some chronology.

22. On 13 June 2012, by email, the Registrar of the Tribunal informed the Applicant that a case management hearing would be held in his case on 25 June 2012. The Registrar asked the Applicant to confirm attendance (in person, by telephone or video conference) by 19 June 2012.

23. On 19 June 2012, after receiving no response from the Applicant, the Registrar by email, reminded the Applicant of the deadline.

24. On 20 June 2012, the Applicant wrote to the Registrar and said he could not attend in person as he was currently on mission in China. On that same day the Registrar wrote to the Applicant asking if he wished to attend by telephone and if so, asking if 4:00 p.m. Amman time was possible. Later that evening, the Applicant communicated to the Registrar that he intended on attending by video conference, but could not confirm until Friday 22 June 2012. The Applicant also noted that if the video conference was not possible he would attend by telephone.

25. On 24 June 2012, on the eve of the case management hearing, having received no confirmation, the Registrar wrote to the Applicant asking him to confirm whether he would attend by video conference or telephone. The Applicant responded that same day that he would attend by phone and requested that the Registrar provide him with the telephone number to call. The Applicant was provided with the telephone number and was asked by the Registrar to supply
his telephone number to the Tribunal in case he faced difficulties in calling in. The Applicant did not provide the Registrar with the requested information, yet replied asking the current local time in Amman. The Registrar, by email, responded that the time “[r]ight now is 3:50” in Amman.

26. On 25 June 2012, the Applicant was reminded by email of the time of the case management hearing and was again requested to provide the Tribunal with a telephone number. The Applicant never responded. At 4:00 p.m. Amman time, after testing the telephone equipment, the case was called.\(^4\) The Tribunal waited for 20 minutes, yet received no phone call from the Applicant. At 4:20 the hearing was adjourned.

27. At 5:01 p.m. on 25 June 2012, the Applicant sent an email to the Registrar saying that he had called the telephone number she had provided him but was not getting an answer. The Registrar then informed him that he had miscalculated the time and was one hour late. She further told him that the Tribunal had waited for his call which never came, the hearing had been adjourned and his case had been taken under reserve. The Applicant acknowledged the Registrar’s email.

**Considerations**

**Main Issues**

*Was the Respondent’s decision not to extend the Applicant’s fixed-term appointment properly made?*

28. It is important to look at the legal basis in this case, the decision not to renew the Applicant’s contract. The fixed-term appointment of the Applicant is subject to International Staff Rule 104.3 which provides, in relevant part, the following:

(a) fixed-term appointment

The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a

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\(^4\) The attendants at the case management hearing included: the Judge; the Registrar; the Tribunal’s Associate Legal Officer; Counsel for the Respondent; two observers from Human Resources and IT support.
period not exceeding two years to persons recruited for service of prescribed duration, including persons temporarily seconded by national governments or institutions for service with the Agency. The fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment.

29. The Tribunal notes that the Applicant's letter of extension of appointment provided that his fixed-term appointment would be subject to a probationary period of one year, going from 14 January 2007 to 13 January 2008, and to the applicable provisions of the International Staff Regulations and Rules.

30. The Tribunal takes guidance from the former United Nations Administrative Tribunal (“UN Administrative Tribunal”) holding in Judgment No. 1010 Kanj (2001) that probation means that a staff member must complete a period in which he/she must demonstrate efficiency and adaptation to his/her working conditions.

31. The Tribunal, as well as the United Nations Appeals Tribunal, have consistently held that:

   (i) the holder of a fixed-term appointment is not, in principle, entitled to renewal of his/her contract,

   (ii) no right of renewal of a fixed-term appointment derives from a series of fixed-term contracts,

   (iii) the decision whether or not to renew a fixed-term appointment lies within the discretionary power of the Commissioner-General,

   (iv) in the absence of countervailing circumstances, non-renewal will not give rise to any rights on the part of the staff member.

32. The Applicant is reminded that a fixed-term contract automatically expires on its expiration date and that no legal expectancy of renewal follows from quality of performance. Koumoin 2011-UNAT-119, Syed 2010-UNAT-061 and Rantsiou UNRWA/DT/2011/006. Even an outstanding performance will not give rise to a legal expectancy or to legal entitlement, as held by the UN Administrative Tribunal in Judgment No. 1247, (2005), and Judgment No. 1399, (2008). The
United Nations Appeals Tribunal confirmed this jurisprudence when it held in *Ahmed* 2011 UNAT-153, paragraph 47, that:

> We concur with the former Administrative Tribunal which held that, unless the Administration has made an “express promise … that gives a staff member an expectancy that his or her appointment will be extended”, or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member’s fixed-term appointment is not unlawful.

33. In the case at bar, the Tribunal notes no such promise on the part of the Agency. The Applicant has not provided evidence - convincing or otherwise - that the Agency created a legal expectancy that his fixed-term appointment would be extended beyond its expiry date of 13 January 2008. On the contrary, the Agency had indicated to the Applicant, through PERs, comments and additional guidance from the DHR since March 2007, that his performance raised concerns as early as his first year with the Agency. Indeed, the extension of the Applicant’s appointment in the second year was subject to a probationary period and follow-up discussions between the Applicant and his supervisors, as confirmed by the fact that the Applicant’s performance throughout his probationary period was rated as “a performance that does not fully meet standards”.

34. The Tribunal is of the belief that the Applicant reasonably should have known that the renewal of his fixed-term appointment beyond its expiry date of 13 January 2008 would not automatically follow, even in the event that his PER rebuttal was successful. The Tribunal finds that the Applicant has failed to meet the requisite burden of proof with regard to the Agency creating a legal expectation that his appointment would be renewed. The Tribunal refers to the UN Administrative Tribunal Judgment No. 834 in *Kumar* (1997):

> [The Tribunal] has noted that the Applicant’s performance evaluation reports have consistently assessed his performance as “very good” or “good” and that he has received a number of complimentary letters for a job well done. Nonetheless, the Tribunal may not substitute its judgment for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors, which the Tribunal has not found in this case.
Was the Respondent’s decision not to extend the Applicant’s fixed-term appointment tainted with improprieties?

35. The jurisprudence of the United Nations Appeals Tribunal is clear in according the Commissioner-General broad discretionary authority in the application of the Agency’s Staff Regulations and Rules, and provides that, while the exercise of that discretionary authority is not unlimited, it will not be disturbed unless the decision was arbitrary or capricious, motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law. When an Applicant alleges that the decision is tainted with improprieties, he/she must adduce convincing evidence in support of his/her allegations, as held by the UN Administrative Tribunal in Judgment No. 553, Abrah (1992).

36. The record in the file indicates that the Respondent’s decision not to extend the Applicant’s fixed-term appointment was based on shortcomings of the Applicant during his probationary period which had been identified and properly documented. The Agency’s records demonstrate the Applicant’s inadequacy in relation to the Agency’s standards of performance, and his failure to adapt to his working conditions as Chief, Human Resources Planning & Development Division. Despite having had his attention drawn to his shortcomings and the Agency’s efforts to help him improve, including frequent discussions with his supervisors as indicated in his PER, the Applicant continued to perform at a less than satisfactory level and failed to meet the requirements of the post during the probationary period. The Tribunal does not find any impropriety in the Respondent’s decision not to extend the Applicant’s fixed-term appointment. However, while not affecting the judicial review on the non-extension, the Tribunal notes the Agency’s failure to comply with former Personnel Directive No. I/112.6/15, in effect at the material time, on the PER rebuttal procedures. While procedural irregularity is present and the Tribunal finds such non-compliance inexcusable, it nonetheless does not prejudice the original decision, as the procedural irregularity occurred after the contested administrative decision was lawfully taken.
37. In regard to the Applicant’s allegation of the DHR’s possible conflict of interest, as she was a member of the Human Resources Committee in charge of the PER rebuttal process, there is no evidence in the file of her actual participation as a panel member. However, if indeed the DHR did participate as a panel member in the Applicant’s rebuttal process, the Tribunal finds such participation inappropriate. Moreover, the Tribunal suggests that in the future reporting officers not be included on rebuttal panels when the subject of review is a decision that they in fact made.

38. The Applicant has not produced any evidence - convincing or otherwise - of arbitrariness or capriciousness, prejudice or improper motivation, procedural irregularity, or error of law in respect of the Respondent’s decision not extend his fixed-term appointment. The Tribunal finds that the Respondent’s decision was properly based on the application of International Staff Rule 104.3(a) and in line with the Commissioner-General’s broad discretionary authority.

Conclusion

39. Given all the above, the Tribunal determines that the application has no merit. The application is dismissed.

(Signed)  
Judge Bana Barazi  
Dated this 22nd day of July 2012

Entered in the Register on this 22nd day of July 2012

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