

Judgement No. 287*(Original: English)***Case No. 265:
Harkins****Against: The United Nations Relief
and Works Agency for
Palestine Refugees in
the Near East**

Non-renewal of the fixed-term appointment of a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

Staff Rule 104.3 (a).—No legal expectancy of further employment of the Applicant had been created.—Discretionary power of the Respondent in the matter.—There was no prejudice of any kind on the part of the Respondent.—The Applicant's challenge with respect to the composition of the Joint Appeals Board.—The Tribunal concludes that there was no miscarriage of justice or biased proceedings because of the composition of the Board.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Arnold Kean; Mr. Luis de Posadas Montero;

Whereas, on 17 June 1981, Adrian I. Harkins, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), filed an application the pleas of which read:

“The Applicant alleges non-performance on behalf of the Agency of the terms of his contract and requests the payment of salary for five years in compensation therefor.”

Whereas the Respondent filed his answer on 14 October 1981;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 10 October 1976 under a fixed-term appointment of one year with an initial assignment as an Administrative and Protective Services Officer at the P-3 level in the Department of Personnel and Administration at UNRWA Headquarters at Beirut, Lebanon, but initially on temporary duty at Amman, Jordan; the letter of appointment specified that after the completion of six months of satisfactory service the appointment should automatically be extended to two years with an expiry date on 9 October 1978, if not converted to a temporary indefinite appointment under the provisions of paragraph (c) of Staff Rule 104.3. On 13 April 1977 the Applicant was informed that his appointment had been extended to 9 October 1978. On 20 September 1978 he was offered a one-year extension of his appointment “in the same terms and conditions stated therein, with the understanding that the post you are now occupying will be reviewed after another six months to determine whether it will be needed on a continuing basis after Headquarters moves to the Vienna International Centre”; the Applicant accepted the offer on 3 October 1978. On 4 April 1979 the Director of Personnel

informed the Applicant that it had been decided to defer the review of his post "until three months after the move of Headquarters to the Vienna International Centre, i.e. probably about the end of 1979". On 25 September 1979 the Director of Personnel sent the following letter to the Applicant:

"In my letters of 20 September 1978 and 4 April 1979, I informed you of the possibility that the post you now occupy might not be needed on a continuing basis after the move of Headquarters to the Vienna International Centre. In my letter of 4 April 1979, I informed you that the post would be reviewed again three months after the move to the VIC. In connexion with reviewing your fixed-term appointment, which expires on 9 October 1979, the Agency necessarily has had to bring forward the review of your post to determine whether it is still required on a continuing basis. The Agency has concluded, after careful examination, that your post will no longer be required after 31 December 1979.

"When I wrote to you in April 1979 that your post might be abolished, I informed you orally that if your post is abolished, the possibility of the Agency's being able to reassign you to another post would depend partly on the availability of a suitable post and partly on your performance in your current assignment. I also suggested you discuss your performance with your supervisors.

"On 12 September 1979, the Director of Administration, Relief and Information informed you of the unsatisfactory aspects of the Periodic Report by your supervisors on your performance during the past 12 months. The Commissioner-General's Periodic Reports Review Committee, having carefully considered this report and having discussed it exhaustively with the Director of Administration, Relief and Information, has recommended and the Commissioner-General has decided that the annual increment due to you on 1 October 1979 be withheld and that your fixed-term appointment be allowed to expire rather than converted to an indefinite appointment.

"While no notice period is required upon the expiration of a fixed-term appointment, you would have little time to wind up your affairs by the expiration of your fixed-term appointment on 9 October 1979, and the Commissioner-General, therefore, has authorized me to offer you an extension of your current fixed-term appointment to close of business on 31 December 1979, in the same terms and conditions as in your current appointment.

"..."

On 28 September 1979 the Applicant accepted the offer to extend his appointment to 31 December 1979. In a letter dated 8 October 1979 the Applicant asked the Commissioner-General to reconsider the decision that his annual increment be withheld and that his fixed-term appointment be allowed to expire rather than converted to an indefinite appointment, on the following grounds:

"My reason for asking you to do so is because you may be unaware that at no time until 12 September 1979, when Mr. Defrates discussed my periodic report with me, had I been informed by my supervisors that they were generally dissatisfied with my performance. On the contrary, I had reason to believe my performance was satisfactory. If you refer to the attached correspondence concerning my employment (I have highlighted those parts I believe to be particularly relevant), you will note that not only did the Director of Personnel presumably believe that my performance was good (since he said nothing to the contrary), but I confirmed that understanding

in my reply. If my understanding either concerning effective assurance of an alternative assignment or my good performance record was misplaced, the Administration was clearly under a moral onus to put me right. It did not do so, and I can only assume that at that time my supervisors were entirely satisfied with my performance. Indeed, when I discussed my performance with Mr. Defrates shortly after this exchange of correspondence he confirmed orally that I had no reason to suppose that it fell below an acceptable level.

"If my performance was subsequently inadequate my supervisors should have interviewed me formally concerning any unsatisfactory aspects of my work and given me a reasonable amount of time before the periodic report was due in which to put matters right. That presumably is one of the vital functions of a supervisor. I was simply told that my report was unsatisfactory on 12 September and thirteen days later received the Administration's decision to terminate me on these grounds.

"I hope you will agree that I should have been given time to improve, if indeed my performance was inadequate as has been suggested to me so recently. I have no wish to be compelled to take my case to the Administrative Tribunal in New York, though I believe my case to be clear cut, since it is based not upon the non-renewal of a fixed-term contract but upon unsatisfactory performance when previous performance had been satisfactory. Instead, I hope that you will grant me a reasonable period, i.e. ten months from 31 December (the expiry date of my present extension) in which to demonstrate that I can, as I believe I have already done, work satisfactorily.

"I should like to add that in any case, any termination before I am 55 (in September 1980—thereafter enjoying improved pensionable remuneration and, incidentally, ensuring after-service medical coverage for my family and myself under the Van Breda scheme) will cause my family considerable hardship. Unless you are satisfied that I have been given every reasonable opportunity to rectify what my supervisors believe is amiss that hardship inflicted on my family will be both cruel and unjust, and I shall not cease in my efforts to achieve a just outcome.

"I very much hope that your own intervention will render such efforts unnecessary.

" . . . "

On 11 October 1979 the Commissioner-General replied:

" . . . "

"I am satisfied that the decision to withhold the annual increment was correct and must stand. The Director of Administration, Relief and Information properly informed you on 12 September 1979 that your performance generally had been unsatisfactory during the past year and your immediate supervisor, Mr. Holdaway, orally expressed to you at various times during the last 12 months dissatisfaction with specific aspects of your work performance.

"The decision not to convert your fixed-term appointment to an indefinite appointment nor to extend it beyond 31 December 1979 was based on (a) a management decision that the post of Administrative Service Officer, which you occupy, would not be required by the Agency beyond 31 December 1979, and (b) the conclusion that there was no other post to which you could suitably be reassigned. In reviewing this decision, I have again concluded that there is no other post to which you could suitably be reassigned, and I am satisfied that the Agency does not

require the post you now occupy beyond 31 December 1979. Nevertheless, I believe your services in your existing post might still be of some use to the Department of Administration, Relief and Information for a limited further period into 1980. Bearing this in mind and having fully considered the exceptional and compelling circumstances of your case (i.e. the little additional service you require to be eligible for after-service medical coverage and to qualify immediately for early retirement), I have decided solely on humanitarian grounds to offer you an extension of your fixed-term appointment until 30 September 1980 under the same terms and conditions as in your current fixed-term appointment. However, if you accept this extension, it would be clearly understood that your fixed-term appointment would be allowed to expire on 30 September 1980.

“ . . . ”

On 16 October 1979 the Applicant accepted the offer to extend his appointment to 30 September 1980. On 1 August 1980, in a further letter to the Commissioner-General, the Applicant wrote:

“I should like to recall to your attention your letter reference I/321 of 11 October 1979. In this letter you advised me that my fixed-term appointment was not to be converted into an indefinite appointment because Management had decided that the post I was occupying would not be required in the future and there was no other post in the Agency to which I could be suitably transferred.

“Your memorandum also advised me that my performance had been generally unsatisfactory and that as a result you were satisfied that my annual increment had been properly withheld. Dealing with the second point first I should like to advise you that I have not, since the date of your letter, received any adverse criticism for my performance from my immediate supervisor and I believe therefore that I am justified in the presumption that my performance over the last nine months has given no cause for complaint.

“Dealing with the first point I would advise you that I am presently in a post different from that to which you referred to in your letter. I was transferred to a post in the corps of supplemental officers on 1 January 1980. The post I am holding is a post which I believe suits my qualifications in both administration and finance and is not scheduled for redundancy. In spite of the final sentence in paragraph 3 of your letter it had seemed to me over the last seven months that the Agency was opening the way for me to pursue my career with UNRWA. It came as something of a shock therefore to find myself being approached by various staff members concerning my approaching separation.

“Since my post is not to be made redundant I must conclude that my separation is taking place on the grounds in inadequate performance. I repeat that at no time in the last nine months have I been advised by my immediate supervisor that my performance continued to be inadequate and that no Periodic Report that I know of had been raised in this period. I believe that it is totally out of line with UN policy to separate staff members (even if this is simply by reaching the end of a fixed-term contract) on the grounds of unsatisfactory performance without having given the staff member the opportunity to refute any negative statements made about him by his supervisor. I should like now to add that any adverse statements arising from my supervisor are, I believe, a result of a harsh conflict of personality between

himself and myself. I have found him a most difficult personality to work with and the abrasiveness from his approach has been experienced also by many other staff members of this Agency.

"I am not, I believe, the first staff member to have been separated from this Agency on the grounds of unsatisfactory performance without having the faintest idea in what sense and at what time my performance had been lacking. It is extremely difficult to refute an unknown allegation.

"I should like to ask your help in allowing me to prove my performance in this Agency by placing me for a period under a different supervisor and ensuring that whatever reports are sent on me are made available to you in order that should any of them be negative I might have the opportunity of redressing my weakness."

On 19 August 1980 the Commissioner-General had a meeting with the Applicant and on 21 August 1980 he sent him the following reply:

"In response to your letter of 1 August 1980 and following up our talk of 19 August, I must confirm that your fixed-term appointment with UNRWA will have to expire on the 30 September 1980 in accordance with my letter to you I/321 of 11 October 1979.

"As I promised when we met on the 19th of this month at your request, I have gone very carefully into your case again, reading your personal file and the periodic reports and speaking to each one of your supervisors as well as reviewing with the Director of Personnel all circumstances that are relevant to your case. In so doing I found no new fact or circumstance that would justify changing my decision taken in October last year.

"The post you now occupy will be abolished upon your separation to permit the establishment of a post in the Technical Office for which recruitment is already in an advanced stage. When we met you asked me to let you have at least another year in any other post at Headquarters or in the field. I have looked into this possibility but no post is available to which you could be assigned.

"..."

On 19 September 1980 the Applicant informed the Commissioner-General of his intention to lodge an appeal with the Joint Appeals Board. On 22 September 1980 the Commissioner-General confirmed the decision conveyed to the Applicant on 21 August 1980. On 23 September 1980 the Applicant requested a three months' extension of his appointment up to 31 December 1980 in view of an accident which his wife had suffered. On 25 September 1980 the Commissioner-General approved a one-month extension, i.e. until 31 October 1980, on compassionate grounds. On 2 October 1980 the Applicant lodged an appeal with the International Staff Joint Appeals Board of UNRWA. The Board submitted its report on 13 February 1981. The sections of the report dealing with the composition of the Board and its decision on the case read in part as follows:

"Composition of the Board

"..."

"The composition of the Board was challenged on 12 November by the Appellant's representative, Vernon M. Taylor, who alleged

"(a) that the Panel of Chairmen from whom the Chairman for the case had been selected had not been appointed after proper consultation with the Executive

Committee of the International Staff Association, as required under International Staff Rule 111.2 (a); and

“(b) that the Chairman selected was potentially partial by virtue of his membership of the Periodic Reports Review Committee and the Staff Management Committee, and that, as head of the Department of Finance, he could have an inhibiting influence on the other two members of the Board, who were his subordinates in the Department.

On the first charge, the Chairman of the International Staff Association, the Legal Adviser and the Director of Personnel and Administration confirmed their satisfaction that consultation had properly taken place, and the Board accepted their position. On the second charge, the Chairman of the Board overruled the objection: of the other two members of the Panel of Chairmen, one was automatically disqualified as one of the Appellant’s supervisors, and Mr. Lattuner had been preferred by the Panel over the third member for the reason that, as a newcomer to the Agency, his lack of previous knowledge of the case enhanced his potential for impartiality; moreover, neither he nor the other two members of the Board agreed that their respective roles in the Department of Finance introduced any inhibiting factor.

“The charges were not pursued further by the Appellant or his representative.

“ . . .

“*Decision of the Joint Appeals Board on the case*

“The Joint Appeals Board was agreed that its obligations under the International Staff Rules and Regulations required it to advise the Commissioner-General on two points:

“(a) whether the terms of the Appellant’s appointment had been properly observed; and

“(b) whether the administrative decision to allow the appointment to expire had been motivated by prejudice or some other extraneous factor.

“(a) . . .

“In arriving at its opinion on the observance of the terms of the Appellant’s appointment, the Board has been governed by the terms set out in the initial Letter of Appointment itself, by the fact that each extension was offered and accepted on the same terms and conditions, and by the relevant International Staff Rule in force at the time of the initial contract and throughout the Appellant’s service, 104.3. The Board noted that, while the Letter of Appointment *allowed for the possibility of conversion of the fixed-term into a temporary indefinite appointment*, it did not *provide* for such a conversion. It also noted that under paragraph (a) of Staff Rule 104.3, ‘the fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment’. It further noted, however, that the same rule provides that a fixed-term appointment ‘may be granted for a period not exceeding two years’.

“The Board concluded that the decision of the Agency to extend the Appellant’s fixed-term appointment for a third year, while the need for his post was being reviewed, rather than convert it into a temporary indefinite appointment was inconsistent with the Agency’s own policy under ISR 104.3. At the same time, the Board could not find that the Agency was under any contractual obligation to make such a conversion or, indeed, to offer further fixed-term extensions. The offers of exten-

sions into a fourth year and then for a further one month, to 31 October 1980, had explicitly been made on compassionate grounds and accepted in this knowledge. While the Administration's decision to make these offers had again been inconsistent with its own rules, the Board could not find that the Agency had offered the Appellant less than he was contractually entitled to; on the contrary, it had offered him rather more.

“(b) The Appellant charged that the principal ground for the decision to allow his fixed-term appointment to expire was his unsatisfactory performance; that his performance suffered from his conflict with his supervisor and the uncertainty surrounding his position; and that this conflict and the stress under which the Appellant had been put introduced extraneous factors which were instrumental in creating the situation which led to the administrative decision.

“The Board concluded, on the evidence available to it, that unsatisfactory performance had most probably been the determining factor in the Administration's decision to dispense with Mr. Harkins' services, and wishes to comment separately on this aspect of the case and the Agency's periodic performance report procedures (see section 2 of Annex H). It was disturbed that the Appellant had not believed there was any proper redress for the difficult situation he felt himself to be in, in relation to his supervisor, and wishes to comment on this also (see section 3 of Annex H). The Board was not persuaded, though, that the decision itself had been motivated by prejudice or some extraneous factor. It had been demonstrated that the Appellant's performance had been reviewed not only by his immediate supervisor and Department Head, but also by the Periodic Reports Review Committee and the Commissioner-General personally. The Board was satisfied that the conclusion reached on the Appellant's performance had been arrived at impartially.

“The Board decided, therefore, to advise the Commissioner-General that, within the terms of the Agency's own rules and regulations, it saw no grounds for upholding the Appellant's appeal, and that it accordingly recommended that the administrative decision not be revised.”

On 23 February 1981 the Commissioner-General advised the Applicant that, having reviewed the case in the light of the Board's report, he found no grounds for amending the decision, conveyed to the Applicant on 21 August 1980, to allow his fixed-term appointment to expire. On 17 June 1981 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. While accepting that certain administrative matters needed redress, the Joint Appeals Board formed its final recommendations on a purely legal issue.
2. The Respondent failed to observe the Applicant's sense that he neglected to observe a series of generally accepted principles, namely:
 - (a) A staff member should have a reasonably adequate working environment having regard to his grade and function;
 - (b) A staff member should have adequate access to the instructions required for the guidance of his administration;
 - (c) A staff member should have senior professional advice (normally a qualified supervising officer) unless his grade and position is such that he should initiate and institute an activity;

(d) A staff member should be able to rely on a relationship with his supervisor which is inherently free from prejudice;

(e) A staff member should be able to rely on an appeals procedure set up in accordance with existing rules;

(f) A staff member should have the assurance that his submission to the Joint Appeals Board will be evaluated independently and in a clearly free and unbiased way.

Whereas the Respondent's principal contentions are:

1. The Applicant's grievances concerning working conditions do not constitute allegations of non-observance of terms of his contract nor do such grievances give rise to a right to the compensation claimed.

2. The Applicant had no entitlement or expectancy to continued service after the expiration of his fixed-term appointment.

3. The decision to allow the Applicant's fixed-term appointment to expire and not to grant the Applicant a further extension of that appointment or any other appointment was a proper exercise of discretion.

4. There were no defects concerning the convening of the Joint Appeals Board, its composition or its determinations which would vitiate validity of its proceedings.

The Tribunal, having deliberated from 29 April 1982 to 13 May 1982, now pronounces the following judgement:

I. The Tribunal finds the provisions of Staff Rule 104.3, paragraph (a) constitute a decisive element in the determination of this case. Under this Rule, a fixed-term appointment, such as the one held by the Applicant, does not carry any expectation of renewal or of conversion to any other type of appointment; this is all the more so as the Applicant had served under a fixed-term appointment only for a very short time. In the circumstances, the Tribunal concludes that no legal expectancy of further employment of the Applicant by UNRWA had been created.

II. Under the Rules, the Respondent had discretionary power to renew or not to renew the Applicant's appointment, and the question for consideration by the Tribunal is whether he exercised his power in a proper manner.

The Tribunal does not find from the evidence before it any material to sustain the allegation made by the Applicant that the Respondent was motivated by prejudice, discrimination or other improper considerations in the handling of the case. Even if the Applicant's reference to various administrative shortcomings and deficiencies (e.g. working conditions, lack of supervision) were relevant, they did not, in the Tribunal's view, significantly affect the level of the Applicant's performance. Moreover, the Tribunal finds that for humanitarian reasons the Respondent accommodated the Applicant by extending his fixed-term appointment first to the end of 1979, then until 30 September 1980 and finally until 31 October 1980. The Respondent did this even though he had earlier expressed his intention of not renewing the Applicant's fixed-term appointment when it expired in October 1979. This action further strengthens the Tribunal's conclusion that there was no prejudice of any kind on the part of the Respondent.

III. The Applicant questions the composition of the Joint Appeals Board, stating that it was not established annually as prescribed in Staff Rule 111.2 (a), but was installed *ad hoc* after his appeal had been filed, and was therefore not properly constituted.

The Tribunal considers that the provision for annual establishment of the Joint Appeals Board is a guarantee of its objectivity in dealing with appeals which should not

be overlooked. However, the Tribunal is of the view that, considering the nature of the Board, the omission to establish it annually cannot be held in this instance to have vitiated its proceedings.

Since no Joint Appeals Board in fact existed when the Applicant's case arose, there were only two alternatives: to make good the omission by establishing a Board to consider his case and any other cases; or to deprive him of the right to have his case considered by a Board at all. The first of these paths was chosen, and the Applicant suffered no prejudice, particularly in view of the selection of a chairman who was unfamiliar with the Applicant's case. In reality this position did not differ from that of any other person whose case might arise for consideration by the Board at a time when annual appointments or elections became due under the Staff Rules.

The Tribunal agrees with the Board's observation that

"While the Board does not believe that its impartiality was in fact affected by the failure to observe the procedures which call for annual appointments, it suggests that this impartiality would be better seen to be assured if these procedures were routinely followed."

The Tribunal concludes that there has been no miscarriage of justice or biased proceedings because of the composition of the Board.

IV. For the foregoing reasons, the Application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

L. de POSADOS MONTERO
Member

Arnold KEAN
Member

Jean HARDY
Executive Secretary

Geneva, 13 May 1982

Judgement No. 288

(Original: English)

Case No. 268:
Marrett

Against: **The Secretary General of
the International Civil
Aviation Organization**

Request by a staff member of ICAO that his post be reclassified with retroactive effect.

Unanimous decision by the Advisory Joint Appeals Board that the appeal was frivolous.—Right of the Tribunal to consider whether that decision was vitiated by some irregularity.—Procedural irregularities