
ADMINISTRATIVE TRIBUNAL

Judgement No. 512

Case No. 542: KORB

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Ahmed Osman, Vice-President, presiding;
Mr. Arnold Kean; Mr. Luis de Posadas Montero;

Whereas at the request of Victoria Korb, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 26 May, 26 July and 26 October 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 26 October 1989, the Applicant filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 25 February 1990, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"Pleas

1. The Applicant respectfully requests the Administrative Tribunal to find that:

(a) The Respondent's decision not to renew the Applicant's contract beyond 22.11.87 was based on discriminatory, prejudiced and ill-founded assessments of her performance;

(b) The Respondent, in rejecting the findings and recommendations of the Panel on Discrimination and other Grievances out of hand, had denied the

Applicant proper redress through a procedure he has himself established;

(c)The Respondent denied the Applicant due process by:

- (i)Imposing arbitrary time limitations for the submission of the Applicant's request for a summary hearing by the Joint Appeals Board [JAB],
- (ii)failing to respond to her request for a conciliatory procedure,
- (iii)accepting a Joint Appeals Board report based on hearings of ITC [International Trade Centre] staff in the absence of the Applicant or her representative,
- (iv)accepting [a] JAB report which improperly based its recommendations on its assessment of the Applicant's performance in contravention to staff rule 111.2(k).

(d)The Respondent has failed to properly and fairly administer his staff, specifically the Applicant, by:

- (i)Giving her inappropriate and/or insufficiently defined assignments,
- (ii)allowing her performance to be judged on the basis of ill-defined criteria,
- (iii)failing to further enquire into or to remedy patently discriminatory actions by one of the Applicant's supervisors,
- (iv)failing to take remedial action on managerial deficiencies within ITC which had been identified both by a PER [performance evaluation report] Rebuttal Panel and by the Panel on Discrimination and Other Grievances and which had specifically affected the Applicant.

2.Wherefore the Applicant most respectfully requests the Administrative Tribunal to order:

(a)The Applicant's reinstatement in ITC or in an appropriate post commensurate with her

qualifications and experience within the UN system of organizations,

(b) her record of service in the UN (ITC) be effectively cleared of all discriminatory and prejudicial assessments to show that she has performed her functions with the competence and dedication required of a staff member of the UN,

or failing (a)

(c) the payment of compensation for the disruption to the Applicant's career of an amount equivalent to four years net base salary at grade P.2/XI,

(d) the further payment of compensation for the moral suffering and professional prejudice inflicted on the Applicant in an amount equivalent to two years net base salary at P.2/XI."

Whereas the Respondent filed his answer on 30 May 1990;

Whereas the Applicant filed written observations on 22 August 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of the International Trade Centre (ITC), an organ of both the United Nations Conference on Trade and Development, and the General Agreement on Tariffs and Trade (GATT) on 19 April 1982. She was initially offered a two-year fixed-term appointment as an Associate Programme Officer at the P-2, Step X level at the Division of Programme, Resources and External Relations (DPRER). According to the record of the case, the Applicant had previously served for two years, from 1979 to 1981, with the United Nations Development Programme as a Junior Programme Officer for Indonesia and the Philippines.

In a first performance evaluation report, evaluating the Applicant's performance during her first 10 months of service, the Chief, Programme and Planning Monitoring Section, DPRER, who acted as First Reporting Officer, gave the Applicant ten "B" (Very Good) ratings and three "C" (Good) ratings. The Director, DPRER, rated

the Applicant's performance as a "very good performance". In a second performance evaluation report, evaluating the Applicant's performance from 1 March 1983 to 31 October 1984, the same First Reporting Officer gave the Applicant eight "B" (Very Good) ratings and five "C" (Good) ratings. A new Director, DPRER, rated the Applicant's overall performance as "a good performance" and stated his belief "that it would be useful if the evaluative judgements in [the] report could be checked under different circumstances in another section in ITC". The Applicant had, during the reporting period, expressed her interest in a transfer to another section of ITC, the Division of Technical Co-operation or the Division of Product and Market Development.

The Applicant's appointment was extended for a further two-year fixed-term period, through 18 April 1987. Effective 1 July 1985, the Applicant was transferred to the Division of Technical Co-operation, Office for Africa.

At a staff meeting held on 1 July 1985, the Chief of the Office for Africa informed the staff that a French-speaking Desk Officer had been transferred to another Division and that the Applicant, who was able to "handle work only in English", would replace him. According to the minutes of the meeting, the Desk Officers of the section expressed their concern at the transfer of "one English-speaking Junior Officer, who was not accepted by any other Office in ITC ... without prior consultation with the Chief of [the] Office". Subsequently, four staff members who had attended the meeting disassociated themselves from the account given in the minutes on the ground that it "gave the impression that a fellow colleague who was being transferred to the Office for Africa, was a principal subject of discussion" and that "apart from the fact that [they] were not competent to comment on her capabilities, this was neither correct nor fair to her".

On 24 July 1986, the Applicant's prior supervisor and First Reporting Officer in previous evaluation reports, evaluated the Applicant's performance from 1 November 1984 to 3 July 1985, prior

to her transfer to the Office for Africa, and reiterated the same ratings he had given her in her previous report, but without providing any comments thereon. The Director, DPRER, rated the Applicant's overall performance as a "good performance" and stated his belief that the Applicant's "performance should be tested in a different working environment". He also commented: "The evaluation may indeed appear somewhat generous".

On 24 September 1986, the Chief, Office for Africa, DTC, evaluated the Applicant's performance from 4 July 1985 to 31 May 1986, at the Office for Africa. Acting as First Reporting Officer, she gave the Applicant five "C" (Good) ratings, in competence, initiative, sense of responsibility and dependability as regards working hours, effectiveness in planning and organization of work, and oral expression; five "D" (Fair) ratings in quality and quantity of work accomplished, ability to meet schedules, effectiveness in maintaining harmonious working relations, and skill in producing a solution, and three "E" (somewhat below standard) ratings in ability to work independently or with minimal supervision, ability to negotiate and persuade, and written expression. The Chief, Office for Africa, did not supplement the ratings with a statement giving an explanation or examples illustrative of the ratings, as required. The Deputy Executive Director rated the Applicant's overall performance as "Fair".

Effective 27 October 1986, the Applicant was transferred to the Office for Asia and the Pacific.

The Applicant instituted a rebuttal procedure, contesting the report evaluating her services at the Office for Africa, in accordance with administrative instruction ST/AI/240/Rev.1. A Panel was constituted to investigate the rebuttal and it submitted a report to the Director, Department of Personnel Management on 3 February 1987. Although it concurred "with the accuracy of the ratings" given in the report, it pointed out "several mitigating factors" to be brought to the attention of management.

In the Panel's opinion, the performance evaluation "appeared

to assume a level of responsibility which went beyond that which should normally be held by a P-2 officer"; the Applicant was given "too early responsibility for a difficult country [Ghana], and less than adequate arrangements were made for her on-the-job supervision and training". Furthermore, 55 days of sick leave during an eleven-month reporting period, "would have affected the quantity of work accomplished and the ability to meet deadlines".

In a further performance evaluation report, evaluating the Applicant's performance from 27 October 1986 to 18 March 1987, the Chief, Office for Asia and the Pacific, gave the Applicant one "B" (Very Good) rating, four "C" (Good) ratings and one "D" (Fair) rating. The Deputy Executive Director refused to evaluate her overall performance on the grounds that he was "unable" to do so "on the basis of partial assessment of the First Reporting Officer". He noted however that the Applicant's performance appeared "to have improved".

On 28 March 1987, the Applicant requested an investigation of her employment situation by the Panel on Discrimination and Other Grievances in the U.N. Secretariat (Panel on Discrimination). She alleged that she had been subjected to conditions of work which "through no fault of [her own, had] resulted in [her being] almost consistently treated in an unfair manner" by ITC since the commencement of her employment and that her professional qualifications and previous experience had not been properly utilized.

The Applicant's appointment was extended for further fixed-term periods of two months and twelve days, through 30 June 1987; one month, through 31 July 1987, and three months, through 31 October 1987.

On 5 August 1987, the Applicant was informed that her appointment would not be extended beyond 31 October 1987. (A further extension was nonetheless given from 1 November 1987 to 23 November 1987, while the Applicant was on sick leave).

On 17 August 1987, the Applicant requested the

Secretary-General to review the administrative decision not to renew her fixed-term appointment beyond 31 October 1987. She also requested the Secretary-General to suspend the administrative

decision not to renew her fixed-term appointment until the Panel on Discrimination's investigation was completed.

On 31 August 1987, the Chief, Administrative Review Unit, informed the Applicant of time-limits and procedures. In a reply dated 29 September 1987, the Applicant sought clarification concerning the procedures before the Joint Appeals Board (JAB) and requested a conciliation procedure as provided for in staff rule 111.2(a).

In the meantime, the Panel on Discrimination authorized a Geneva-based staff member to conduct a "proxy investigation" on its behalf. That investigation, as described in the Panel on Discrimination's memorandum of 15 July 1987, to the Assistant Secretary-General for Personnel Services, concluded that ITC had "bent over backwards" to accommodate the Applicant, who, the proxy investigator also concluded, had "an attitude problem". Then, the Panel on Discrimination disassociated itself from the proxy investigator's conclusions on the Applicant's case. In its final report dated 1 October 1987, to the Assistant Secretary-General for Personnel Services, the Panel on Discrimination concluded that the Applicant was "justified in almost all of her complaints" and that the Applicant had essentially been the victim of "hearsay, personal opinions of a biased nature, or downright calumny". It recommended that the Applicant's appointment be extended for a two-year period during which she should be given proper guidance and supervision. On 21 October 1987, the Assistant Secretary-General for Personnel Services forwarded the Panel on Discrimination's report to the Executive Director, ITC, for appropriate action. The report was brought to the attention of the ITC Joint Appointment and Promotion Board (Appointment Board) on 30 October 1987, which, following re-consideration of the Applicant's case, concluded that there was no justification for changing its recommendation that the Applicant's fixed-term appointment not be renewed.

Not having received a substantive reply to her request for an administrative review, on 5 November 1987, the Applicant lodged

an appeal with the Geneva JAB, which first considered the Applicant's request for a suspension of the administrative decision not to renew her fixed-term appointment. The JAB adopted its report on the Applicant's request for suspension of the Respondent's administrative decision on 10 December 1987. It concluded that the Secretary-General should grant that request up to 29 February 1988, so as to allow for good faith consideration and action on the recommendations of the Panel on Discrimination. On 23 February 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to take no action on her request on the grounds that:

(a) the recommendations of the Panel on Discrimination had already been considered and had not been accepted, and

(b) since the contested decision had been implemented on 23 November 1987, prior to submission of the JAB's report, her request for suspension of action had become moot. The JAB adopted its report on the merits of the case on 20 October 1988. Its conclusions and recommendations read as follows:

"VI. CONCLUSIONS AND RECOMMENDATIONS

23. Thus, the Panel is unable to recommend that the ITC rescind its decision not to renew the appellant's fixed-term appointment. It recognizes though that the appellant has a very good academic background and that her competence and skills could be put to good use in some analytical, rather than operative work, for which there may be opportunities in the United Nations system. The fact that her effectiveness and prospects were confined in a very limited environment, which is the result of her being hired for service only within ITC, is to be regretted.

..."

On 29 November 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to maintain the contested decision and to take no further action on the case.

On 25 February 1990, the Applicant filed with the Tribunal

the application referred to earlier.

Whereas the Applicant's principal contentions read as follows:

1. The decision taken by ITC not to renew the Applicant's contract was based on prejudicial and ill-founded assessments of her performance.

2. Those assessments resulted from gravely deficient managerial practices which, though identified, were allowed to continue unchallenged.

3. Previous attempts to obtain redress were frustrated either because no heed was paid to findings and recommendations made by administrative review panels or because safeguards provided for in the staff rules were overlooked and/or disregarded.

4. The foregoing circumstances resulted in a violation of due process vis-à-vis the Applicant.

Whereas the Respondent's principal contentions read as follows:

1. The Respondent's decision not to renew the Applicant's fixed-term appointment was a valid exercise of his discretionary authority; it was not vitiated by prejudice nor based on inadequate or erroneous information.

2. The Applicant was accorded the process due her in respect of the proceedings of the Panel on Discrimination and the Joint Appeals Board.

The Tribunal, having deliberated from 15 February to 1 March 1991, now pronounces the following judgement:

- I. The Applicant contests the Respondent's decision not to renew her fixed-term appointment beyond 22 November 1987, and requests the Tribunal to order her reinstatement in the

International Trade Centre (ITC) or in an appropriate post within the United Nations system.

II. The Tribunal observes that the Applicant was employed on fixed-term appointments. According to staff rule 104.12(b), fixed-term appointments carry no right of renewal or of conversion to any other type of appointment. Moreover, this provision was incorporated verbatim in all of the Applicant's appointments. According to staff rule 109.7(a), such appointments expire automatically and without prior notice.

III. In this case, the Applicant claims that renewal of her appointment is based on three grounds:

First: That the non-renewal of her fixed-term appointment was due to prejudice;

Second: That she had a legal expectancy of renewal; and

Third: That the decision not to renew her appointment was flawed by breach of due process.

IV. As regards the first claim, the Applicant invokes as evidence of deliberate prejudice against her: the opinions expressed at a staff meeting of the Office for Africa held on 1 July 1985, prior to her transfer, in which it was pointed out that such transfer was not desirable; her performance evaluation report for the period running from July 1985 to May 1986 and the report of the Rebuttal Panel to whom this report was submitted for review.

V. It is the opinion of the Tribunal that the views expressed at that staff meeting are not evidence of prejudice against the Applicant. It was only the issue of the suitability of the transfer of a staff member of the Applicant's level and language capability to the post of Associate Trade Promotion Officer that was raised at the meeting. The objections raised in connection with her transfer in no way reflected any personal feeling against her as an

individual. Furthermore, four staff members who attended the meeting, subsequently stated in writing that the minutes of the meeting erroneously conveyed the impression that the Applicant's pending transfer was the principal subject of discussion. According to them, the purpose of the meeting was to convey a constructive message to management, concerning the organization of the Office.

VI. The Applicant also considered her performance evaluation report (PER) for the period from July 1985 to May 1986, as an instance of prejudice and consequently, rebutted it. The Rebuttal Panel concluded that the ratings in the Applicant's report were accurate, although there were several "mitigating factors".

VII. The Tribunal has been unable to find substantial evidence of the existence of any arbitrary or wrongful intentions or motives behind the ratings given to the Applicant. On the other hand, the Tribunal concurs with the Rebuttal Panel that "the performance evaluation appeared to assume a level of responsibility which went beyond that which should normally be held by a P.2 Officer" and that "the staff member was allocated too early responsibility for a difficult country", and also that "arrangements for the on-the-job training and supervision of the staff member were less than adequate". It is the Tribunal's view that these factors, though not due to prejudice, denote a certain negligence in dealing with the Applicant that may have led to the non-renewal of her fixed-term appointment.

VIII. The issue of prejudice was brought by the Applicant before the Panel on Discrimination and Other Grievances in the UN Secretariat (Panel on Discrimination). In its final report, the Panel on Discrimination stated that "Dr. Korb is justified in almost all of her complaints".

IX. The Tribunal, having given due consideration to the Panel on

Discrimination's report, cannot concur in it because of lack of evidence to substantiate its conclusions.

X. Moreover, the Tribunal notes that the renewal of the Applicant's appointment was discussed on several occasions: in March 1987, by the Executive Director, along with her present and past supervisors; again in June 1987, by the Executive Director and her new supervisor; and finally by the Joint Appointment and Promotion Board in June and October 1987. This sequence of events shows that the non-renewal of the Applicant's appointment was not decided upon rashly or by a single person or small group of persons prejudiced against her.

XI. The Tribunal, having reached the conclusion that no evidence of prejudice on the part of the Administration has been produced, is unable to order any modification of the Applicant's service record as requested.

XII. The Applicant also claims that the non-renewal of her fixed-term appointment was unlawful because ITC is governed by the "Personnel Policy Guidelines and Practices of the ITC" and according to those Guidelines fixed-term appointments carry an expectancy of renewal. The Tribunal is unable to share this view.

XIII. Paragraph I.5 of the Guidelines states that: "Staff members whose worth to the Centre has been demonstrated will subsequently be eligible for consideration for extensions...". This provision in no way alters the general system in force, and in no way limits the discretion of the Secretary-General. It only provides that "worthy" staff members will be "eligible for consideration" for renewal (emphasis added). This amounts to a statement that worthy staff members may be renewed, not that they shall be renewed. It is also to be noted that the Introduction to the Guidelines clearly states that they are subject to the Staff Regulations and Rules of

the United Nations, precluding any interpretation of that text that would run counter to those rules and regulations, in particular to staff rule 104.12(b).

XIV. The Applicant further contends that she has been denied due process by:

(a) "rejecting the findings and recommendations of the Panel on Discrimination ... out of hand";

(b) "imposing arbitrary time limitations for the submission of the Applicant's request for a summary hearing by the Joint Appeals Board;"

(c) "failing to respond to her request for a conciliatory procedure";

(d) "accepting a Joint Appeals Board report based on hearings of ITC staff in the absence of the Applicant or her representative";

(e) "accepting [a] JAB report which improperly based its recommendations on its assessment of the Applicant's performance in contravention to staff rule 111.2(k)".

XV. In connection with the rejection of the findings of the Panel on Discrimination, the Tribunal notes that the original decision not to renew the Applicant's appointment was taken while the proceedings of the Panel on Discrimination were still under way.

Nevertheless, short extensions were granted in order to allow the Panel to finish its work. Also, the report of the Panel on Discrimination was received and considered by the Joint Appointment and Promotion Board the same day it decided to ratify its previous recommendation not to renew the Applicant's appointment. It is the Tribunal's view that, though it would have been advisable for the Administration to act less hastily, the basic principles of due process were respected as far as the consideration of the Panel on Discrimination's report is concerned.

XVI. As far as the allegation that arbitrary time limitations were imposed for the submission of the Applicant's request for a summary hearing by the JAB, it is the Tribunal's opinion that staff rule 111.2(a) was in no way violated by the Administration when fixing 31 October 1987, as the deadline for filing the Applicant's appeal.

XVII. The Applicant also asserts that due process was not observed when the Administration failed to respond to her request for a conciliatory procedure. According to staff rule 111.2(a) the decision to resort to this procedure rests solely with the Respondent. It follows that no breach of due process can be claimed if the Applicant's request for conciliation of the case met with no direct response.

XVIII. The Applicant also asserts that staff rule 111.2(k) was not observed. The Tribunal notes that staff rule 111.2(k) is not applicable in the Applicant's case since hers was a case of non-renewal of a fixed-term appointment and not a case of termination on grounds of inefficiency.

XIX. A breach of the principle of due process is also claimed because the JAB heard several witnesses in the absence of the Applicant or her representative. In the opinion of the Tribunal, this fact, not contradicted by the Respondent, constitutes a serious flaw in the procedure of the JAB, since it is an accepted principle of due process that witnesses should always be heard in the presence of the parties. "Procedural unfairness is, in itself, wrong and is to be evaluated in the circumstances of the case in which it is found". (Judgement No. 507, Fayache (1991), para. XIV).

XX. As to the Applicant's claim that she was given inappropriate and/or insufficiently defined assignments and that her performance was judged on the basis of ill-defined criteria, the Tribunal notes

that these allegations, coincident with what the Rebuttal Panel calls "mitigating circumstances", have not been contested by the Respondent and must therefore be considered as well-founded. In the Tribunal's opinion, they indicate a certain degree of negligence in dealing with the Applicant's situation, entailing some responsibility on the part of the Administration.

XXI. The Tribunal, having considered all the circumstances of the case, finds:

1. That the decision not to renew the Applicant's fixed-term appointment was not due to prejudice;
2. That the Applicant had no legal expectancy of such renewal;
3. That the Applicant suffered injury from a certain degree of negligence on the part of the Administration, as well as from breaches of due process, for which the Tribunal awards her compensation.

XXII. In view of the foregoing:

1. The Tribunal orders the Respondent to pay to the Applicant one month net base salary at the rate in effect at the time of her separation from service, as compensation.
2. All other pleas are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Luis de POSADAS MONTERO
Member

New York, 1 March 1991

R. Maria VICIEN-MILBURN
Executive Secretary