
ADMINISTRATIVE TRIBUNAL

Judgement No. 786

Case No. 865: DOMATO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, at the request of Angelina Domato, a former staff member of the United Nations Population Fund (hereinafter referred to as UNFPA), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 July 1995;

Whereas, on 15 June 1995, the Applicant filed an application requesting the Tribunal to order the Respondent to provide certain information and documentation and, further:

(a) To rescind the decision of the Secretary-General of 3 February 1995, based on the recommendation of the Joint Appeals Board (JAB) of 26 January 1995, not to extend the Applicant's fixed-term appointment beyond 14 February 1995;

(b) To order that UNFPA reinstate the Applicant in the service of the Organization retroactive from 14 February 1995;

(c) To order that the Secretary-General pay the Applicant her salary and appropriate allowances retroactive [to] 14 February 1995 as well as appropriate contributions on her behalf to the United Nations Joint Staff Pension Fund retroactive [to] 14 February 1995;

(d) To award the Applicant appropriate and adequate compensation for the material and moral injuries suffered by her as a direct consequence of the arbitrary and prejudicial decision taken by UNFPA not to extend her contract beyond 14 October 1994."

Whereas the Respondent filed his answer on 21 November 1995;
Whereas the Applicant filed written observations on 27 March 1996;

Whereas the facts in the case are as follows:

Beginning in 1985, the Applicant worked as a consultant with UNFPA and UNICEF in Burkina Faso and in Afghanistan, respectively, and in the UN Population Division. The Applicant entered the service of UNFPA on 13 August 1990, as an Evaluation Officer at the P-3 level, on a six-month fixed-term appointment. On 15 October 1990, her appointment was extended for approximately two years, and renewed twice thereafter, for additional periods of one year each. It was further extended to 14 November 1994 and, subsequently, through 14 February 1995. The Applicant separated from service on 14 February 1995.

The Applicant received three annual performance appraisal reviews (PARs), for the years 1991, 1992 and 1993. The Applicant's PAR for 1991 indicated a rating from her supervisor of (3) ("meets the expectations of the performance plan"), which was downgraded by the Management Review Group (MRG) to a rating of (4) ("meets some of the expectations of the performance plan but performance needs improvement"). As regards the Applicant's performance in 1992, her supervisor recommended, and the MRG endorsed, a rating of (3). For her 1993 performance, her supervisor recommended, and the MRG endorsed, a rating of (4). In a memorandum dated 14 February 1994, the Applicant submitted to the Chief, Personnel Branch, Division for

Finance, Personnel and Administration (DFPA), UNFPA, some information in order to "correct errors of omission" in her 1993 PAR.

The Applicant, by a memorandum dated 31 May 1994, to the Director, DFPA/UNFPA, requested a formal rebuttal investigation of her 1993 PAR. In its report dated 24 August 1994, the Rebuttal Panel concluded that "there [was] insufficient evidence to support the rating assigned and unanimously recommend[ed] that the MRG upgrade the rating provid[ed] by the supervisor".

By a letter dated 10 October 1994, the Director, DFPA/UNFPA informed the Applicant that the MRG had reconvened to consider the Rebuttal Panel's report and determined that the report "did not provide sufficient basis to justify a change in the rating". Therefore, the rating of (4) would be retained. The letter also advised the Applicant that, because her services "ha[d] not in all respects met the standards and requirements of UNFPA, management ha[d] decided not to offer [her] a renewal of [her] fixed-term appointment".

On 26 October 1994, the Applicant lodged with the Joint Appeals Board (JAB) a request for suspension of action under staff rule 111.2(c), seeking to suspend the decision to separate her from the service of the Organization on 14 November 1994. On 10 November 1994, the JAB unanimously adopted its report and recommended "that the suspension of action requested be granted and that no action be taken to carry out the separation process until a decision is taken on the substance of the [Applicant's] appeal".

On 11 November 1994, the Under-Secretary-General for Administration and Management notified the Applicant as follows:

"The Secretary-General has taken note of the Board's report and decided, taking into account the circumstances of your case, to approve the recommendation of the Panel with the understanding that your appointment will be extended through 14 February 1995 to enable the Joint Appeals Board Panel to submit its report on the substance of your appeal.

The Joint Appeals Board is being requested to submit its report on the substance of your appeal to the Secretary-General by 1 February 1995."

On 21 November 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 27 January 1995. Its considerations and recommendation read as follows:

Considerations

"...

31. The Panel carefully considered the Appellant's PARs for the years 1991, 1992 and 1993. The Panel observed that these appraisals contained many positive statements regarding the Appellant's character, her language skills, her conscientiousness and hard work, and her ability to work with people. Similar statements were found in letters submitted by the Appellant from several consultants. The Panel also observed, however, statements in the Appellant's PARs by two supervisors and the MRG regarding inadequacies in her substantive and technical work:

(a) In the 1991 PAR, the Appellant's supervisor, who is no longer with the United Nations, discussed the 'dilemma' in the evaluation field in 'balanc[ing] substantive expertise and evaluation and monitoring skills' and stated that the Appellant was 'still undergoing a transitional phase where she may reach this balance eventually'. The comment by the Deputy Chief of the Evaluation Branch indicated that the Appellant 'would benefit from training in English writing and editing' and 'should acquaint herself with the relevant aspects of UNFPA policies and programmes'. The MRG referred to the Appellant's 'lack of familiarity with UNFPA policies and programme approaches', and advised that the Appellant should 'improve her output qualitatively' and that 'significant progress needed to be made to bring her performance to an acceptable level'.

(b) In the 1992 PAR, although the Appellant received a rating of (3) from her supervisor and the MRG and improvements were noted in her performance, the Panel [noted] several comments by her supervisor suggesting that there was 'still room for improvement' in her written work, e.g., '[h]er written output has improved in quality, although there is still room for improvement'; '[t]he ultimate products

still vary significantly in quality from case study to case study but the discrepancies would have been even more drastic without her intervention'.

(c) In the Appellant's 1993 PAR, 'inconsistency' in the quality of her written outputs was cited as a primary reason for finding that her performance did not meet expectations in full, i.e., a rating of (4). The MRG 'noted that the quality of [the Appellant's] work was inconsistent and her performance uneven'.

32. During the hearing, the Panel had the opportunity to hear the Appellant's supervisor describe the Appellant's work during 1992 and 1993, and elaborate on the quality of the Appellant's performance. The Appellant's supervisor further explained her reasons for having given the Appellant's performance a rating of (4) in 1993.

33. The Panel carefully reviewed the Rebuttal Panel's report of 24 August 1994 and heard from two of the members of the Rebuttal Panel. Although the Rebuttal Panel had recommended that the MRG upgrade the Appellant's rating, such recommendation was based on the insufficiency of the evidence to support the lower rating, i.e., the lack or inadequacy of documentation on (i) the results of the Appellant's 1993 mid-term review, (ii) an elaborated performance plan or training programme or (iii) variations in the quality of the Appellant's work. It was thus the absence of documentation to demonstrate the inadequacy, rather than evidence of the quality and adequacy, of the Appellant's performance that was the basis for the Rebuttal Panel's recommendation.

34. The Panel considered the efforts over the past four years by the Appellant and the Organization to support the Appellant's professional development. In this regard, the Panel noted that the Appellant had taken, as had been recommended, various seminars and workshops, and was pursuing a doctorate degree in a field relevant to her work. In addition, the Appellant's supervisor explained her efforts to work with the Appellant to improve the Appellant's written work product. Despite such efforts, based on the supervisor's testimony and the Appellant's PARs, the Appellant's performance was not found to meet the performance expectations in full.

35. Based on the foregoing, the Panel concluded that, as early as 1991, it appeared that the Appellant may not have possessed all of the skills required for the P-3 Evaluation Officer post. Since then, there had been genuine efforts on

the part of the Appellant and the Organization to assist her to acquire the skills necessary to perform the functions of the post. Nevertheless, her supervisor and the MRG found that the Appellant's 1993 performance did not satisfy some of the performance expectations. In reaching its conclusion, the PAR guidelines (paragraph 58) require the MRG to consider the Rebuttal Panel's report and recommendation, which was done by the MRG in this case, but do not require the MRG to accept the recommendation of the Rebuttal Panel. In sum, the Panel found no evidence that (i) the supervisor's rating of the Appellant's performance or (ii) the MRG's decision to maintain such rating was arbitrary or based on discrimination, prejudice or other improper motive.

36. According to the PAR guidelines (paragraph [32]), if a staff member's performance receives [two successive (4) ratings], UNFPA has several options, including separation of such staff member from UNFPA service. Moreover, after four years of fixed-term employment, UNFPA usually considers a staff member for a probationary appointment which 'is normally of six months' duration' and, '[i]f the recommendations ... are positive, the probationary appointment is converted to a permanent appointment ...' After four years of fixed-term appointments, the MRG met and determined not to renew the Appellant's fixed-term appointment. The Panel found no evidence that this decision was arbitrary or based on discrimination, prejudice or other improper motive.

37. As had been pointed out by the Rebuttal Panel, when a staff member's performance is rated as (4), the PAR guidelines (paragraph 32) require the supervisor 'to keep track of specific critical incidents of poor performance and behaviour as well as clear instances of improvement, to help the staff member understand in precise terms those areas where performance requires improvement.' Further suggestions are made regarding more frequent interim reviews and a more elaborate Performance Plan. The Panel found that documentation of critical incidents of poor performance, and of the efforts to address such incidents, was lacking and would have been useful to substantiate the decisions taken by the Appellant's supervisor and ultimately by the MRG. In particular, the Panel noted the absence of documentation regarding the Appellant's 1993 mid-term appraisal. In addition, the Panel was disturbed that UNFPA (and thus the Appellant) did not have a current post description outlining the duties and responsibilities of a P-3 Evaluation Officer.

Recommendation

38. Based on the foregoing considerations, the Panel makes no recommendation in support of the appeal."

On 3 February 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and noted its finding that the decision not to renew your appointment was not arbitrary or based on discrimination, prejudice or other improper motive; and, that it made no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to maintain the contested decision and to take no further action on your case."

On 15 June 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legitimate expectancy of further employment after the expiration of her fixed-term contract.
2. The Respondent's decision not to extend the Applicant's contract was tainted by prejudice, caprice and lack of due process.

Whereas the Respondent's principal contentions are:

1. The Applicant has failed to establish any basis for her claim that she had an expectancy of renewal of her fixed-term appointment.
2. The UNFPA MRG properly evaluated the Applicant's performance.
3. The Applicant has not adduced evidence of prejudice or lack of due process in the decision not to extend her appointment.

The Tribunal, having deliberated from 4 November to 21 November 1996, now pronounces the following judgement:

I. The Applicant worked as an Evaluation Officer at the P-3 level at the United Nations Population Fund (UNFPA) since 1990 under a series of fixed-term appointments. On 14 February 1995, the Applicant was separated from service. During her period of service with UNFPA, the Applicant received three periodic performance appraisal reports (PARs) which assessed the Applicant's performance for the years 1991, 1992 and 1993. The Applicant's PAR for 1991 indicated a rating of (3) - "meets the expectations of the performance plan" which was, however, downgraded by the Management Review Group (MRG) to a rating of (4) - "meets some of the expectations of the performance plan but performance needs improvement". For the year 1992, she received a rating of (3). For 1993, she received a rating of (4).

II. Following the 1993 rating, the Applicant requested a formal rebuttal investigation. This resulted in the Rebuttal Panel recommending that the MRG upgrade the PAR. However, on 10 October 1994, the MRG informed the Applicant that they rejected the Panel's recommendation and maintained the rating of (4). They also advised the Applicant that her service "ha[d] not in all respects met the standards and requirements of UNFPA" and therefore her fixed-term appointment was not renewed. Thereafter, the Applicant appealed to the Joint Appeals Board (JAB) who did not support the Applicant's appeal and whose recommendations were accepted by the Secretary-General.

III. The main issue in the case is whether the non-renewal of the Applicant's fixed-term contract with UNFPA violated her rights. The Applicant argues that the decision by UNFPA not to renew her

contract was arbitrary and tainted with prejudice. She asks the Tribunal to reinstate her retroactively from 14 February 1994 and to compensate her for material and moral injuries.

IV. At the outset the Tribunal will deal with the Applicant's request for the production of documents. It appears to the Tribunal that the documents and information sought are not relevant. Therefore, this request is rejected.

V. The Applicant contends that she had an expectancy of renewal of her contract. She cites in support of her case, Judgement No. 345, Najjar (1985), which holds that in determining fixed-term appointments three considerations are taken into account: the record of performance, the need for continued service and the availability of suitable posts. The Tribunal is of the view that this case does not support the Applicant's argument. It is clear from the facts that the Applicant did not satisfy at least one of these considerations, as her record of performance was considered weak. In addition, the Applicant cites Judgement No. 142, Bhattacharyya (1971). From that case, it is clear that consideration of the renewal of a staff member's contract must involve factors other than the mere expiration of the fixed-term contract. Here too, the Tribunal concludes that this judgement does not support the Applicant's case. The basis of the non-renewal of the Applicant's contract was not the expiration of her fixed-term contract but the inefficiency in her work performance. Therefore, the Director had linked the Applicant's termination to a specific cause.

VI. The Tribunal finds it surprising that the Applicant would have expected a renewal of her contract. She was fully aware that her performance had been rated at (4) for the second time. Moreover, as early as 1991, the MRG advised the Applicant that she should "improve her output qualitatively" and that "significant

progress needed to be made to bring her performance to an acceptable level". Once again, in 1992, the Applicant was informed that "there is still room for improvement".

Paragraph 32 of the PAR guidelines specifies that if the staff member's performance "continues to be lacking and the staff member is rated **a second time** in this category [(4)], ... These steps may ... be taken: ... (b) separation from ... service".

Accordingly, the Tribunal rejects the contention that the Applicant had an expectancy of renewal.

VII. The Applicant asserts that the MRG's rejection of the Rebuttal Panel's recommendation was unfounded and that the MRG provided only a "flimsy" explanation for its rejection. The guidelines for the PAR provides inter alia:

"37. The main purposes of the MRG are to:

- a. Review and approve narrative appraisals and performance ratings by supervisors to ensure consistency and fairness ...
- b. Propose staff for promotion through the existing Appointment and Promotion machinery.

...

44. ... [T]he quality of the [MRG] narrative [in section 10] is important because the staff member learns how managers view him or her in addition to the immediate supervisor. The narrative feedback must reflect accurately and comprehensively the MRG's deliberations. This is important for staff at any level of performance including those at the (3) rating level ..."

The Tribunal considers that the MRG followed the above guidelines and endorsed the rating of (4) that was given to the Applicant by her supervisors, stating that the Applicant's work was inconsistent and her performance uneven. The Tribunal considers

this explanation was justifiable and not at all flimsy. In addition, the MRG carefully reviewed the recommendation of the

Rebuttal Panel and concluded that the Panel's report did not justify a change in the rating. As the Applicant herself admits in her arguments, the MRG had the "legal power" to reject the recommendation of the Rebuttal Panel. She, therefore, had the burden of proving that extraneous factors or prejudice existed which resulted in the rejection. The differences of opinion between the MRG and the Rebuttal Panel concerning the Applicant's performance do not indicate prejudice or suggest the existence of extraneous factors. The Tribunal finds that the Applicant has not offered evidence to the contrary. The Tribunal concludes that the MRG's review of the Applicant's performance and its decision to maintain the ratings were not arbitrary or based on any other improper motive.

VIII. In addition, the Applicant has not met her burden of proving that there was a lack of due process or prejudice on the part of the Respondent when he refused to renew her fixed-term appointment. It is not the role of the Tribunal to review the performance evaluations of staff members. It cannot substitute its judgement for that of the Respondent. The Tribunal can only intervene in these decisions if it is shown that the Staff Rules and Regulations, including UNFPA's Guidelines for PAR, have not been respected or that prejudice or extraneous factors have tainted the Respondent's decision. The Applicant has failed to meet the burden of proving that such factors existed.

IX. The JAB had the opportunity to analyze the Applicant's performance for the years 1991, 1992 and 1993. It found that her performance had been properly reviewed under the PAR system by her supervisors and the MRG. The Tribunal can only concur with the JAB's findings.

X. Based on the foregoing, the Tribunal rejects the Applicant's pleas in their entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary