
ADMINISTRATIVE TRIBUNAL

Judgement No. 805

Case No. 899: EL AOUI

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. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Lalla Boudour El Aoufi, 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, successively extended to 31 August and 30 November 1994, 28 February, 31 May, 31 August and 30 November 1995, the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 November 1995, the Applicant filed an application, requesting the Tribunal:

"1. To find that:

(a) The Respondent's decision not to extend her appointment was based on the prejudiced evaluation of her performance prepared by the Deputy-Chief of the Division for the Arab States and Europe, ...

(b) The Respondent, in rejecting the findings and recommendations of the Ombudsman Panel and the JAB [Joint Appeals Board] Panel, denied the Applicant proper redress through a procedure he has himself established.

(c) The Respondent denied the Applicant due process rights

- (i) By failing to respect both the form and purpose of the performance evaluation system: ...
- (ii) The Rebuttal Panel was given false information on an essential issue, [and] was not given sufficient time by the Administration to investigate the matter fully and fairly;
- (iii) The special UNFPA Ad Hoc Investigative Panel set up to hear the charges of sexual harassment wrongly refused to consider vital evidence in the case ...

2. ... to reinstate the Applicant as of 17 July 1992, or, in the alternative, to see that she is offered a two year contract in an environment in which she can be judged on the basis of her work alone, as recommended by the Ombudsman Panel.

3. ...

- (a) To remove the invalid PER [performance evaluation report] from the personnel file;
- (b) To pay the Applicant compensation equal to nine months' net base salary, for the violation of the PER rules;
- (c) To order that an independent panel be established to investigate the sexual harassment aspect of the case, an aspect not considered by the JAB ...

4. ... that the Tribunal also award the Applicant an additional two years' net salary, for violation of her right to due process in both the rebuttal panel procedure and before the UNFPA administration Ad Hoc Investigative Panel."

Whereas, the Respondent filed his answer on 26 February 1996;
Whereas the Applicant filed written observations on
22 October 1996;

Whereas, the facts in the case are as follows:

The Applicant entered the service of UNFPA on 18 March 1989, on a one-year fixed-term contract as a Programme Officer at the P-3,

step 7 level in the Division for Arab States and European Programmes. Her appointment was extended for two years, until 17 March 1992. The Applicant's appointment was further extended until 17 May 1992 and, thereafter, until 17 July 1992, when she separated from service.

There was no evaluation of the Applicant's performance during her first year of service. On 12 February 1992, the Applicant signed her performance appraisal review (PAR) for the year 1991. In comments attached thereto, she contested the rating of her performance as "5" ("unsatisfactory") and requested an "immediate transfer to another UNFPA division". On 24 February 1992, the Applicant signed a Performance Review and Staff Development Report (PR), covering the period from 20 March 1989 to 9 July 1990. The report concluded that the Applicant was "a staff member whose performance does not meet expected standards in all respects".

By a letter from the Chief, Personnel Branch, UNFPA, dated 20 March 1992, the Applicant was informed that, in light of her "unsatisfactory performance", it was not UNFPA's intention to continue her employment, but that she was granted a grace period until 17 May 1992, to enable her to conclude her responsibilities. In a reply of the same day, the Applicant gave formal notice to the Deputy Executive Director (Programme), UNFPA, of her recourse against the decision to terminate her services. By a letter dated 16 April 1992 to the Administrator, UNDP, the Applicant requested administrative review and rescission of the decision to separate her from service. The Applicant submitted a formal rebuttal to her 1991 PAR to the Director, Division of Personnel on 6 May 1992.

In a memorandum to the Applicant dated 12 May 1992, the Chief of the Legal Section of the Division of Personnel, UNDP, stated that the decision to separate her from service would be maintained, in view, inter alia, of the fact that 'an internal inquiry on your allegation of prejudice or improper motivation by your superior has not revealed any evidence supporting your claim'.

On 12 May 1992, the Applicant requested, in accordance with staff rule 111.2(f), a summary hearing by the Joint Appeals Board (JAB) to recommend the suspension of action to separate her, pending completion of the rebuttal process. She noted that a rebuttal panel had not been established in her case.

An Ombudsman Panel was convened to review the issue of the Applicant's performance evaluations. In its report dated 14 May 1992, the Ombudsman Panel noted that "because performance-related discussions were not held with her during the first year, and because she was given the maximum possible extension after 12 months of service, the Panel feels that a very legitimate case exists for the staff member to have assumed that her performance had been at least satisfactory." The Ombudsman Panel went on to recommend that the Applicant "be moved to a different division in UNFPA, under a different supervisor, that she be given an additional one-year contract ... and that her performance be assessed at the end of the proposed one-year extension." The Panel felt that this was the fairest solution since it believed that "[the Applicant] is being penalized because deadlines for reporting procedures during her first two years with UNFPA were not observed by management."

On 14 May 1992, the JAB Panel held a summary hearing on the Applicant's request for suspension of action. In the proceedings before the JAB, the Ombudsman Panel Member who had reviewed the case in depth testified that the Applicant's file contained no written evaluation of her work expressing any dissatisfaction with her performance during her first two years with UNFPA. In its report of 15 May 1992, the JAB unanimously agreed on its conclusions, which read in part as follows:

- "(b) There was sufficient reason to warrant awaiting the outcome of the rebuttal process which would include an investigation of the allegation that the performance evaluation on which the decision not to renew the Appellant's contract may not have been based on

objective criteria but on improper considerations, as a result of professional and sexual harassment of the Appellant by her supervisor.

- (c) Without going into the substance of the issues at this stage, in the view of the Panel, the Appellant would suffer irreparable damage if she were separated before the rebuttal proceedings were completed. The Panel understands that proceedings have begun and that there is therefore no reason why they should not be completed without undue delay.
- (d) The damage Appellant could suffer would not be limited to procedural handicaps in pursuing her claim for rebuttal, but lies in the vast difference in her chances for obtaining complete satisfaction should she prove successful. If still in service, she would, no doubt, continue to serve under appropriate formal arrangements. If no longer in service, she might have to embark on the pursuit of her claim before other organs, including the UNAT [United Nations Administrative Tribunal] and even then the likelihood of reinstatement or reemployment rather than monetary compensation is limited."

The JAB, therefore, unanimously recommended that the request for the suspension of action be granted.

On 20 May 1992, the Secretary-General informed the Applicant of his approval of the JAB's recommendation to extend her appointment for two months in order to enable the Rebuttal Panel to complete its investigation.

The Rebuttal Panel held a number of hearings in which 15 witnesses, including the Applicant, testified. In its report of 10 July 1992, the Rebuttal Panel, which examined both the Applicant's PAR and PR, unanimously concluded that the evaluation process "was conducted in a fair and appropriate manner and that the supervisor's appraisal was based on an objective assessment of the staff member's performance and was rendered without bias". The Rebuttal Panel was also satisfied that the Applicant had received reasonable coaching, training and supervision, as well as oral warning of her poor performance.

Also, an ad hoc panel (the Ad Hoc Panel) was convened by the Executive Director of UNFPA to investigate the Applicant's charge of sexual harassment. It commenced its duties on 6 July 1992 and finished its investigations on 31 July 1992. In its report dated 31 July 1992, the Ad Hoc Panel found "no evidence whatsoever to substantiate any of the Applicant's allegations regarding sexual harassment by [the Deputy Chief, Division for Arab States and Europe]." On 4 August 1993, the Applicant submitted comments on the Report of the Ad Hoc Panel, noting its "serious inaccuracies".

The JAB adopted its report on 5 October 1993. Its considerations, findings and recommendations read as follows:

"Considerations

A - Performance

...

17. ... the Ombudsman Panel Member who had reviewed the case in depth testified that there was no written evaluation of [the Applicant's] performance in the file of [the Applicant] during the first two years with UNFPA alleging any dissatisfaction with the Applicant's work. Furthermore, the Ombudsman Panel found that there had been professional harassment by [the Deputy Chief, Division for Arab States and Europe] of the Applicant, which was witnessed by former staff members of DTCD [Department of Technical Co-operation for Development] who had professional dealings with UNFPA. [The Ombudsman Panel Member who had reviewed the case in depth] felt that there was personnel mismanagement and recommended that the Applicant be moved to a different division in UNFPA, that she be given an additional one year contract, and that her performance be assessed at the end of the proposed one year extension. The Panel also noted [the Coordinator's, UNDP/UNFPA Ombudsman Panel] statement that there were no guidelines on sexual harassment and that he had proposed that an independent panel write guidelines on sexual harassment.

The Panel proceeded to consider whether the Applicant had received sufficient coaching, training, and supervision. The Representative of the Secretary-General asserted that the Rebuttal Panel had decided that the Applicant had received reasonable coaching, training and supervision, and

that she also had received oral warnings of her poor performance on various occasions from several levels of management. However, the Applicant had not been receptive to efforts by her supervisors. The Applicant's output in terms of both quality and quantity was unsatisfactory.

[The Deputy Chief, Division for Arab States and Europe] contended that the reason why no written statements were put in the Applicant's file was because they would impair the staff member's mental outlook and block the incentive to improvement. He also stated that he did not harass the Applicant sexually or professionally.

[The Chief, Division for Arab States and Europe] stated that he was aware of the Applicant's poor performance. For example, during his trip to Morocco, he had repeatedly asked the Applicant to submit a project and there was no action by the Applicant. She had told him that she did not have time to do it. He had discussed with her the possibility that because of her performance her home-leave might not be granted. However, eventually he did approve the Applicant's home-leave in December 1992.

Counsel for the Applicant pointed out that, in December 1992, when the home-leave was authorized, [the] Applicant had less than six months of anticipated future service by the time she was to take it in February/March 1993. Under the Staff Rules, no home-leave should therefore have been granted, unless it was anticipated that the contract was to be renewed.

The Representative of the Secretary-General pointed out that, under staff rule 111.2(k), in the case of termination or other action on grounds of inefficiency, the Panel should not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor.

The Applicant's counsel pointed out that there was a serious problem of lack of communication, which was noted by the Rebuttal Panel, in connection with the purchase of supplementary vehicles. That Project was bounced back and forth between the Applicant, [the Deputy Chief, Division for Arab States and Europe], and [the Chief, Division for Arab States and Europe]. According to the Applicant's counsel, the Rebuttal Panel considered as key evidence against [the Applicant], the letter concerning a conversation with [a staff member of DTCD] regarding allocation of funds for the

supplementary vehicles. On that subject, [the Chief, Division for Arab States and Europe] contended that he had told [the Applicant] to cancel the purchase of the two vehicles immediately and that the Applicant maintained that she had acted promptly. In support of his contention that she had failed to do so, [the Chief, Division for Arab States and Europe] asserted that the cancellation did not arrive until after the purchase had already been made.

The Applicant's counsel contended that a memorandum concerning the utilization of savings for the buying of the vehicles (...), and a memorandum referring to a sufficient amount in the budget, specifically stating that amount to be \$25,000 (...), implied agreement to go ahead with the purchase of the vehicles.

The Applicant's counsel further contended that documents submitted to the Rebuttal Panel by [the Deputy Chief, Division for Arab States and Europe] were not copies of the 'prefilleds' the Applicant actually submitted, that [the Deputy Chief, Division for Arab States and Europe] had erased the Applicant's comments, date, and initials on certain documents to support his allegations that he had done the work (...). [The Deputy Chief, Division for Arab States and Europe] submitted documents to refute the Applicant's assertion. The Panel did not find that there was sufficient evidence to show that the original documents had been altered.

[The] Applicant's counsel submitted that, since her client was not represented by counsel before the Rebuttal Panel, the Applicant did not get due process. Moreover, the Rebuttal Panel had made serious mistakes of fact.

The Panel considered that there were deficiencies in the reporting procedures, both formal and informal. There was evidence of mismanagement at the higher levels which resulted in a lack of clarity as to whether there was an implied authorization by superior to junior officers to take certain actions which later became the subject of dispute.

B - Sexual harassment

The Panel denied the Respondent's request that the report of the Ad Hoc Panel on the allegations of sexual harassment, which was made available on a confidential basis to the JAB, should not be released to the Applicant. As the rules demanded that anything revealed to one party must also

be made available to the other party, the Panel could not accept that condition. However, it agreed to ask the Applicant and her counsel to ensure that the report would be made available only for the purpose of these proceedings. The latter gave that assurance.

The Panel noted the Applicant's request to the JAB to take into consideration the composition and manner of the Ad Hoc Panel's operation and it also took note of the Applicant's comments on the report of the Ad Hoc Panel. The Chairperson pointed out that this was the first time a JAB Panel was asked to deal with the substance of allegations of sexual harassment. While the JAB was competent to make appropriate recommendations, it could instead ask that an independent body investigate the matter.

The Panel considered that, in the present case, the Administration had failed in its obligation to provide proper and equitable procedures for the timely evaluation of the staff member's performance. The Administration did not complete a PER for the Applicant until she requested it. The Panel, therefore unanimously recommends that the Applicant's PER describing her services as unsatisfactory be removed from her file.

The Panel further recommends that Management, especially in PER evaluations, should follow strictly the rules applicable thereto.

The Panel unanimously recommends that the Applicant be paid compensation equal to nine months' net base salary for the violation of those rules.

As a fixed-term appointment carries no expectation of extension or conversion to another type of appointment, the Panel does not find it possible to recommend reinstatement of the Applicant and the extension of her contract, which she requested, in accordance with the suggestion by the Ombudsman Panel.

The Panel unanimously recommends that an independent Panel be established to investigate the sexual harassment aspect of the case."

On 18 February 1994, the then Under-Secretary-General for Administration and Management informed the Applicant as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that your fixed-term appointment carried no expectation of extension or conversion to another type of appointment and that it did not find it possible to recommend your reinstatement. The Secretary-General has accepted this conclusion.

Although the Secretary-General has noted the Board's conclusions and recommendations regarding the evaluation procedures, he has also given consideration to the report of the Performance Review Rebuttal Panel which reviewed documents and conducted interviews and found that the evaluation of your performance was conducted in a fair and appropriate manner and that the supervisor's appraisal was based on an objective assessment and was rendered without bias. The Secretary-General has also noted that there was no finding by the Joint Appeals Board that there was any bias on the part of the Rebuttal Panel. The Secretary-General has also reviewed the recommendations of the Ombudsman but has noted that the report of the Ombudsman was issued before the Rebuttal Panel made its findings of a fair performance evaluation.

The Secretary-General has also confirmed that you, as an UNFPA staff member, were indeed given early notice of the need to initiate the evaluation of your performance, in particular in UNFPA Circulars dated 27 November 1990 and 17 April 1991. In the light of these circumstances, the Secretary-General has decided not to remove the PAR in question from your file or to pay you compensation.

The Secretary-General has noted the Board's recommendation that an independent Panel be established to investigate your sexual harassment allegations. The Secretary-General has also noted that these allegations have already been reviewed by a special Ad Hoc Investigative Panel set up by the Executive Director of UNFPA and that the report of this Panel concluded that they found no evidence to substantiate any of your allegations. The Secretary-General takes allegations of this nature with extreme seriousness and has considered with care the report of the Ad Hoc Panel as well as your submission and that of your counsel to the Joint Appeals Board regarding this report. After giving full consideration to all factors, the Secretary-General has decided not to establish another investigative panel.

The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision and to take no further action on your case."

On 30 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to extend her appointment was vitiated by extraneous factors since it was based on a prejudiced evaluation of her performance.

2. The Respondent has denied the Applicant due process in the following ways: (a) by failing to respect the form and purpose of the performance evaluation system; (b) by failing to give the Rebuttal Panel sufficient time fully and fairly to investigate the issue of Applicant's performance evaluations and by presenting it with false information on an essential issue; and (c) by the refusal of the Ad Hoc Investigative Panel set up to hear the charges of sexual harassment to consider evidence presented by witnesses for the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment.

2. The decision not to renew the Applicant's fixed-term appointment was not vitiated by extraneous factors.

The Tribunal, having deliberated from 28 October to 21 November 1996, now pronounces the following judgement:

- I. The Applicant joined the United Nations Population Fund (UNFPA) in March 1989, on a one-year fixed-term contract, which was

extended for an additional two-year period. In March 1992, the Applicant was informed that UNFPA did not intend to renew her appointment, due to her unsatisfactory performance. In April 1992, the Applicant requested administrative review of this decision, contending that the evaluation of her performance which formed the basis of the decision had been prejudicial as she had been subjected to sexual harassment by her supervisor, whose advances she had rejected. The Applicant notes that the supervisor in question was the subject of a similar complaint by another staff member.

II. In July 1992, an ad hoc panel was constituted to investigate the allegation of sexual harassment. After interviewing 26 witnesses, the Ad Hoc Panel concluded that there was "no evidence whatsoever to substantiate the claims ... presented". The Applicant challenges the composition of this panel, which was constituted solely of members chosen by the Administration. The Applicant further contends that the panel wrongly refused to consider evidence presented by several witnesses for the Applicant, including evidence of contemporaneous accounts made by the Applicant to friends and other staff members of the alleged harassment.

III. A Rebuttal Panel, which had been constituted to examine the Applicant's rebuttal to her performance appraisal review (PAR) and Performance Review and Staff Development Report (PR), after hearing 15 witnesses, concluded that the Applicant's performance had been evaluated in a fair and appropriate manner, and that the supervisor's appraisal was based on an objective assessment without bias. The Rebuttal Panel further concluded that the Applicant had received adequate coaching, training, and supervision and had been given oral warnings of her performance inadequacies. However, according to one of its members, the Rebuttal Panel's considerations were flawed by two important factors: the "serious doubts about the veracity of the statements made by [the Applicant]", doubts which

eventually turned out to be unfounded. According to that Rebuttal Panel member, had the Panel known the truth at the time of its hearings, it would have probably come to a different conclusion about the Applicant's veracity. Also, the time pressure put on the Panel to finish its deliberations by the end of the Applicant's extension adversely affected those deliberations.

IV. An Ombudsman Panel, which conducted an in-depth investigation in March 1992, found that the Applicant had not received the required periodic evaluation of her performance for her first year of service with UNFPA but that at the end of that year, her contract was renewed for the maximum period of two years. The Ombudsman Panel further found that at the end of her second year with UNFPA, the Applicant still had not been formally evaluated and that there was no indication in the file of any dissatisfaction by her supervisor with the Applicant's work. The supervisor had transferred to another office in July 1991, during the two years of the Applicant's extension.

V. The Respondent does not dispute that performance reviews of the Applicant were not conducted in a timely manner, as she was evaluated nearly two years after the performance period. However, the Respondent relies on the report's findings that the Applicant's performance was ranked as "somewhat below standard" for the period March 1989 to July 1990. The performance review covering the year 1991 ranked the Applicant's performance as "unsatisfactory". These ratings were reviewed and endorsed by the Management Review Group that recommended non-extension of the Applicant's appointment. The Respondent notes that, following investigation of the Applicant's allegation that this rating was based on personal prejudice relating to sexual harassment, the Rebuttal Panel upheld the rating as having been made "without bias".

VI. In considering the circumstances of this case, the JAB concluded that the Administration had failed in its obligation to provide timely performance evaluation of the Applicant. To compensate for this failure, the JAB recommended the award of nine months' salary to the Applicant. The JAB also recommended the removal of the PAR from the Applicant's file. With regard to the allegations of sexual harassment, the JAB noted the concerns raised by the Applicant relating to the composition of the Ad Hoc Panel to investigate the allegation, and to the manner in which that panel conducted its investigation. Rather than addressing these concerns itself, the JAB recommended that an independent panel be established to investigate the claim of sexual harassment.

VII. The Tribunal agrees with the JAB's finding that the Administration failed to adhere to performance evaluation procedures. Had these procedures been followed, the Applicant's first supervisor would have completed evaluations that would have been free from any possible bias relating to the allegation of sexual harassment. Moreover, the Applicant would have been on formal notice of any shortcomings in her performance and would have had an opportunity to address them through job training and other performance improvement opportunities.

VIII. The Applicant claims that an episode that took place in Damascus in 1989, which she alleges constituted sexual harassment, was connected with her non-renewal, as it resulted in a prejudicial appraisal of her performance by one of the supervisors involved in the sexual harassment episode.

On the basis of the record before the Tribunal, it is not possible to determine whether the Applicant was subjected to sexual harassment by her supervisor. Nor is it possible to ascertain

whether, if there was sexual harassment by the Applicant's supervisor, this influenced the performance evaluation of the Applicant by other supervisors.

IX. As the Tribunal has held, sexual harassment is a very serious offence and the Administration has a responsibility to investigate claims of sexual harassment promptly and effectively (Judgements No. 560, Claxton (1992) and No. 707, Belas Gianou (1995)). Such investigation is greatly obstructed by the failure of the Administration to adhere strictly to its performance evaluation procedures. These procedures serve as important safeguards against the introduction of prejudice and bias arising from sexual harassment or any other improper motivation.

X. Since the investigation of the Applicant's claim of sexual harassment, the Administration has introduced in ST/AI/379 of 29 October 1992, a policy on sexual harassment which includes procedures for the investigation of complaints. These procedures were not in place when the Applicant's claim was made. As a consequence, the investigation undertaken by the Administration did not fully conform to subsequently established procedures.

In view of the foregoing, the Tribunal finds that, in light of the procedural shortcomings in the performance evaluation process, the Applicant is entitled to compensation and further investigation of her claim regarding sexual harassment is warranted.

XI. For the foregoing reasons, the Tribunal orders that the Respondent:

(1) Remove the PAR and PR performance evaluation reports from the Applicant's file;

(2) Establish an independent panel, as set forth in ST/AI/379, to investigate the Applicant's claim of sexual harassment; and

(3) Pay the Applicant compensation equal to \$15,000.00.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary