



Administrative Tribunal

Distr.
LIMITED

AT/DEC/1018
20 November 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1018

Case No. 1097: AL-FAHOUM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo;
Ms. Brigitte Stern;

Whereas, on 14 September 1999, Maha Al-Fahoum, a former staff member of the
United Nations, filed an Application containing pleas which read as follows:

"II. *PLEAS*

(i) Confirmation that the Applicant's separation from service was in effect a termination and not an expiration of appointment. The ground for termination was given as irreconcilable differences between her and her supervisor. The clear implication of that was that except for the 'irreconcilable differences' she should have continued in service.

(ii) Confirmation that the termination of the Applicant was the result of prejudice which was clearly demonstrated by a three-month performance evaluation which was in effect discredited by the Rebuttal Board and amended by the Executive Director of UNEP.

(iii) Confirmation that the Applicant had a legal commitment for at least a one year extension of fixed-term appointment effective 1 January 1997 and would in fact have been formally extended but for the high-handed arbitrary decision of her latest chauvinistic and prejudiced supervisor.

(iv) Confirmation that in view of the sudden change in the evaluation of a long standing loyal and productive staff member, and in view of the Applicant's complaints of prejudice, it was incumbent on the Executive Director of UNEP to investigate the matter in the interest of the Administration of justice and of due process rather than chose the easier way of terminating the lower rank Applicant. The Ombudsman assigned by the Executive Director had no authority to investigate and acted merely as a conciliator who, being faced with an unreasonable and uncompromising supervisor reported that there were 'irreconcilable differences' between the Applicant and her supervisor, which the Executive Director found it easier to resolve by terminating the Applicant.

(v) Confirmation that the discretionary power to terminate the holder of a temporary appointment 'must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision.' (AT Judgements Nos. 43, 44, 45 and 54).

(vi) To order that the Secretary-General (the Executive Director of UNEP) rescind the order to terminate the Applicant's service and ... reinstate her in fulfilment of the commitment in writing [of] 11 December 1996 that all General Service and Professional staff contracts whose performance meets expectations of high standards of efficiency, competence and integrity [would] be extended for a period of one year ... [T]here was a clear and unequivocal assumption that an extension for one year was forthcoming, had it not been for the high-handed, arbitrary and vengeful intervention of [the] Applicant's new supervisor.

(vii) To order a sum of one year's net salary as compensation for the Applicant, should the Secretary-General chose not to reinstate her, taking into account the abrupt, arbitrary and prejudicial measures taken against her and the severe hardship she had suffered as a result of that."

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2000;

Whereas the Respondent filed his Answer on 24 January 2000;

Whereas the Applicant filed Written Observations on 7 February 2000;

Whereas on 25 July 2001, the Tribunal decided to postpone the consideration of the case until its autumn session;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) as a part-time teacher in October 1976. After a break in

service, on 18 February 1993, she joined the United Nations Environment Programme (UNEP) on a one-year fixed-term appointment at the P-4 level as a Communications Officer (Programme), Office of the Executive Director, UNEP, Nairobi. She was reassigned to the UNEP Regional Office in West Asia in Manama, Bahrain, effective 15 February 1994, and her functional title was changed to Regional Communication/Information Officer, UNEP/Regional Office for West Asia. Her appointment was extended for further fixed-term periods, the last appointment expiring on 31 March 1997.

The Applicant received several performance evaluations between February 1993 and July 1995, giving her overall ratings from "a very good performance" to "an excellent performance". In January 1996, a new Regional Director was assigned to the Manama duty station. He became the Applicant's First Reporting Officer. The Applicant's performance evaluation report (PER) for the period 1 January 1996 to 31 March 1996, written by the Regional Director gave the Applicant an overall rating of "good" but rated some aspects of her work as less favourable. Her ability to meet schedules, effectiveness in planning and work organization, effectiveness in supervision, and ability to motivate and direct a productive work unit were rated as "D". Her effectiveness in maintaining harmonious working relationships earned an "E". The Applicant rebutted the individual grades and they were subsequently upgraded. The Applicant's overall rating remained "good".

In a memorandum dated 11 December 1996, the Executive Director, UNEP, informed all UNEP staff that she would extend the contracts of all General Service and Professional staff whose contracts were scheduled to expire on 31 December 1996, for a period of one year provided that their performance met "expectations of high standards of efficiency, competence and integrity".

The working relationship between the Regional Director and the Applicant had deteriorated to the extent that the UNEP Headquarters engaged an Ombudsman to attempt a reconciliation in January 1997. The report of the Ombudsman, dated 22 January 1997, concluded that the Applicant's problems "[stemmed] from her independent course of action during the period of [the new Regional Director's] predecessor". The report concluded that the breakdown in the relationship was performance-related and the differences between the Applicant and her supervisor were irreconcilable.

In a letter dated 13 February 1997, the Executive Director, UNEP, informed the Applicant that her contract would not be extended, basing this decision on the irreconcilable differences between the Applicant and her supervisor and the Applicant's failure to accept instructions. The Executive Director also noted that, although the Applicant had good qualifications in public relations, the Regional Director's work plan envisioned different priorities and his plan had not been implemented at least in part due to the Applicant's conflicting views. For this reason, and to permit the office to function properly, the Executive Director concluded that there was no alternative but to instruct that the Applicant receive no further extension of her contract.

On 15 February 1997, the Applicant requested the Executive Director, UNEP, to convene a Panel on Discrimination and Other Grievances to consider her case.

On 12 and 27 March 1997, the Applicant wrote to the Executive Director, UNEP, requesting administrative review of the decision not to extend her contract. She addressed a letter to the Secretary-General on 27 March with the same request. On 1 April 1997, the Executive Director advised the Applicant that the decision would not be rescinded.

On 13 June 1997 the Panel on Discrimination and Other Grievances submitted its report to the Executive Director, UNEP, recommending that "UNEP attempt to find another position for the [Applicant] and deal with her alleged irregularities through enquiry and disciplinary action, if necessary".

On 8 August 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 27 May 1999. Its considerations, conclusions and recommendations read as follows:

"Considerations

...

33. ...[T]he panel could not completely ignore the underlying insinuation in the appellant's contentions that the Executive Director's decision not to extend her fixed-term contract appointment was contaminated by the appellant's supervisor's personal grudge and chauvinistic behaviour which led to his recommendation for non-extension of the appellant's fixed-term appointment. ...

...

36. The majority of witnesses could not corroborate the allegations of sexual harassment by the [appellant's] supervisor. ...

37. ... [T]he panel concluded that even though the appellant's supervisor might be viewed as one of the more difficult supervisors ... it found no evidence that he was prone the kind of chauvinistic harassment the appellant accuses him of.
...

Conclusions and Recommendations

47. ... [T]he Panel concludes that:

- a. The decision not to extend the Appellant's fixed-term contract was not motivated or contaminated by prejudice and extraneous factors.
- b. The Appellant was not given due consideration of her rights on the occasion of her separation from service.
- c. The Appellant did not have a reasonable expectation of renewal of her contract.

The Panel therefore *recommends* to the Secretary-General that the Appellant be paid one month [of her] net salary as compensation.

The Panel makes *no further recommendations* in support of the appeal."

On 31 August 1999, the Officer-in-Charge, Department of Management, transmitted a copy of the JAB report to the Applicant and informed her as follows:

"...

The Secretary-General has ... taken note of, and agrees with, the Board's conclusion that the non-extension of your appointment was void of the extraneous and prejudicial motivations that you alleged in your appeal. The Secretary-General also agrees with the Board's conclusion that the Executive Director's memorandum of 11 December 1996 did not create a legal expectancy of renewal of your appointment.

The Secretary-General also notes that the Board also emphasized that the Administration should have looked into the allegations of misconduct made against you and, if appropriate, institute disciplinary action against you, and should have also handled shortcomings in your performance, if any, within the context of the PAS and in accordance with its procedures. In the Board's view, the failure to implement those

procedures' resulted in a violation of your due process rights, for which the Board recommended compensation in the amount of [one] month net base salary.

The Secretary-General notes that the initiation of disciplinary proceedings is not mandatory but discretionary, and that the decision not to initiate disciplinary proceedings against you neither prejudiced your case nor violated your due process rights. Accordingly, no justification exists for the payment of compensation for the Administration's decision not to initiate disciplinary proceedings against you ... In the light of the foregoing, the Secretary-General has decided to take no further action on your appeal.

..."

On 14 September 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. She was sexually harassed by her supervisor and, due to her rejection of his advances, he carried a grudge against her and consequently exerted persistent efforts to minimize her role at the office and in the region. Further, he gave her a poor rating in her PER of 31 March 1996, although in previous years her performance had been rated as "very good" and "excellent".
2. The irreconcilable differences mentioned in the Applicant's letter of termination were entirely the fault of her supervisor and cannot form the basis for her termination.
3. The Applicant's separation from service was the result of termination and not because her appointment carried no expectation of renewal or extension.
4. The use of an Ombudsman with no designated authority was improper and had no legal basis in the United Nations system of due process.
5. The Applicant had an absolute commitment from the Executive Director, UNEP, to an extension of her appointment for at least one year.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment and the non-renewal of her appointment did not violate her rights.

2. The Respondent's actions were not discriminatory, nor were they vitiated by prejudice or any other extraneous factors.
3. The Applicant's separation from service resulted from the expiration, not the termination, of her appointment.
4. It was proper to use an Ombudsman to attempt reconciliation in the Applicant's case.

The Tribunal, having deliberated from 6 to 25 July 2001 in Geneva, and from 29 October to 20 November 2001 in New York, now pronounces the following Judgement:

I. This case arises out of a challenge to an administrative decision of non-renewal of contract for the Applicant, who held a fixed-term contract. The Applicant had been a staff member of UNEP since 18 February 1993 and, since January 1995, assigned to Manama, Bahrain, where her title was "Regional Communications/Information Officer". The Application filed by the Applicant contests the refusal to renew her contract, as a result of which she left UNEP on 31 March 1997.

II. The Tribunal recalls that the Administration has the discretionary power to terminate fixed-term contracts. Staff rule 104.12 (b) (ii) states: "[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". Similarly, rule 109.7 (a) states: "[a] temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment."

III. While it is true that, *as a general rule*, there is no entitlement to the renewal of a fixed-term contract, even for exceptional employees (see Judgements No. 173, *Papaleontiou* (1973); No. 205, *El-Naggar* (1975); No. 368, *Roy* (1986); No 427, *Raj* (1988); No. 440, *Shankar* (1989), such entitlement was *specifically* conferred on deserving members of the UNEP staff by a memorandum dated 11 December 1996. In this document, the Executive Director stated:

"I am pleased to inform you that I am now able to take the following decisions in respect of staff whose contracts expire on 31 December 1996, and whose performance meets expectations of high standards of efficiency, competence and integrity. All General Service and Professional Staff contracts will be extended for a period of one year."

IV. The Tribunal notes that administrative instruction ST/AI/411 of 18 September 1995, which sets out a number of guidelines for an assessment which is as objective as possible of United Nations staff, explains the rating system, based on the following ratings:

- 1 (equivalent to A),
- 2 (equivalent to B),
- 3 (equivalent to C),
- 4 (equivalent to D),
- 5 (equivalent to E).

Paragraph 20 of the Administrative Instruction states that ratings 1, 2 and 3 (and therefore A, B and C) establish satisfaction with the work performed and should be so viewed when staff members are considered for renewal of fixed-term appointment. In other words, these ratings - A, B, C - confer the right to renewal; it was in implementation of that principle that the Executive Director made her collective announcement to the UNEP staff.

V. The question is therefore, whether the Applicant should be considered as belonging to the category of employees with entitlement to renewal of their contract, as conferred by the December 1996 memorandum. To answer this question, the Tribunal will consider the Applicant's ratings and the procedures by which they were determined.

VI. The Tribunal will begin by dismissing the Applicant's allegation that the evaluation prepared by her new supervisor was untimely. While the Tribunal is somewhat surprised by the haste shown by the new supervisor to subject the Applicant to an evaluation procedure as soon as he arrived, it does not view that as an act that could be characterized as arbitrary; the Applicant's evaluation period had ended on 31 December 1995. It might seem inappropriate to start a new evaluation period on 1 January 1996, but specific provision is made for this procedure when a staff member is reassigned or a new supervisor arrives (see ST/AI/411, para. 5). The Tribunal

therefore considers that this action belongs to the category of procedures that may be used without exceeding one's powers.

VII. Moreover, the Tribunal does not consider the dispatch of an Ombudsman to be objectionable in itself, since any course of action leading to conflict resolution is welcome. This conclusion is further justified by the statement in the Respondent's Answer that a pilot Ombudsman programme had begun in UNEP in 1993 and then been formalized by UNEP Governing Council resolution 18/42 of 25 May 1995.

VIII. With regard to the contents of this first evaluation by the new Regional Director, the Tribunal notes that it was completely and starkly at odds with the Applicant's previous evaluations and that she challenged the ratings that she had been given. After being informed of the decision by UNEP not to renew her contract, the Applicant requested, in a letter dated 15 February 1996, that the ratings should be submitted to the Panel on Discrimination and Other Grievances for review; the Panel reported on 13 June 1997. The Tribunal takes particular note that the Administration did not await the Panel's report before terminating the Applicant's contract.

IX. The individual ratings in the final PER, which the Applicant contested before the Panel, were extremely unfavourable, even if the overall evaluation was good. Her ratings were as follows: D-C-C-E-D-D-D. As a result of the Panel's assessment, the contested performance evaluation report was amended on 4 June 1997 - that is, after the termination of the Applicant's contract - to read as follows: C-B-B-C-C-C-C. The Executive Director stated that she had made the changes on the basis of the Panel's statements regarding the difficulties and complexities of the case.

X. The Tribunal notes that all the ratings were raised by one level, with one notable exception: the "E" rating which was given in evaluation of the Applicant's effectiveness in maintaining harmonious work relationships with her colleagues was upgraded by two levels. This implies that, at the very least, the original evaluation was highly inaccurate. This point may

be of some importance, bearing in mind that the reason for the non-renewal of the Applicant's contract was precisely the fact that she could not work harmoniously with her supervisor.

XI. On the basis of this corrected evaluation, the Tribunal considers that in December 1996 the Applicant was entitled to an additional year's contract and does not, in that regard, agree with the analysis of the JAB. In other words, she was entitled to a further 12 months in December 1996, and, therefore, in March 1997 was still entitled to nine more months.

XII. The JAB considered that the Applicant could not have a "reasonable legal expectancy" that her contract would be renewed, despite the memorandum of 11 December, because she knew that her working relationship with the Regional Director was very poor. In his Answer of 24 January 2000, the Secretary-General adduced the same argument.

XIII. The Tribunal cannot accept this reasoning and believes that the JAB - and subsequently the Secretary-General - confused the objective entitlement to renewal of the contract, conferred by the memorandum of 11 December to all employees of a certain category who had achieved certain ratings, with the subjective fears of non-renewal that the Applicant might feel owing to her difficult relationship with her new supervisor.

XIV. If the Applicant's amended evaluation had been known at the time when her contract came up for renewal, she would have been one of those whose right to renewal had been recognized in December 1996. It is therefore the Tribunal's conclusion that, if the ratings retroactively awarded her by the Administration had been known in December 1996, the Applicant would have been entitled to the renewal of her contract until December 1997.

XV. Thus, when putting forward a reason for not renewing her contract in March 1997, the Administration should have based its action on a legitimate reason. The Tribunal considers that the JAB and the Applicant are right in believing that the Administration has not shown satisfactorily that the decision not to renew the Applicant's contract was based on a rigorous and objective determination of the unsatisfactory nature of her services.

In its report, the JAB is extremely critical of the Administration's behaviour:

".... the panel disapproves strongly of the way in which the case of the appellant was handled by her supervisor and the [A]dministration at UNEP Headquarters. As already mentioned above, it is the view of the panel that the Administration should have on the one hand looked into the allegations of misconduct made against the appellant and, as appropriate, institute[d] disciplinary proceedings against her at an early stage and that, on the other hand, the alleged shortcomings of the appellant in her work performance should have been handled in accordance with the procedures governing the monitoring of staff members' performance (...). The observance of such procedures would have clarified many of the problems ... Furthermore, the panel believes that, because both the central and regional [A]dministration failed to implement these procedures, the appellant was not given due consideration of her contractual rights."

XVI. While the Tribunal concurs with this aspect of the JAB's analysis, it considers that the reasoning should be followed through to its logical conclusion and that the shortcomings in the Applicant's performance evaluation were instrumental in depriving her of the renewal of her contract. Staff should be evaluated as objectively as possible and the Tribunal cannot accept that, when the amended evaluation was entirely favourable and, moreover, followed on a long line of excellent evaluations before the arrival of the new supervisor, it was adequate for the Administration to invoke, without further ado, "the irreconcilable differences between you and the Regional Director" as a reason for refusing to renew the Applicant's contract, to which the Applicant was entitled in view of the circumstances of the case.

XVII. The JAB obviously examined this question but decided that the irreconcilable differences between the Applicant and her supervisor did not *a priori* appear to be an arbitrary motive. It did, however, consider that the issues should be examined more closely and that it should consider the underlying factors, namely, the accusations of sexual harassment made by the Applicant against her supervisor. After taking into account a number of factors that it mentions in arriving at its conclusion, but at the same time dismissing a whole range of evidence, the JAB considered that the accusations of sexual harassment could not be corroborated. The Tribunal does not consider it necessary to review here opinions on whether or not the sexual harassment took place, since it is always a difficult matter to prove - or to disprove - and the question is not material in deciding the case. Whether there were incidents of sexual harassment

or not, the reason given for the non-renewal of the Applicant's contract - that she did not get on with her supervisor - while she was entitled to such renewal, is not a sufficient reason if it is not founded upon observance of the established procedures.

XVIII. In conclusion, the Tribunal considers that in December 1996 the Applicant was entitled to a one-year renewal of her contract, and that it was due to improper implementation of procedures established to protect the staff that the decision not to renew her contract was taken without waiting for the results of the review of the evaluation which prompted the decision and that the grounds for the decision, namely irreconcilable differences between the Applicant and her supervisor, were arbitrary.

XIX. In view of the foregoing, the Tribunal:

- Orders the Respondent to pay the Applicant nine months of her net base salary payable at the rate in effect at the date of her separation from service, as compensation for the injury resulting from the non-renewal of her contract until December 1997, in conformity with the commitments of the Administration; and
- Rejects all other pleas.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Omer Yousif BIREEDO
Member

Brigitte STERN
Member

New York, 20 November 2001

Maritza STRUYVENBERG
Executive Secretary