



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1045

Case No. 1156: OBINY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Omer Yousif Bireedo; Ms. Brigitte
Stern;

Whereas, on 17 October 2000, Philip Ogutu Obiny, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application requesting the Tribunal:

"...

3. ... [T]o order the rescission of the prejudicial and arbitrary decision by the Respondent not to renew the Applicant's fixed-term Appointment
4. ... [T]o consider the findings of the Special Human Resources Mission to Kenya Report ... dated 19 November 1997 and find its relevance to the Applicant's case
5. [To order that the] Applicant be paid salary at the current rate from 1 January 1997 until the date of reinstatement
6. [To order] reinstatement of [the] Applicant in United Nations service from 1 January 1997 ...
7. [To order] additional compensation for [legal costs] ... and other damages amounting to US\$ 10,000 ...

...

11. ... [T]o order the waiver of the immunity against prosecution of [the UNDP Resident Representative in Nairobi (the Resident Representative)] and [the Deputy Resident Representative (Operations)] ...
 12. [To] order removal of all those documents, which were fabricated and confidential from the [A]pplicant's personal file ...
 13. [To] order the public apology to the [A]pplicant by the ... Resident Representative and to retract the contents of his letter dated 29 November 1996...
 14. [To] order payment of compensation in an amount equivalent to salary ... from 1.1.97 until the date on which the [A]pplicant would retire in addition to damage[s] at (7) above plus termination indemnity, in case the Secretary-General wishes to exercise the option given to him under article 9, paragraph 1 of the Statute...
- ..."

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 30 April 2001 and thereafter until 29 June 2001;

Whereas the Respondent filed his Answer on 12 June 2001;

Whereas, on 26 September 2001, the Applicant filed Written Observations amending his pleas as follows: "The [Applicant] wishes to withdraw ... plea number 1".

Whereas, on 18 June 2002, the Applicant submitted an additional communication;

Whereas the facts in the case are as follows:

The Applicant joined UNDP in Nairobi, Kenya as a Programme Assistant, Programme Support Unit (PSU), on a three-month fixed-term appointment at the GS-8 level, on 1 August 1990. Due to organizational changes in the GS scale, the Applicant's level was changed to GS-6. The Applicant's fixed-term appointment was extended several times, until 31 December 1996.

Between April 1994 and May 1996, the Applicant was Chairman of the Staff Association.

In the Applicant's Performance Appraisal Review (PAR) for 1994, his overall performance was rated as "4", on a scale from 1 to 5 where 1 is highest. The Applicant rebutted this rating and, on 20 October 1995, the PAR Rebuttal Panel recommended that his overall performance be upgraded to "3".

On 19 September 1996, at the request of the Deputy Resident Representative (Operations) and in her presence, the Co-ordinator, Office Technology, accessed the Applicant's computer and copied several files. The Applicant was not present during this search.

On 2 November 1996, the Applicant's supervisor urged him to improve his performance. On 14 November, however, the Applicant's supervisor informed the Resident Representative that she was "unable to support a further extension of [the Applicant's] contract" due to tardiness and absences, and stated that his work had fallen short of her expectations. She added that she had learned that the Applicant had a job elsewhere. She concluded: "given our inability to deal with disciplinary cases in a satisfactory manner in the past, I propose that we inform [the Applicant] that his contract will not be extended beyond 31 December 1996". The following day, the Resident Representative requested the approval of the Office of Human Resources, UNDP, (OHR) to proceed with implementation of this proposal. On 21 November, the Director, OHR, confirmed his agreement with the proposed measures and instructed the Resident Representative to ensure that the Applicant's Performance Appraisal Review (PAR) for the year 1996 was documented and that a copy had been given to the Applicant.

On 29 November 1996, the Resident Representative informed the Applicant that due to his failure to meet the required standards of performance, his fixed-term appointment would not be renewed beyond its expiration date of 31 December 1996. He further advised the Applicant that he would be placed on special leave with full pay (SLWFP) until then and that his entry to the UNDP offices would be restricted. A memorandum to this effect was distributed to all relevant security offices.

On 19 December 1996, the Applicant requested administrative review of the decision not to renew his fixed-term contract. On 22 January 1997, the Chief, Legal Section, OHR, responded, informing him that they saw no justification for reversing the original decision.

On 5 June 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 23 February 2000. Its considerations, conclusions and recommendations read, in part, as follows:

"V. Considerations

1. ...

... [T]here is no PAR for the last performance period. This omission in itself is a serious breach of procedure and a violation of the staff member's rights ...

... The staff member was not given any time and no real opportunity to improve his alleged shortcomings. It is an indication of arbitrariness to urge a staff member to improve his performance and then two weeks later recommend separation of that staff member.

In addition, the panel took note of ... the Personnel Manual of UNDP, subsection 1.6 (b) which lays out specific procedures in cases of termination for unsatisfactory service. ... The panel found no evidence that this procedure was respected.

...

2. ...

... [T]he recommendation not to extend the [Applicant's] fixed-term contract was based on alleged acts which the Administration a few years earlier had not found serious or not evident enough to warrant the institution of disciplinary proceedings. It is an act of arbitrariness to then, several years later, base the non-extension of the [Applicant's] contract on exactly those grounds.

Concerning the [Applicant's] alleged outside activities without the consent of the Secretary-General (Realtime Software Ltd), ... [in] the absence of an official enquiry into the facts of the case, the panel regards the [Applicant's] explanation as plausible and sufficient to have weakened the *prima facie* case against him and to have warranted, if not the instigation of [Joint Disciplinary Committee] proceedings, at least further investigation into the allegations. ... The fact that no investigations were conducted was a violation of the staff member's rights.

... [T]he panel also believes that it was arbitrary not to have copied the letter of 14 November 1996 to the staff member to enable him to submit his opinion on the assessment of his supervisor. This omission violated principles of transparency and the staff member's right to [defence].

3. The panel did not find sufficient evidence to allow it to conclude with certainty whether the [Applicant] was the victim of arbitrariness as a result of his involvement in the Staff Association of UNDP. ...

4. Regarding the [Applicant's] contention that he had a legal expectation of renewal of his contract, the panel concludes that there is no reason or legal basis for such an expectation. ...

...

VII. Conclusions and Recommendations

For the foregoing reasons the panel unanimously *concludes* that the decision not to extend the [Applicant's] fixed-term contract was arbitrary.

The panel therefore *recommends* to the Secretary-General that the [Applicant] be paid 9 months net base salary as compensation."

On 12 September 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's conclusion and recommendation.

On 17 October 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's rights of due process were violated
2. The decision not to renew the Applicant's fixed-term appointment was arbitrary and was vitiated by prejudice, discrimination and other extraneous factors. The Applicant suffered harassment reprisals as a result of his involvement in the Staff Association.
3. Essentially, the Applicant's case is one of termination, rather than non-renewal, of contract.
4. The JAB erred in determining that the Applicant had no expectancy of renewal of his fixed-term appointment, since renewal "was precluded by the prejudicial and arbitrary termination action".
5. The compensation recommended by the JAB is not commensurate with the serious violations that the Applicant suffered.

Whereas the Respondent's principal contentions are:

1. The Applicant was appropriately compensated for procedural irregularities in connection with the non-renewal of his fixed-term appointment.
2. The Applicant had neither the right nor the legal expectancy of continued employment with the Organization.
3. The decision not to renew the Applicant's fixed-term appointment was not prompted by improper motivation or other extraneous factors.

The Tribunal, having deliberated from 26 June to 23 July 2002, now pronounces the following Judgement:

I. This case arises from the non-renewal of the Applicant's fixed-term contract in circumstances the JAB found to be arbitrary, unfair and in violation of the Applicant's rights. The Applicant contends that the award paid by the Secretary-General for procedural irregularities and for the arbitrary decision taken, pursuant to the JAB's recommendation of nine months net base salary, is insufficient. He appeals to the Tribunal to order his reinstatement.

II. The Tribunal must emphasise that the Applicant's appointment was under a fixed-term contract. Staff rule 104.12 (b) (ii) stipulates that "[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment" and this was also clearly stated in the Applicant's Letter of Appointment. Furthermore, the Tribunal has consistently reiterated that "a fixed-term appointment normally ends on its expiration date, and prior renewals cannot create, for the staff member, a legal expectancy of renewal or conversion to any other type of appointment". (Judgements No. 578, *Hassani* (1992), No. 440, *Shankar* (1989) para. V.)

III. The Tribunal notes that the Applicant's appointment was terminated because of deteriorating performance, unauthorized absences, and misconduct which allegedly included operating a company, Realtime Software Ltd, without the permission of the Secretary-General.

With respect to the Applicant's performance, he contends that his past performance had been mostly rated as "fully satisfactory". The Tribunal notes the finding of the JAB that,

notwithstanding the Respondent's claim that the Applicant's performance in the last year of his contract was not satisfactory, no PAR was undertaken for the said period. The Tribunal agrees with the JAB that this omission is a serious breach of procedure and a violation of the Applicant's rights. It is even more serious in light of the fact that there was a specific instruction from Headquarters to issue the Applicant with a PAR reflecting the quality of his performance for this period.

In this regard, the Tribunal notes that on 2 November 1996, the Applicant's supervisor urged him to improve his performance, yet on 14 November 1996, less than two weeks later, recommended to the UNDP Resident Representative that the Applicant's fixed-term contract not be extended. It is obvious that the Applicant was given neither the time nor a genuine opportunity to improve his alleged shortcomings. The JAB rightly noted that urging a staff member to improve his performance and two weeks later recommending his separation from service is an indication of arbitrariness.

IV. Insofar as the alleged misconduct is concerned, the Applicant contends that the Administration should have instituted disciplinary proceedings to investigate the allegations of misconduct and unauthorized absences and to provide him with an opportunity to clear his name. The Tribunal agrees that disciplinary proceedings ought to have been initiated in order to investigate these serious allegations: the fact that no such disciplinary measures were conducted violated the Applicant's rights and satisfies the Tribunal that the action taken against him was arbitrary and unfair. In this regard the Tribunal recalls Judgement No. 877, *Abdulhadi* (1998) which provides:

"The Tribunal finds that, considering the serious implications of the 'strong suspicion' voiced against the Applicant, as well as the Auditor's recommendation, the Respondent should not have terminated the Applicant without first holding disciplinary proceedings. Not only would such proceedings have been an appropriate forum to resolve the multiplicity of issues which had been raised in the Audit Report; such proceedings also would have had the added benefit of providing necessary due process to the Applicant. The Tribunal has pointed out on previous occasions the consequences that ensue when the Administration deprives staff members of due process." (Para. IV.)

Furthermore, the Applicant did not receive a copy of the letter dated 14 November 1996 which was sent by his supervisor to the UNDP Resident Representative regarding alleged acts of misconduct, said to have occurred over several years, which had not been the subject of disciplinary procedures as provided for in the Staff Rules. Had the Applicant received a copy of that letter, he would have been in a position to respond to these allegations. The Tribunal considers that the failure to provide the Applicant with a copy of this letter is yet another example of the Administration's violation of the principles of transparency as well as the Applicant's rights of due process.

With regard to the Applicant's alleged outside activities, i.e., his involvement with Realtime Software Ltd. without the consent of the Secretary-General, again the Administration demonstrated a lack of fairness and equity, by failing to initiate the necessary enquiry. The Applicant explained that he was looking for another job with the intention of resigning from the Organization if his attempts at acquiring business for Realtime Software Ltd. proved successful. Noting the absence of an official enquiry into this matter, the JAB regarded the Applicant's explanation as sufficient to have weakened the *prima facie* case against him, and the Tribunal agrees with this reasoning. Moreover, the Tribunal wishes to express its concern regarding the *modus operandi* involved in obtaining the documentation which led his supervisor to the conclusion that the Applicant was involved in such outside activities, i.e., by breaking into his computer. The Tribunal has previously addressed the issue in Judgements No. 1022, *Araim* (2001) and No. 1023, *Sergienko* (2001) stating:

"The Tribunal wishes to express its concern regarding the conducting of investigations by way of private intrusions into others' computers. It cannot accept that investigations could be conducted without rules and guarantees of due process, and without giving due respect to inalienable rights as proclaimed by the Organization itself in the Declaration on Human Rights. This is regardless of what the internal regulations of the Organization say as to its rights to the contents of staff members' computers. This is even more troubling when considering that even OIOS, in its guidelines, is required to at least have the staff member present when retrieving evidence from their immediate vicinity, such as his or her desk".

V. The Tribunal turns now to the issue of the Applicant's involvement with the Staff Association of UNDP. The Tribunal cannot accept the conclusion of the JAB that there was

insufficient evidence to conclude with certainty that the Applicant was the victim of arbitrariness. The Tribunal is cognizant of the fact that the Applicant was Chairman of the Staff Association for two terms from April 1994 until May 1996, and that this made him vulnerable to victimization for his role in championing staff welfare matters and defending their interests. Moreover, the JAB itself pointed out that,

"whilst the Panel could not conclude with a sufficient degree of certainty that the Appellant himself was indeed a victim of reprisals due to his participation in the activities of the Staff Association, the circumstantial evidence before the Panel seems to point to the possibility that the general atmosphere at UNDP might have been such as to intimidate staff members actively engaged in Staff Association functions".

In this regard, the Tribunal notes the important and significant information outlined in the Report of the Special Human Resources Review Mission to Kenya, dated 19 November 1997, as well as the Minutes of the Staff Association meeting of 29 August 1997, which detailed unfair treatment which members of the Staff Association had suffered as a result of their involvement in such matters.

The Tribunal also notes in the findings of the Rebuttal Panel, following the Applicant's rebuttal of his 1994 PAR, the following: "[the UNDP Resident Representative in Nairobi] mentions additional reasons for the lowering of the Staff Member's rating, namely, matters related to [the Applicant's] position as Chairman of the UNDP Kenya Staff Association".

In addition, according to the Applicant, in April 1994 he was pressurized by the UNDP Administration to withdraw aspects of a presentation which, as Chairman of the Staff Association, he had prepared for the UNDP Administrator's visit to Nairobi. The Applicant, faithful to the independence of the Staff Association, declined to change the presentation.

Furthermore, the Applicant stated that although he was initially recruited against a regular budget post, he was transferred and placed against an extra-budgetary post. The Applicant contends that the Administration was aware of the fact that in so doing, his post would no longer be covered by the regular budget, rendering it dependent on extra-budgetary resources, and consequently jeopardizing his position and career with UNDP.

VI. In conclusion, the Tribunal is convinced that the decision not to extend the Applicant's fixed-term contract was tainted by arbitrariness and lack of due process, and that he was victimized because of his involvement with the Staff Association. Accordingly, he is entitled to reasonable compensation.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation of twelve months' net base salary at the rate in effect on the date of his separation from service, less the amount already paid by the Secretary-General; and,
2. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Omer Yousif BIREEDO
Member

Brigitte STERN
Member

Geneva, 23 July 2002

Maritza STRUYVENBERG
Executive Secretary