



Administrative Tribunal

Distr.
LIMITED

AT/DEC/1048
23 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1048

Case No. 1158: DZUVEROVIC

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Spyridon
Flogaitis;

Whereas, on 17 July 1999, Vesna Dzuverovic, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 March 2000 and twice thereafter until 31 December 2000;

Whereas, on 3 October 2000, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

"II: Pleas

...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General upholding his decision not to extend the Applicant's fixed term appointment and to take no further action on her case;

(b) *to find and rule* that the Joint Appeals Board [(JAB)] erred as a matter of law and equity in failing to find that the decision not to extend the Applicant's fixed term appointment was vitiated by prejudice and other extraneous considerations and should therefore be rescinded;

...

(d) *to order* the Applicant's immediate reinstatement with effect from 4 June 1999 and consideration for conversion to permanent appointment at the earliest opportunity;

(e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(f) *to fix* pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(g) *to award* the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."

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 periodically thereafter until 31 July 2001;

Whereas the Respondent filed his Answer on 24 July 2001;

Whereas the Applicant filed Written Observations on 30 November 2001;

Whereas, on 2 July 2002, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

On 13 November 1994, the Applicant joined the Technical Co-operation Division (TCD), United Nations Centre for Human Settlements (Habitat), (UNCHS) in Nairobi, Kenya, on a two year fixed-term appointment as a Programme Management Officer at the P-3 level. Her

appointment was extended until 31 January 1997, and subsequently thereafter until 4 June 1999 when she separated from service.

On 7 November 1995, the Applicant wrote to the Office of Internal Oversight Services (OIOS) alleging irregularities within her Unit, particularly with regard to recruitment and procurement. On 15 November, the Applicant's supervisor responded to her allegations and requested her immediate transfer.

On 30 November, the Applicant's performance evaluation report (PER) covering the period 13 November 1994 - 30 November 1995, was completed. The Applicant's overall performance was rated as "D", "Fair". The Applicant successfully rebutted this report and, consequently, her overall performance was upgraded to "B", "Very Good".

On 26 February 1996, the Applicant was informed that she was to be reassigned to the Information and Audio-Visual Department (IAVD). On 7 March, the Applicant wrote to the Executive Director, UNCHS, protesting her transfer.

On 1 August 1996, the Applicant wrote to OIOS requesting an investigation as to the circumstances of the preparation of her PER and her transfer from her Unit following her visit to its office in November 1995. On 28 August, the Chief, Investigation Section, OIOS, replied that, due to financial constraints, they would not be able to take action.

Effective 1 February 1997, the Applicant was reassigned from IAVD to the Office of the Executive Director (OED), as Special Assistant to the Executive Director of UNCHS. On 27 July 1998, the Applicant was informed that, as of 1 August, she would be transferred to Meeting, Planning and Services Section, Conference Services, United Nations Office at Nairobi (UNON). On 30 July, she requested that this decision be reconsidered.

On 1 September 1998, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances.

On 7 September 1998, the Applicant was informed that her fixed-term appointment would not be extended beyond its expiry date of 31 December 1998.

On 9 September 1998, the Applicant again wrote to OIOS, requesting their intervention in her case.

On 17 September 1998, the Applicant wrote to the Secretary-General requesting administrative review of the decision not to renew her fixed-term appointment.

On 10 November 1998, the Panel on Discrimination and Other Grievances issued its report, recommending the extension of the Applicant's contract "in an appropriate job, for some time ... to give her a chance and to appraise her performance correctly".

On 25 November 1998, the Applicant submitted an appeal to the JAB requesting suspension of the administrative decision not to extend her appointment. On 18 December, a summary hearing was held on the Applicant's request for suspension of action and, on the same day, the JAB produced its report. It noted that the non-extension of the Applicant's contract would be an obstacle to due process and would result in irreparable injury to her. Accordingly, the JAB recommended that the request for suspension of action be approved.

On 23 December 1998, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had decided to approve her request and to extend her appointment for three months in order for the merits of the case to be determined.

On 13 January 1999, the Applicant lodged an appeal on the merits with the JAB. The JAB adopted its report on 9 April 1999. Its considerations, conclusions and recommendations read, in part, as follows:

"... CONSIDERATIONS

... [T]he Panel ... was left with the impression that the decision to transfer the [Applicant] from TCD Unit (1) could have some relationship with her visit to ... OIOS.

...

CONCLUSIONS AND RECOMMENDATIONS

7.1 WITH REGARD TO THE [ACTING EXECUTIVE DIRECTOR, UNCHS,] DECISION OF THE NON-EXTENSION OF THE APPELLANT'S CONTRACT

...

- It is the Panel's view that the [Acting Executive Director, UNCHS,] duly exercised his authority and prerogative as vested in him through his mandate;

...

- The [Applicant] is one of several others whose fixed-term contracts have not been renewed;
- The Panel is of the view that the [Acting Executive Director, UNCHS,] did not arrive at the decision *of* non-extension (of the [Applicant's] contract) subjectively, particularly

considering that the crux of the [Applicant's] case revolves around the 1994-5 period which significantly predates the arrival of the [Acting Executive Director, UNCHS];

...

7.2 WITH REGARD TO THE MANAGEMENT OF THE [APPLICANT'S] CASE BY UNCHS ADMINISTRATION SINCE 1995

...

[The Panel] concurs with the views respectively of the Chief of Administrative Services of UNON and the OIOS who expressed that there is an element of gross mismanagement of the [Applicant's] ...

The transfer of the Appellant from the TCD Unit (1) to several units ... without proper job description cannot be described as being a sound personnel management practice in the [United Nations].

The failure or reluctance to conclusively see through the investigations regarding the allegations made by the [Applicant] cannot but give the impression that the report she submitted to the OIOS must have caused some bad feeling.

The Panel therefore, recommends that the issues herein raised be looked into, in an appropriate manner ...

7.3 WITH REGARD TO THE OIOS

- The Panel found it difficult to understand why the OIOS argued that due to resource constraints, it was unable to act on the report submitted by the [Applicant]. In doing so, the OIOS did not only raise questions about its role, but most importantly due process and justice might not have been seen to be done;
- The Panel recommends that the necessary measures be taken by the OIOS to act on the report submitted to it by the [Applicant];

...

7.5 WITH REGARD TO THE MEASURES THAT THE SECRETARY-GENERAL MAY WISH TO CONSIDER

The on-going ... Reform Process, which includes the UNCHS, entails staff cuts, and therefore, heads of agencies will have to take decisions on the non-extension of contracts depending on the exigencies of the situation. This is clearly the basis for the [Acting Executive Director, UNCHS,] decision regarding the Appellant's case and the panel therefore recommends that this decision should be upheld.

... the Secretary-General may wish, as an intermediate measure, to consider whether opportunities exist for the placement of the Appellant in other parts of the UN System ..."

On 2 June 1999, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"... [w]ith respect to the Board's observation that your transfer in 1995 out of the unit you were working in did not uphold sound personnel management practices, the Secretary-General points out that this matter is not the subject matter of your appeal and is in any event long time-barred. With respect to the subject matter of your appeal, the Secretary-General ... agrees with the Board's conclusion and further notes that there were no defects or lack of due process or improper procedures in the decision not to extend your fixed-term appointment. He has therefore decided to accept the Board's unanimous recommendation and to take no further action on your appeal.

With respect to the Board's recommendation that OIOS act on the report that you had submitted in November 1995, the Secretary-General points out that, in its response to you of 28 August 1996, OIOS indicated that it had carefully reviewed and considered the matters raised in your report and had decided not to take any action. However, the Secretary-General will draw the attention of OIOS to the Board's remarks in this respect ..."

On 3 October 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant had a right to fair consideration of renewal of her contract or, alternatively, to fair consideration for other assignments.
2. The Applicant's legitimate expectation for continued employment can be adduced from the circumstances surrounding her appointment.
3. The underlying reason for not renewing the Applicant's contract was never specified. It appears to have been based solely on extraneous reasons, originating from the Applicant's complaint to OIOS.

4. The decision not to renew the Applicant's appointment was arbitrary, motivated by bias and prejudice. The Applicant suffered discrimination and her rights to due process were violated.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right under her fixed-term appointment nor the legal expectancy of continued employment with the United Nations. The decision not to renew the Applicant's appointment did not violate her rights.

2. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice, discrimination, bias, improper motivation or other extraneous factors.

The Tribunal, having deliberated from 2 to 23 July 2002, now pronounces the following Judgement:

I. The Applicant joined the Organization on 13 November 1994, on a two-year fixed-term contract as a Programme Management Officer at the P-3 level. Her appointment was extended through January 1997 and subsequently further extended on several short-term contracts, until her separation on 4 June 1999. In fact, the Applicant's period of service, subsequent to 31 December 1998, was only due to an interim relief measure, recommended by the JAB and adopted by the Secretary-General, prior to which the Applicant had been informed that her contract would not be extended beyond 31 December 1998.

The Applicant is requesting the Tribunal to rescind the Respondent's decision not to extend her fixed-term appointment.

II. On 7 November 1995, about a year after joining the Organization, the Applicant filed a report with OIOS, alleging irregularities within her Unit. Specific reference was made to various practises of the Officer-in-Charge of her Unit, particularly regarding recruitment. A few days later, the Officer-in-Charge responded to the allegations and asked for the immediate transfer of the Applicant to another unit. Subsequently he completed the Applicant's PER giving her an

overall rating of "D". The Applicant submitted a rebuttal of this PER, which proved to be successful, resulting in her overall rating being upgraded to "B".

Following the request of her Officer-in-Charge and despite the Applicant's protest, she was transferred to IAVD. Subsequently, on 1 August 1996, the Applicant wrote to the Officer-in-Charge, Internal Audit Division, requesting an investigation of her case. The Chief, Investigation Section, OIOS, responded to this request, informing the Applicant that financial constraints prevented OIOS from taking action on her request.

III. The Applicant continued serving the Organization on short-term extensions of her contract, while being transferred from one job to another. On 1 September 1998, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances. The Panel recommended that the Applicant be given an opportunity to perform in an appropriate job over a certain period, so as to enable a true and correct appraisal of her performance. However, prior to the issuance of the Grievance Panel's report, the Applicant was informed that her contract would not be renewed beyond its expiration date of 31 December 1998.

IV. The Applicant lodged an appeal with the JAB, requesting suspension of that decision, upon which the JAB concluded that, under the circumstances, the non-extension of her contract "would ... be an obstacle to due process and would result in irreparable injury to the [Applicant]". The JAB therefore recommended, as an interim measure, that the Applicant's contract be extended until a decision on the merits could be taken.

V. When deciding on the merits of the case the JAB pronounced itself, *inter alia*, in the following way:

- "Staff rule 104.12[(b)](ii) clearly states the terms and conditions of fixed-term contracts;
- It is the Panel's view that the [Acting Executive Director, UNCHS,] duly exercised his authority and prerogative as vested in him through his mandate; ...
- The Panel is of the view that the [Acting Executive Director, UNCHS,] did not arrive at the decision of non-extension (of the [Applicant's] contract) subjectively, particularly considering

that the crux of the [Applicant's] case revolves around the 1994-5 period which significantly predates the arrival of the [Acting Executive Director, UNCHS,]; ..."

VI. The Tribunal shares the opinion of the JAB as expressed above. The Applicant was serving on a fixed-term appointment. Staff rule 104.12(b)(ii) stipulates that such appointments carry no expectancy of renewal. This is also stated very clearly in the Applicant's letter of appointment. Furthermore, this principle has repeatedly been upheld by the Tribunal. (See Judgement No. 440, *Shankar* (1989).) Additionally, the Tribunal has consistently held that decisions regarding the renewal of fixed-term appointments are within the discretionary authority of the Respondent, provided that such a decision is not arbitrary or motivated by prejudice or other extraneous factors. In Judgement No. 885, *Handelsman* (1998), the Tribunal stated: "[t]he Respondent's exercise of his discretionary power in not extending a ... contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors". The Tribunal, after careful consideration of the record in this case, finds that the Respondent acted within his authority when deciding not to renew the Applicant's appointment and, therefore, the Applicant's plea to rescind this decision is rejected.

VII. The above notwithstanding, the Tribunal is satisfied that throughout the Applicant's career in the Organization, decisions were taken which proved to be to the detriment of her career opportunities and which raise serious questions regarding management practices. The Tribunal concurs with the statement of the JAB that:

"there is an element of gross mismanagement of the [Applicant's] case ... The transfer of the [Applicant] from the TCD Unit (1) to several units without proper job description cannot be described as being a sound Personnel Management practice in the [United Nations].

The failure or reluctance to conclusively see through the investigations regarding the allegations made by the [Applicant] cannot but give the impression that the report she submitted to the OIOS must have caused some bad feeling."

The Tribunal finds that these actions warrant compensation.

VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation of three months' net base salary at the rate in effect on the date of her separation from service; and,
2. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 23 July 2002

Maritza STRUYVENBERG
Executive Secretary