



Administrative Tribunal

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LIMITED

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1082

Case No. 1196: YEARWOOD

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President; Mr. Omer Yousif Bireedo;

Whereas, on 28 November 2000, Calvin Yearwood, 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, on 31 May 2001, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal to grant:

"...

- (a) [T]hat [the decision not to renew his fixed-term appointment] be rescinded;
- (b) [T]hat [he] be paid full salary and benefits including Pension Fund contributions for the entire period since such payment ceased and until this case is decided;
- (c) [T]hat [he] be reimbursed the amount corresponding to fifteen days of salary which was unlawfully deducted for sick leave taken;

(d) [T]hat [his] character be cleared of allegations stated in [his Performance Evaluation Report (PER)];

(e) [T]hat the amount of Dfl. 500,000 be awarded ... for moral and material damages (...)."

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 October 2001 and periodically thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 25 March 2002;

Whereas the Applicant filed Written Observations on 14 May 2002 amending his pleas as follows:

"I am requesting that this Tribunal find that the decision taken by the Respondent contains countervailing circumstances; that I was denied due process; my rights were violated and to consider the tense working environment and the pressures that I was subjected to. This Tribunal should quash the Respondent's pleas in [their] entirety, restore my character and respectability; grant me the recourse I seek ... and perhaps invoke Article 9 of [the Statute and Rules] for continuing injuries being suffered through a strenuous conventional way of life started by the [International Criminal Tribunal for the former Yugoslavia (ICTY)] Administration since October 1997."

Whereas the Applicant submitted an additional document on 8 November 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations as a Security Officer, Security and Safety Services, on a short-term appointment at the S-1, step 1 level, on 8 August 1994. Effective 20 February 1995, he joined the ICTY Security and Safety Service on a three-month fixed-term appointment. His fixed-term appointment was renewed several times, the final extension running through 19 November 1997.

On 11 March 1997, the Chief, and the Deputy Chief, Security and Safety Services, ICTY, met with the Applicant to discuss his performance in light of certain complaints received and incidents that had occurred.

On 15 April 1997, the Applicant received a letter of reprimand in light of a serious breach of the procedures established for the handling and escort of the accused persons brought before

the ICTY, and the Applicant's failure to follow the instructions of the Officer-in-Charge of the Escort Detail.

During the period January to June 1997, the Applicant took 15 days of uncertified sick leave. On 15 April and on 30 June, the Chief, Personnel Services, ICTY, informed the Applicant that he was entitled to seven days of uncertified sick leave per year and that his absence on uncertified sick leave in excess of his entitlement would have to be considered as "a non-compensable period".

On 21 October 1997, the Deputy Chief, Security and Safety Services, ICTY, informed the Applicant that in view of his performance evaluation contained in the PER for the period 20 November 1996 to 19 November 1997, his fixed-term appointment would not be extended.

On 3 November 1997, the Applicant received a copy of his PER. The overall rating indicated in Section IV of the PER was "5", i.e., "a performance that does not fully meet standards". In addition, the second reporting officer noted in Section IV of the PER that the Applicant's "performance of duty" clearly had been "below the satisfactory standard that is so important in the Security and Safety Service" and referred to a number of performance-related incidents and frequent absences from duty. He added that discussions had been held with the Applicant on these issues. On the same date, the Applicant indicated in Section VI that he wished "to exercise his rights to rebut this PER". However, on 13 November the Applicant informed the Chief, Personnel Services, ICTY, that he did not wish to rebut his PER, but that he was "submitting this written explanation to show that [he was] not in agreement with the evaluation contained in [his] PER".

On 19 November 1997, the Applicant separated from service.

On 9 December 1997, the First Vice-President of the Staff Union advised the Chief, Personnel Services, ICTY, that he would "represent [the Applicant] as his Counsel in the rebuttal of his [PER]". On 11 December 1997, the Chief, Personnel Services, ICTY, responded that as the Applicant had advised him that he did not wish to rebut his PER, the PER had been put in his Official Status file. He added that the term of 30 days to file a rebuttal had passed, but that if the Applicant still wished to rebut his PER, that request would be considered favourably.

On 29 December 1997, the Applicant requested administrative review of the decision not to renew his fixed-term contract.

On 26 January 1998, the Applicant informed ICTY of his intention to rebut his PER and, on 27 February 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 8 June 1998, the Applicant submitted his rebuttal. On 28 August, the Investigation Panel convened to review the Applicant's rebuttal issued its report, recommending that several individual ratings be revised in favour of the Applicant, but expressing its agreement with the overall rating given. On 11 September 1998, the Registrar, ICTY, reviewed the report and accepted all the recommendations and conclusions contained therein.

The JAB adopted its report on 8 July 2000. Its considerations, conclusions and recommendation read, in part, as follows:

"Considerations

34. ... The Panel observed that ... the [Applicant]'s poor performance was well documented and he was apprised of the situation. ...

35. ... The Panel did not find evidence of procedural defects, administrative negligence, extraneous allegations or improper motives in the rebuttal procedures ...

36. The Panel noted also that the Investigation Panel which reviewed the [Applicant]'s rebuttal did not find any procedural irregularity. ...

Conclusions and Recommendation

37. In light of the foregoing, the Panel *agreed unanimously* to make no recommendation in support of the appeal."

On 28 August 2000, the Officer-in-Charge, Department of Management, transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General agreed with the Board's findings, and had decided to accept its recommendation and take no further action on his appeal.

On 31 May 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew his contract was unlawful in that: (a) it was procedurally defective; (b) it was not reasoned; (c) it did not respect his legitimate expectation; (d) it violated the principles of good faith; (e) it contained error of law; (f) it contained errors of

facts; (g) it caused moral and material damages; and, (h) the lack of genuine reason for the decision has caused prejudice.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy to renewal of his 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 1 to 20 November 2002, now pronounces the following Judgement:

I. Whilst the Applicant argues his case, inter alia, on the basis that he was separated from service "by actions that are tantamount to summary dismissal" or that his appointment was terminated "for unsatisfactory services" or that he was "effectively dismissed for professional incompetence", these submissions are neither technically nor legally speaking relevant to the actual facts of this case.

II. The Applicant had served with the Organization from 8 August 1994 until 19 November 1997 (from 20 February 1995 onwards with ICTY) on a succession of fixed-term contracts, each of which contained a provision which was acknowledged and accepted by the Applicant that it did not carry any expectation of renewal or of conversion to any other type of appointment in the Organization. When his final fixed-term appointment expired by effluxion of time on 19 November 1997 he was then separated from service in that he was not offered any new contract or any extension of contract so that he ceased to be an employee of the Organization from that time. The Tribunal can act on the basis that the decision not to offer him a new or extended contract was made because the Applicant's superiors and those in direct authority over him were of the opinion that the Applicant's performance "does not fully meet standards" as was indicated in the assessment or evaluation of his performance as set out in his PER for the period 20 November 1996 to 19 November 1997.

III. It seems clear from the record that it was this perceived and found shortcoming in his performance which gave rise to the decision not to renew his contract so as to separate him from service as of that time. The Applicant has at all times asserted that he was told he was being separated for that reason. This has never been denied and it appears to be accepted by the Respondent, even if not expressly acknowledged by him to be the case. Accordingly, the Tribunal can approach the case on the basis that the separation from service occurred by reason of the said assessment of his performance as stated in the said PER and on the basis that the matters were inextricably entwined. Since the Security Division of ICTY was at all material times being increased and as there is no discernible "other reason" as to why the Applicant was not kept on, it would be perverse of the Tribunal to conclude otherwise. However, because of the manner in which his separation actually occurred, the Tribunal must consider the case in accordance with the actual facts and the principles applicable to the true issues arising therefrom rather than treat the case as if the Applicant, as he claims, had been "summarily terminated" or summarily dismissed on an allegation or finding of unsatisfactory service or on a finding which might be construed as perhaps that the Applicant had conducted himself in a manner which would have justified a disciplinary sanction.

IV. Accordingly, whilst the Tribunal will consider the circumstances leading to the preparation of the said PER and consider if there was evidence to justify the conclusions or the evaluation of the Applicant's performance as set out therein, it does so for the purposes of seeing if there was evidence to justify the making of that evaluation and not with a view towards establishing if there was sufficient evidence to justify a finding of misconduct or a finding of such unsatisfactory performance as would have justified disciplinary action being taken against the Applicant.

It is well recognised and established by the jurisprudence of the Tribunal that fixed-term appointments of the type enjoyed by the Applicant do not carry any legal expectancy of continuation or renewal, even if the performance of the staff member concerned has been truly excellent or outstanding and this is not in dispute. (See Judgement No. 422, *Sawhney* (1988) citing Judgement No. 199, *Fracyon* (1975); and No. 1030, *Jensen* (2001).)

V. Whilst there can be cases where a legal expectancy or legitimate expectation of renewal can be established on the basis of unequivocal promises made by persons with appropriate authority,

that a particular staff member's contract would be renewed, there is no evidence of such a binding promise in this particular case. The Applicant can go no further than allege that because he had joined ICTY virtually at its inception and because it recruited more and more security personnel as its work and its needs expanded, that he had "a realistic expectation that he would be offered continuing employment" and he then argues that, as a result of that expectation, he developed "a set of informal unwritten assumptions, expectations and obligations with the ICTY Administration" which he says concerned a range of issues such as his job security, career, work load and "a general way in which I was treated". These vague, uncertain and unsubstantiated assertions fall far short of what it would be necessary to establish, in order to justify a finding that the Applicant had enjoyed any legal or binding expectation of any continuity or extension of his appointment, so that insofar as he claims such an expectation, such claim must be rejected. As stated by the Tribunal in *Jensen*:

"The Tribunal is satisfied that even if the Applicant could establish that he genuinely entertained such an expectation, it would not bind or create any obligation on the part of the Respondent to so retain the Applicant unless the Applicant could establish first, that such an expectation was reasonably entertained, and second that it resulted from some promise made by or on behalf of the Respondent by someone who had actual, or at least ostensible, authority to make such a promise, so that it would become legally binding upon him".

This is because where there is clear and unambiguous evidence that the Administration has effectively changed the terms of what had been a fixed-term appointment with no right of renewal, it would be unjust and inequitable to deny a staff member a promised extension on the basis of terms contained in the original contract which no longer applies.

VI. The Applicant makes numerous claims regarding the manner in which the challenged PER came into being and about what he claims was the inadequate opportunity afforded to him to challenge it or to mount an adequate or meaningful rebuttal thereto. He claims that he was given insufficient notice of the contents to enable him to mount a rebuttal, that the PER was prepared too late in the day to afford him an opportunity of refuting some of the allegations, and that he was not sufficiently forewarned as to its contents as would have enabled him to mount a proper rebuttal to same. Salient dates of relevant events are as follows:

- (i) 21 October 1997. The Applicant was given sight of what was to become the PER for the period in question, which then contained all materials and allegations of which he now complains;
- (ii) 3 November 1997. The Applicant was furnished with a copy of the PER on which he wrote under Section VI "I wish to exercise my rights to rebut the PER. Special emphasis should be placed [on] my last PER";
- (iii) 13 November 1997. The Applicant wrote to the then Chief, Personnel Services, ICTY, informing him that he did not wish to rebut his PER but that he would submit instead a "written explanation to show that [he was] not in agreement with the evaluation contained in [his] PER" being a recognized and less formal procedure than embarking upon a formal rebuttal procedure;
- (iv) 19 November 1997. Upon expiration of his fixed term appointment, the Applicant separated from service;
- (v) 9 December 1997. Fax from Applicant's Counsel to Chief, Personnel Services, ICTY, informing him that the Applicant wished to rebut the said PER;
- (vi) 11 December 1997. The Chief, Personnel Service, ICTY, replies to the Applicant's letter of 13 November 1997, indicating that the time for rebuttal had now elapsed and further indicating that if a formal application was made for an extension that this would be viewed favourably;
- (vii) 29 December 1997. The Applicant requests administrative review of the decision not to renew his fixed-term contract;
- (viii) 13 January 1998. The Applicant informs ICTY of his intention to rebut the said PER;

- (ix) 27 February 1998. The Applicant filed an appeal with the JAB complaining, inter alia, that the said PER was invalid and that he was denied a meaningful and proper opportunity to rebut same;
- (x) 26 January 1998. The Applicant requests that the rebuttal be transferred to New York;
- (xi) 5 June 1998. The Administration declines to have the rebuttal review transferred to New York on the basis that the Director, Operational Services Division, "had no reason to believe that ICTY could not conduct a review of the rebuttal in a professional, fair and competent way or that it would not make every effort to conduct its review in a speedy manner, as soon as same [was] rebutted";
- (xii) 8 June 1998. The Applicant files his rebuttal of the said PER with the appropriate authority.

It is apparent from the above chronology that far from having been denied a reasonable opportunity or time for preparing or filing his rebuttal, the Applicant was extended great latitude and indulgence in the matter in question. The Tribunal is further satisfied that there is no merit in the Applicant's submission that his service should have been extended so that he was still employed by the Organization whilst his rebuttal was being considered. It must be noted that when the Applicant's fixed-term appointment expired on 19 November 1997, the Administration then held his letter of 13 November in which he had indicated that he did not propose to rebut the PER in question so that there could have been no question of keeping him on in employment for such time as he might require to rebut the PER when he had in fact indicated that it was not his intention to do so. He did not indicate a change in his intentions until after his separation from service had taken place.

VII. The Tribunal has carefully considered the report of the Investigation Panel on the rebuttal of the said PER and it is of the opinion that the Panel carried out its investigation and review of the issues in a most thorough, considerate and fair minded manner. It appears to the Tribunal that the

Investigation Panel was scrupulous in the manner in which it carried out its work and the Tribunal can find no evidence of bias, prejudice, negligence or any impropriety as to the manner in which it was done. The Applicant makes unspecific and unsubstantiated complaints that he was not provided with a fair or equal opportunity for him to rebut the said PER but the Tribunal can find no evidence to substantiate such claims. On the contrary, it appears to the Tribunal that the Applicant was afforded every reasonable consideration and that, in its considerations and findings, the Investigation Panel gave him the benefit of the doubt where it had any doubt as to the validity of certain shortcomings which had been alleged against the Applicant. This is evidenced by the scrupulous attention to detail evident from the report and from the nature and content of the report and the decision of the Investigation Panel to revise upwards certain individual ratings in favour of the Applicant, although the Panel saw fit to leave the overall rating of the Applicant's service as "a performance that does not fully meet the standards" unchanged. The Tribunal is satisfied that such changes as were recommended by the Panel and endorsed on evaluation are not of sufficient importance or magnitude as should persuade the Tribunal that had the original PER appeared in the form now appropriate in the light of the report of the Investigation Panel and the evaluation which took place thereafter, that the decision not to renew the Applicant's contract beyond 19 November 1997 would have been any different.

An examination of the records satisfies the Tribunal that the decision to separate the Applicant from service was made on the general picture which emerged from the PER and not from any single or isolated incident recorded therein. Whether in its original form or when modified following upon the rebuttal and its evaluation, there was in the view of the Tribunal ample evidence to support the evaluation as "a performance that does not fully meet the standards" and it was this overall picture which clearly brought about the decision that he be separated as from that date.

In the circumstances, the Tribunal shares the view of the JAB that the Applicant, as of 19 November 1997, had no legal expectancy of renewal of his appointment and that he had been afforded a fair and appropriate opportunity to rebut the PER and that there was no evidence of bias, prejudice or base motive on the part of either those who had prepared the disputed PER or on the part of the Panel which had considered the Applicant's rebuttal, so that it is satisfied that the rights of the Applicant were not infringed in the manner in which he was separated from service. The Tribunal is satisfied that far from suffering any hindrance in the conduct of his rebuttal, the Applicant was in fact afforded considerable latitude in relation thereto. The Tribunal is satisfied

that there was nothing improper or suspicious in the procedures followed in the preparation of the report and that it was reasonable that the Applicant personally was not afforded sight of a particular document (so as to protect the privacy of others) particularly when the complete document was given to his Counsel, then acting for him in relation to the said rebuttal.

VIII. The Tribunal is satisfied that the Applicant has failed to establish any grounds for believing that his separation was anything other than lawful or that there was any defect or shortcoming in the manner in which the rebuttal subsequently took place.

IX. Accordingly, all claims are rejected.

(Signatures)

Mayer GABAY
President

Kevin HAUGH
Vice-President

Omer Yousif BIREEDO
Member

New York, 20 November 2002

Maritza STRUYVENBERG
Executive Secretary