United Nations AT/DEC/1126

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1126

Case No. 1238: BYAJE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Mayer Gabay, First Vice-President; Mr. Kevin Haugh, Second Vice-President;

Whereas at the request of Jeanne d'Arc Byaje, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 July 2001, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 December 2001, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"*II: PLEAS*

...

2. Reinstatement into former position with all adjustments (payment of arrears and adjustment of functional title) …

3. Reinstatement of prior contributory services for pension purposes …

4. Payment of general, special and punitive damages due to UNEP harassment …

5. Compensation for extra work …

6. Payments of language allowance …

7. Compensation for termination without prior notice …

8. [The Applicant also requests:]

… Production of … documents …

… Compensation [for:]

… [the period] from the date of [the Applicant's] wrongful dismissal … until the date of her reinstatement …

… moral damage due to suffering from injustice and prejudice

… all expenses incurred with regard to this appeal … .

…

Clearance of my name … by posting a letter refuting all allegations in my file and by providing me with a copy."

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 May 2002 and once thereafter until 30 June 2002;

Whereas the Respondent filed his Answer on 27 June 2002;

Whereas the Applicant filed Written Observations on 9 August 2002;

Whereas on 22 January 2003, the Applicant submitted an additional communication;

Whereas on 26 February 2003, the Respondent submitted comments on the Applicant's Written Observations and, on 17 March 2003, the Applicant responded thereto;

Whereas on 27 May 2003, the Applicant submitted an additional communication and requested that an oral hearing be held in her case;

Whereas, on 24 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant was employed by UNEP, as a free-lance typist, from 1989 until 19 June 1992, when she was granted a six-month fixed-term contract, as a Conference Typist (Trainee) at the G-5 level. On her functional title changed to Conference Typist and she was promoted to the G-6 level. The Applicant's

appointment was subsequently renewed several times. On 18 September 1994, prior to the expiration of her last fixed-term contract, the Applicant submitted her resignation, effective 1 October 1994.

In a Note to the File dated 28 September 1994, the Applicant's supervisor, the Chief, Translation and Reproduction Section (TRS), referred to the short notice with which the Applicant had terminated her employment with the Organization, complaining that her abrupt departure would have financial implication for the Organization.

On 30 September 1994, the Officer-in-Charge, Conference and Governing Council Service (CGCS), wrote to the Acting Chief, Human Resources Management Section (HRMS), expressing her profound dissatisfaction with the Applicant's resignation, the manner in which it was done and the bad timing and recommending that the Applicant be prevented from any further employment. with the United Nations. On 3 October, the Acting Director, HRMS, accepted the Applicant's resignation and recommended that, in future, she be more considerate by giving advance notice. The Applicant responded on 13 January 1995, stating that she had no other option.

On 28 August 1996, the Applicant joined the Secretariat of the Convention on Biological Diversity (SCBD), Montreal, on a temporary appointment, as a Bilingual Secretary at the G-5 level.

On 1 July 1997, HRMS forwarded to the Executive Secretary, SCBD, a copy of the September 1994 Note to the File and requested, prior to proceeding with official recruitment of the Applicant, to have the Executive Secretary's reaction.

On 15 July 1997, the Applicant was granted a one-month fixed-term appointment.

On 23 September 1997, the Executive Secretary, SCBD, informed HRMS that he had received a satisfactory explanation from the Applicant and requested HRMS to proceed with issuing her a contract. Consequently, on 3 October, the Applicant was offered a fixed-term contract for six months, with retroactive effect from 15 July 1997.

In November 1997, the Applicant applied for seven posts which had previously been advertised, but was not successful. Subsequently, on 7 April 1998, the Applicant appealed to the Appointment and Promotion Panel (APP), contesting the recruitment process.

On 15 January 1998, the Applicant's contract was extended for a further three months, to expire on 14 April 1998. On that date, 14 April 1998, the Applicant was informed that her contract with SCBD would not be extended beyond its expiry date.

On 31 May 1998, the Applicant requested review of the decision regarding the non-renewal of her fixed-term appointment following a tainted recruitment process, as well as of the decisions concerning "compensation for extra duties performed", "expiration of contract without prior notice", "pension" and "language allowance" .

Following review of the Applicant's case, on 31 August 1998, the APP requested the Departmental Panel to review its matrix, particularly as regards the criterion of "formal secretarial training", and to re-submit the case for consideration. In response, the Departmental Panel clarified that, the criterion of "formal secretarial training" was not used to disqualify any candidate and, having reviewed the case, re-submitted it for the APP's approval.

On 20 September 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 1 December 2000. Its considerations, conclusions and recommendations read, in part, as follows:

> "*Considerations*
>
> …
>
> 1. *Reinstatement*
>
> … the panel rejects the Appellant's plea for reinstatement.
>
> 2. *Reinstatement of prior contributory service for pension and change of Entry-on-Duty-Date*
>
> ...
>
> … the panel … noted … that the Appellant's plea is directed towards a change of her Entry-on-Duty-Date and is therefore only indirectly connected to pension fund entitlements which may result from a change of the Entry-on-Duty-Date. The panel considered that it is competent to give a recommendation in this respect. …

The panel observed that the Appellant was working under several short-term … contracts from August 1996 until July 1997. … the panel noted that there was an uninterrupted chain of employment contracts between the Appellant and the Organization as of 28 August 1996. Consequently, the date of entry on duty must be 28 August 1996 and the record should reflect this correctly.

The panel would like to point out, that this change of date of Entry-on-Duty will not necessarily effect the Pension Fund entitlements of the Appellant as the short-term contracts … expressly excluded the participation of the Appellant in the Pension Fund. …

3. *Payment of general, special and punitive damages*

…

The panel found no evidence that the [recruitment] process was in any way flawed or tainted by arbitrariness, capriciousness, prejudice or any other extraneous motives. …

4. *Compensation for extra work either by SPA or as quantified by tables*

The panel believes that these claims are time-barred. …

… even if the panel would receive these claims, the Appellant would not be successful on the merits. … Not even the Appellant is arguing that there was a higher level post whose functions she was performing. In consequence the claim for payment of SPA must be rejected.

What the Appellant is in effect arguing is that she be compensated for extra work done … This plea, too, has to be rejected …

The United Nations has installed specific rules dealing with compensation of staff members who have worked over-time. …

The Appellant did not submit any evidence that she had adhered to this most important rule of procedure. As a consequence, it is no longer possible for the JAB to verify the Appellant's claims and the panel therefore rejects them in their totality.

5. *Payment of language allowance*

The panel was notified that the Appellant had been paid language allowance from the date that she received a 100-Series contract. Before that date, the Appellant … was not eligible for a language allowance … As a consequence, any further remuneration on that basis must be rejected by the panel.

6. *Compensation for termination without prior notice*

… the panel is not convinced that under the circumstances of this particular case, compensation is warranted for lack of notice.

…

… the Appellant herself was aware that her contract would not be extended which is evidenced by her efforts to secure a different job within

SCBD. … The lack of prior notice therefore, did not disadvantage the Appellant in any way and consequently does not warrant compensation.

Conclusions and Recommendations

In the light of the above considerations, the panel concludes that the date of entry on duty as documented in the Official Status File is not correct and should be changed. The panel further concludes that the Appellant has no right to reinstatement, no right to payment of general, special and punitive damages, no right to compensation for extra work performed during her time of employment with SCBD, no right to further payment of language allowance beyond that already received and, finally, no compensation for termination without prior notice.

The panel therefore recommends:

1. The Appellant's date of entry on duty should be changed from 15 July 1997 to 28 August 1996.

2. All other pleas be rejected."

On 31 January 2001, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"…

… The Secretary-General has decided to accept the Board's conclusions and its recommendation for correcting the date of entry on duty. He notes, in this respect, that this change of date will not affect your Pension Fund entitlements, as the short-term contracts under which you were employed from August 1996 to July 1997 expressly exclude your participation from the Pension Fund.

…"

On 27 December 2001, the Applicant filed the above-referenced Application with the Tribunal.

On 10 January 2003, the Applicant received a cheque from UNEP in the amount of $433.76 for language allowance for the period 15 July 1997 to 14 April 1998.

Whereas the Applicant's principal contentions are:

1. The recruitment process for the posts that the Applicant applied for in November 1997 was tainted.

2. The Applicant's case is not one of non-renewal of a fixed-term contract but rather a case of termination. Had the Applicant been selected to one

of the posts for which she had applied, her contract with SCBD would have been extended.

3. The Applicant suffered harassment and discrimination.

4. The JAB erred when determining that the Applicant's claim for compensation for extra work performed was time-barred.

Whereas the Respondent's principal contentions are:

1. No rights of the Applicant were violated in the recruitment process in early 1998 for secretary and programme assistant positions with the SCBD or in connection with the expiration on 14 April 1998 of her appointment as secretary with the SCBD.

2. The Applicant's plea for "reinstatement of prior contributory service for pension purposes" is not receivable and is without legal foundation.

3. The Applicant is not entitled to damages for alleged "harassment" by UNEP.

4. The Applicant's claim for compensation for alleged "extra work" is not receivable and is without legal foundation.

5. The Applicant's plea for "final clearance of my name" is not receivable.

The Tribunal, having deliberated from 25 June to 25 July 2003, now pronounces the following Judgement:

I. The Applicant was employed by UNEP from 1989, initially as a free-lance typist, until 1992, when she was offered and accepted a fixed-term contract. On 1 October 1994, the Applicant resigned for personal reasons. Her letter of resignation, dated 18 September 1994, did not state any reason for her action. According to her supervisors, her resignation on such notice caused substantial disruption and difficulties for her Unit in CGCS and imposed an additional workload on her colleagues, at a time when her Unit was servicing a meeting in Nairobi, for which the Applicant's services were said to have been badly needed.

Subsequent to the Applicant's resignation, the Chief, TRS, wrote a Note to the File, complaining of the short notice of resignation and stating that the Applicant "should have known better than anyone else the difficulties the sudden decision to leave the Organization would cause Conference Services on the eve of the current Ozone Meeting."

This Note to the File was later placed in the Applicant's Official Status File, as was a memorandum from the Officer-in-Charge of Conference Services to the Acting Chief, HRMS, which contained the following passage:

> "I would like to express my profound dissatisfaction with the action taken by [the Applicant] without any consultation and regard for the work which CGCS is currently involved in. I am in particular very concerned that this resignation comes at a time when we are servicing a meeting in Nairobi for which [the Applicant's] services were badly needed. I would like to add that [the Applicant] was fully informed of the importance of the meeting and the need for her to work on it here in Nairobi."

The memorandum concluded as follows:

> "I would like for you to register this dissatisfaction in her file and would recommend that she be prevented from any further employment with UNEP and possibly with other UN Organizations."

II. On 3 October 1994, the Acting Director, UNON, informed the Applicant that her resignation had been accepted effective 1 October 1994 and that her lack of notice "seriously impacted the morale and workload during a most critical period in CGCS". He further recommended that the Applicant try to be more considerate in future by giving advance notice to her supervisors.

By letter dated 13 January 1995, the Applicant responded to the aforementioned memorandum but again did not give any reason as to why she had resigned. She merely stated that the situation in which she was placed left her no other available option but to resign. The Applicant added that, whilst she was aware that some problems would occur, she had hoped that the other regular typists in the Unit would have been able to take over her functions and workload.

III. The Applicant again entered the service of the Organization on 28 August 1996, in SCBD, Montreal, which at the time was in the initial phase of being set up. She was employed on a series of short-term contracts.

By letter of appointment dated 15 July 1997, the Applicant was offered a fixed-term contract (100-series contract). The corresponding personnel action form indicated "15 July 1997" as her "date of entry on duty".

As opposed to the other GS staff members, the Applicant was offered only a one-month fixed-term contract on the occasion, whereas the others were offered a six-month term. It is clear that this was done because the Chief, HRMS, had brought to the attention of the Executive Secretary, SCBD, the issues arising from the Applicant's resignation from UNEP, back in 1994. The Chief, HRMS, also sent the Executive Secretary a copy of the Note to the File of 28 September 1994. The Executive Secretary, naturally enough, considered that these matters merited proper consideration before making a decision as to whether the Applicant should be offered a contract of similar duration to those being offered to her colleagues. Subsequently, the Executive Secretary discussed this issue with the Applicant, accepting the latter's explanation. The Applicant was then offered a fixed-term contract for six months, in line with the other GS staff members at SCBD.

It appears to the Tribunal that this was perfectly reasonable and that the initial difference between the fixed-term contract offered to the Applicant, as opposed to the contracts offered to the other GS staff members, cannot be considered as arbitrary, prejudicial or in any way unfair.

IV. In November 1997, the Applicant applied for seven secretarial and programme assistant positions with SCBD. The file indicates that the Applicant was short-listed for all but one post. In regards to the other six posts, the Applicant was short-listed but other candidates were considered better qualified or more suited for the positions in question.

On 7 April 1998, the Applicant wrote to the APP, making various complaints and submissions in a memorandum which she entitled as "An Appeal", contesting the recruitment process in relation to the appointments for which she had unsuccessfully applied.

On 14 April 1998, the Applicant was officially informed that she had not been recommended for any of the positions that she had applied for and that her contract with SCBD would not be extended upon its expiry, on that same date.

V. On 31 May 1998, the Applicant wrote to the Chief, Administrative Review Unit, indicating that she had decided "to lodge an appeal against all decisions taken

at my expense and also for all the bad treatment I was subjected to." This resulted in this far flung, scattergun Application. It is couched in such imprecise and uncertain terms that it is very difficult for the Tribunal to identify the issues raised and it is clear that both the JAB and the Respondent encountered similar difficulties.

VI. Doing the best it can to identify the nature and detail of the Applicant's various complaints and grievances, in summary it appears to the Tribunal that the Applicant's main grievance concerns her non-selection to any of the seven posts due to a flawed selection process. She submits that the selection process for the various posts within SCBD for which she had applied was unfair, arbitrary and otherwise than in accordance with applicable rules. The Applicant's principal argument is that she had better qualifications, experience and skills and greater talent than all or many of the candidates who were appointed to those posts. Accordingly, the selection process must have been flawed, unfair or she was prejudiced and not selected for some improper motive.

The Applicant further cites several other factors which, she says, establish impropriety or prejudice in the selection process.

The principal ground for the Applicant's complaints is her assertion that she was better qualified, more experienced and altogether a more talented and worthy candidate than all, or some, of the persons who had succeeded in being appointed to the posts. She submits that this demonstrates that the recruitment process was unfair or that the failure to so appoint her was a result of prejudice. The Applicant contends that had there been an objectively fair selection process, she would have been successful in her application to one of the posts for which she had applied. Additionally, the Applicant seeks production of some documents, which she claims relate to this issue.

VII. It is the well established jurisprudence of the Tribunal that the Secretary-General has a broad discretion in selection of candidates for posts. (See, for example, Judgements No. 312, *Roberts* (1983); No. 428, *Kumar* (1988)*;* and, No. 1087, *El-Charaoui* (2003).) The Tribunal has also held that it will not substitute its own judgement for that of the Secretary-General (see Judgement No. 989, *Akkawi* (2000) citing Judgement No. 554, *Fagan* (1992).) Notwithstanding the foregoing, the Tribunal has also held that the Secretary-General's decision may be vitiated in cases where it is demonstrated that it was tainted by prejudice, breach

of procedure, lack of due process, or motivated by extraneous factors. The burden is on the Applicant to produce evidence to prove such claims (see Judgements, *Fagan* (ibid.); No. 1085 Wu (2002).)

The Tribunal wishes to emphasise that the discretion exercised in taking of decisions such as the one contested in these proceedings is the discretion of the Respondent or those to whom he delegates same and not that of a JAB, the Tribunal nor any other body as may be asked to review a contested decision. Thus the Tribunal will not embark on its own assessment of the relative talents, merits, or experience of the Applicant as compared with the attributes of the other candidates (See Judgement No. 1110, *Shaban* (rendered during this session).)

The Tribunal further emphasises that the discretion to be exercised concerning appointments is a true discretion, meaning that the body making the selection will make its assessment as to the relative strengths and weaknesses of the various candidates. This is usually a very different process than the application of sterile formulae or mathematical-like computations.

If selection was to be made by such an arid or mathematical type of testing or by means of such a sterile formula, then selection might be attempted solely by the completion by multiple choice questionnaires or other examination papers which, no doubt, would frequently result in successful candidates having extensive theoretical knowledge, but frequently lacking many other skills which might be required. Many would say that the selection of candidates is frequently more an art than a science and the Tribunal would not disassociate itself from this sentiment.

VIII. Whilst the Tribunal is sympathetic to the Applicant's understandable interest in obtaining information as to how her candidacy was reviewed by the bodies concerned, at the same time the Tribunal shares the Respondent's concern, that the documents sought should be kept beyond reach of the parties in order to preserve the confidential nature of the promotion and appointment proceedings and to enable them to function properly and efficiently. Furthermore, the Tribunal is satisfied that the JAB had before it all necessary documents and information, such as enabled it to have carried out an adequate review of the issues and to have reached an informed decision. (See also Judgement No. 1056, *Katz* (2002).) Therefore, the Tribunal rejects the Applicant's request for documents "indicating the profile of the candidates" and setting out the "criteria matrix", as in the opinion of the

Tribunal, such documents have no relevance to the task which the Tribunal is required to perform.

IX. With regards to the Applicant's contention that the "recruitment process was based on oral interviews with no written tests", the Applicant failed to cite, let alone establish, any requirement that written tests had to be administered in relation thereto. She had based her said submission on the mistaken belief that the provisions of Personnel Directive PD/1/90 of 17 December 1990, entitled "Recruitment of external candidates to posts in the General Service and related categories at Headquarters" had applied to the questioned recruitment process. But this is not so. By its express terms, PD/1/90 applies solely to the recruitment of external candidates in the General Service and related categories *at Headquarters*. Accordingly, the Tribunal accepts the Respondent's claim that the Administration was entitled to rely on the result of any tests which the candidates might previously have executed, in order to make its own assessments of skills as it saw fit. The Tribunal therefore rejects the Applicant's submission in this regard.

X. Concerning the Applicant's assertion that "the decision to terminate her contract [was] based on a decision of [the] Departmental Panel before presentation to the APP", the Tribunal is satisfied that this submission is misconceived. The Tribunal emphasises that the separation of the Applicant from service arose by reason of the expiration of the term of her fixed-term contract on 14th April 1998, and not as a result of any decision to terminate that contract. Whilst it is correct to say that had the Applicant succeeded in obtaining any of the positions for which she had applied, she would not have separated from service, this does not mean that because she had failed to secure any such post, a decision was made to terminate her. The Tribunal wishes to emphasize that a decision to terminate is qualitatively and materially different from a decision not to offer a new contract. The expiration of her fixed-term contract was never a matter for consideration by the APP and was not dependent or contingent upon a decision by the APP, so that this submission is also rejected.

In any event, since the Applicant had been notified on 14 April 1998 that she had not been recommended for any of the positions for which she had applied, it follows that by that date, the APP must have finalized its decisions concerning the Applicant. Consequently, the sequence contended for by the Applicant is demonstratively incorrect.

XI. As to the Applicant's contention that "the Departmental Panel did not include my supervisors", she points to no legal or other ground for the proposition that the inclusion of her supervisors was required. The Applicant first made a new allegation concerning this aspect of her claim when the Respondent asserted in his Answer that, according to UNON Human Resources Management Service, its procedures did not allow for the supervisors of the post in question to be a member of the Departmental Panel. The Respondent further asserted that under applicable procedures, recommendations of the Departmental Panel were sent to the supervisor or head of the office for approval or comment, before submission to the APP and that no objection had been received in connection with the filling of the posts in question. The Applicant alleges in her Written Observations that the procedures, as advised by UNON Human Resources Management Service, had not been applied to the questioned recruitment process and that the supervisors of GS staff members, who had applied for the posts, had in fact been included on the Departmental Panel concerned. The Applicant submits that in these circumstances, those candidates enjoyed an unfair advantage over her, as her performance had not been known to the said Panel. The Tribunal points out that this issue had not been made by the Applicant in the course of her proceedings before the JAB and that accordingly the Respondent had been denied the opportunity of contesting the factual basis for same in those proceedings and that the JAB had been afforded no opportunity of investigating that issue or reaching any decision or conclusion thereon.

As is apparent from the Tribunal's Judgment No. 1009, *Makil* (2001), it is not envisaged by the Statute of the Tribunal, that issues of primary fact will ordinarily be found by the Tribunal itself. Since proceedings before the Tribunal are preceded by an investigation of some other body, be it a Board of Inquiry, a JAB or a JDC, save for exceptional cases such as where matters come directly to the Tribunal under its Statute by way of Agreed Facts, the factual basis for a case had already been decided by such body. The Tribunal then acts upon primary facts so found, unless it identifies a reason for not doing so. Such reason might arise from a finding of prejudice, or a finding by the Tribunal that there was no sufficient or credible evidence to support the facts so found. Accordingly, where a party to proceedings wishes to rely on any primary fact in support of any particular proposition, it is important that such matters of a factual nature, as may prove to be in issue, be identified and asserted at the earliest appropriate and opportune time. This would allow reasonable time for the Respondent to take issue with this proposition, if he so desires, and for a proper investigation to be carried out, by the

appropriate body, before the matter comes to the Tribunal, rather than being sprung on the other party at the latest possible opportunity, as has happened in these proceedings.

However, the Tribunal is satisfied that it is not necessary to embark upon an investigation of the issues concerning the presence or otherwise of supervisors on the Departmental Panel at this late remove, as the Tribunal does not consider that a resolution of these issues is necessary so as to enable the Tribunal to deal with the points made.

Suffice it is to say that even if the Tribunal accepts, for the purpose of argument, that the Applicant's assertions are correct and that supervisors of some candidates were on the Departmental Panel, the Tribunal is neither satisfied that this gave such candidates a distinct advantage over the Applicant, nor that it constituted such a departure from the norms of fair play, that it should invalidate the recruitment process. Accordingly, without proceeding to any finding of fact on this issue, this ground is likewise rejected.

XII. In so far as the Applicant asserts that no reply had been received from the APP to what she has described as "her appeal" and that this supports her contention that the recruitment process was tainted by arbitrariness, it is clear from the APP's memorandum of 31 August 1998, that the Applicant's appeal had, in fact, been considered, albeit that the Applicant had not been personally informed as to the consequences or findings made thereon. The APP, having reviewed the Applicant's appeal, believed that the Departmental Panel had an inconsistent approach as to the requirement for "formal secretarial training". The APP therefore referred the case back to the Departmental Panel, requesting that the "criteria matrix" be re-examined. The Departmental Panel's memorandum of 2 November 1998, clarified what had troubled the APP as to its perception of inconsistency and explained, that the criterion for such training had never been used to disqualify any candidate. It further explained that both work experience and higher education had been treated as of equal importance to secretarial training per se.

The Tribunal is satisfied from the record that the Applicant's Appeal had been given due consideration. The fact that the Applicant had not been given personal notice of the steps taken with respect to her appeal does not invalidate the recruitment process, nor provides ground to condemn its propriety or fairness and therefore this claim is rejected.

XIII. In her Written Observations, the Applicant clarified what was meant by her complaint concerning "fictional characters who never materialized". Her explanation indicated that the Administrative Officer, UNON, had informed her, by way of explanation as to why she had not been successful in her application for any of the posts, that the successful candidates had enjoyed particular talents, background or experience which made them preferable candidates to the Applicant. However, the Applicant contends that no such persons had actually been appointed or that these candidates' talents, backgrounds or experience were exaggerated beyond their due. This, again, is a new allegation, not previously submitted for the consideration of the JAB and hence the Respondent had been denied an opportunity of taking issue with same there, and the JAB had been afforded no opportunity of investigating it or making any determination or finding thereon. However, once again, the Tribunal is satisfied that it can proceed with this Application without further investigation. Even if the Applicant's assertions are to be accepted as accurate for the purpose of the argument, the Tribunal fails to understand how this would invalidate the recruitment process.

There is no evidence to support any suggestion that any candidate had deceived or misled the Departmental Panel in relation to any such matter or had even sought to deceive or mislead same and this ground is rejected.

XIV. In all of the circumstances the Applicant failed to substantiate her pleas, that the recruitment process was tainted by arbitrariness, or that she was prejudiced, and accordingly this submission is rejected.

XV. As for the Applicant's claim, that she was entitled to additional notice that her fixed-term contract would not be extended or renewed, and that it had been terminated without notice "for reasons which required notice", the Tribunal believes that the said contract had expired by efflux of time and it is not accurate to describe it as having been terminated. The said fixed-term contract, by its own terms as set out in the appropriate letter of appointment, specified that it would expire on the said date and that it did not carry an expectancy of renewal or conversion to any other type of appointment. These terms were acknowledged by the Applicant in her submission to the JAB dated 17 January 1999, when she indicated that upon signing the contract she was fully aware that it did not carry any expectancy of renewal. Furthermore, staff rule 104.12(b)(ii) provides

to similar effect and staff rule 109.7(a) provides that other than the notification contained in the letter of appointment, no additional notice was required.

The Tribunal, like the JAB, is satisfied that the Applicant must have been fully aware, for a considerable time, that her situation was precarious and that it was unlikely that her contract would be renewed, as this is the only rational explanation as to why she had applied for so many other posts. The Applicant maintains that she only applied for those vacancies to test UNEP's fairness, maintaining that so good were her qualifications and experience, that she could not envisage how her applications for these positions could have failed on objectively fair grounds, thereby providing her with "evidence" that she was victimized. The Tribunal is not satisfied that it understands this submission, which on a view appears to be absurd. If the Applicant means that she applied for those positions with no intention of taking up any should it have been offered to her, then the absurdity of the proposition becomes self-evident. If this was the case, she could have no complaint that her applications proved to be unsuccessful. The Tribunal is further satisfied that some days prior to 14 April 1998, the Applicant was informed that her applications for these posts were unsuccessful and that her contract would not be renewed.

In all of the circumstances, the Tribunal must reject this submission and find that no additional notice was required. It follows, that for the reasons set out, the claim for wrongful dismissal must likewise be rejected.

XVI. The Tribunal is also satisfied, that the Applicant has advanced no grounds which would entitle her to be reinstated in her former position and accordingly her claim in this regard is also rejected.

XVII. The Applicant claims that the backdating of her "entry into service date", from 15 July 1997 to 28 August 1996, gives rise to some additional pension entitlement.

It is doubtful if this matter is properly before the Tribunal, as in so far as it raises a pension fund issue, there was no jurisdiction to have included it in the Applicant's appeal to the JAB. Furthermore, in so far as it raises such an issue, it should have, in the first instance, been dealt with under the UJSPF Regulations and Rules. However, the Tribunal notes the JAB's recommendation that the date of "entry

into service" be amended accordingly and that the Respondent accepted this recommendation. The Tribunal is of the view that the JAB was correct in observing that a change in the Applicant's "entry-on-duty" date would not necessarily effect her pension entitlements. The JAB sensibly dealt with the entry-on-duty issue without purporting to decide what effect, if any, this might have regarding the Applicant's entitlements under the Pension Scheme.

For the period from 28 August 1996 (the actual date of the Applicant's entry into service) until 15 July 1997, when she was granted a 100-series fixed-term contract, the Applicant was employed on a series of short-term contracts, which by their terms, expressly excluded the Applicant from participation in the Staff Pension Scheme. Accordingly, she was not a participant in the Scheme during this period, no pension contributions were paid into same by her or on her behalf, so that she accrued no rights to any benefits from this period of service. Since this period of service is not to be reckoned for pension purposes, this claim is rejected.

XVIII. Concerning the Applicant's claim for compensation for extra work performed – the Tribunal finds this claim to be time-barred and therefore not receivable. The Tribunal agrees with the JAB's finding, that the Applicant failed to follow the necessary steps required to request compensation for overtime. The Applicant should have requested same at the time that she was actually working overtime, rather than raise this issue some time later. Moreover, this issue was brought before the JAB several months after she initially raised it, thus missing the time limits as prescribed in staff rule 111.2. The Tribunal further notes, that overtime is not usually compensated by payment, but rather by way of compensatory time off, which the Applicant, obviously, cannot get once she is no longer a staff member. As for her request for SPA – the Applicant bases this claim on her contention that she had performed tasks, which were beyond the prescribed tasks of her post. The Respondent denies this claim, stating that, in fact, the Applicant had only performed work as expected of her. The Applicant failed to satisfy the Tribunal of her assertion that she had performed such duties, or that she had any reasonable excuse for not seeking compensation for performing extra work, at the appropriate time. Furthermore, the granting of SPA is discretionary and no staff member has an entitlement to receive same as of right. Additionally, the Tribunal concurs with the JAB in that

> "the rules governing payment of SPA … presuppose that there is an existing post whose higher level functions are being performed by the staff member. Not even the Appellant is arguing that there was a higher level post whose functions she was performing. In consequence the claim for payment of SPA must be rejected."

XIX. As for the Applicant's claim for payment of language allowance – the Tribunal is satisfied, and indeed the Respondent acknowledged, that the Applicant was entitled to same from the date she received a fixed-term appointment under the 100 series. However, due to an administrative mistake, the payment of this allowance to the Applicant was significantly delayed. The Tribunal is therefore of the opinion that the Applicant is entitled to receive interest on this payment, from the date it was due her until the actual date of payment.

XX. In view of the foregoing, the Tribunal:

1. Orders the Applicant be paid language allowance, if same has not already been received by her, plus eight percent interest, from the date of her appointment on a fixed-term contract under the 100 series and until actual payment of same; and

2. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Mayer **Gabay**
First Vice-President

Kevin **Haugh**
Second Vice-President

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary

.../BYAJE