United Nations AT/DEC/1132

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1132

Case No. 1184: GODDARD Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas at the request of Peter Goddard, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 25 April 2001, the Applicant filed an Application requesting the Tribunal, inter alia, to *find*:

"8. …

(a) that the report and recommendations of the Joint Appeals Board (JAB) … are, in the main, ill founded in facts and in law;

(b) that … the JAB did fail to give the Applicant a fair hearing …

…

(g) … that this be considered an exceptional case justifying the payment of higher indemnity … for the following reasons:

(1) the Registrar [of the International Criminal Tribunal for Rwanda (ICTR)] took against the Applicant a decision that he knew he did not have the authority to take, a decision that was taken with malice and forethought;

(2) the Registrar and his subordinates mounted a campaign of false accusations against the Applicant in order to destroy his reputation and credibility …

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(3) senior staff of [the Office of Human Resources Management (OHRM)], knowingly and in collusion with the Registrar, allowed the smear campaign to continue …

(4) senior staff of OHRM, knowingly by the use of false documents and in full knowledge of the Registrar's actions, attempted to block the Applicant's later employment;

(5) the [Under-Secretary-General, Office of Internal Oversight Services (OIOS) and the Chief, Investigations Service, OIOS,] mounted a slanderous attack on the Applicant's reputation …

(6) … OIOS … refused to protect the Applicant as a whistleblower …

...

(h) … additionally, …:

(1) with the full knowledge and encouragement of the Registrar and senior staff of OHRM, the Applicant's wife, not a [United Nations] staff member, was subjected to a humiliating and slanderous attack …

…

9. [and] *to order*:

(a) that the Organization clear the Applicant's name of all complaints made against him, and, [compensate him for all the injury and indignity caused to him in the amount equivalent to 12] years of salary;

…

(1) that the Organization compensate the Applicant in order to cover some of the expenses … in an amount of US$ 4,000."

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 September 2001 and periodically thereafter until 31 October 2002;

Whereas the Respondent filed his Answer on 31 October 2002;

Whereas the Applicant filed Written Observations on 26 March 2003;

Whereas the facts in the case are as follows:

The Applicant joined ICTR on a one-year, fixed-term appointment at the P-4 level, in the capacity of Chief, Budget and Finance Section, on 27 October 1995. The Applicant's appointment was extended through 30 November 1996, when he separated from service. Following his reappointment on 28 August 1997, the Applicant continues to serve at the P-4 level in the United Nations Interim Administration Mission in Kosovo (UNMIK).

In April and May 1996, the Applicant met with the Registrar of ICTR in order to convey his concerns about alleged misconduct by the staff of ICTR. Reports regarding such alleged wrongdoing were prepared by the Applicant in May, June and 8 August 1996, and submitted to OIOS.

During the period from 14 February through 31 July 1996, six memoranda setting forth complaints by other staff members of ICTR against the Applicant were placed in the Applicant's Official Status file without being brought to his attention.

On 9 October 1996, ICTR offered the Applicant a six-month extension of his appointment expecting that during this period "an occasion will not arise as a result of your actions which will create any discomfort among other staff members of the Tribunal". Attached to the offer was a performance evaluation report (PER) for the period 27 October 1995 to 26 October 1996 referring to reported difficulties encountered by other staff members in working with the Applicant. On 10 October 1996, the Applicant signed the PER, invoking his right to rebut same, which he did subsequently, on 8 November. Also on 10 October, the Applicant replied to the 9 October letter, protesting the implication that he had been found guilty of the complaints made against him, and, on 11 October, requested the Assistant Secretary-General for Human Resources Management to investigate the matter.

On 18 October 1996, ICTR informed the Applicant that his contract would be terminated on 30 November.

In November 1996, OIOS sent investigators to ICTR in order to look into the Applicant's complaints. At the time, the Applicant's request that OIOS accord him "whistleblower status" was refused. According to the OIOS report, dated 6 February 1997, serious operational deficiencies existed in the management of the Tribunal, exacerbated by the recruitment of inexperienced or otherwise unqualified staff, including the Applicant. No misconduct was found on the part of the Applicant. The Applicant submitted further complaints to OIOS in early 1997; however, OIOS took the position that the Applicant's concerns had been properly addressed.

On 19 May 1997, the Applicant wrote to the Assistant Secretary-General, OHRM, requesting that his PER be "destroyed". On 14 August, the Assistant Secretary-General, OHRM, replied that the PER could not be destroyed as it was a part of the Applicant's official record. He recognized, however, that a number of

factors had impeded the establishment of a panel to review the Applicant's rebuttal, and proposed three ICTR staff members for the convening of a rebuttal panel. Following further communications on the matter, the Applicant requested that the rebuttal panel be composed of staff members from the Department of Peacekeeping Operations, and convened in New York.

On 10 December 1997, the Applicant requested the Secretary-General to review certain administrative decisions taken during the period when he served in ICTR and thereafter.

On 3 March 1998, the Applicant agreed to the composition of a rebuttal panel, which submitted its report on 15 May and recommended that the Applicant's overall performance rating be changed from good to very good. The Registrar accepted these findings on 31 August 1998.

On 24 March 1998, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 14 September 2000. Its conclusions and recommendations read as follows:

"**Conclusions and recommendations**

37. … the Panel agreed that the Appellant's rights to due process in connection with his PER rebuttal were denied. The Appellant was not given enough time to rebut his PER and could not, therefore, have availed himself of the rebuttal procedure in any meaningful way. There were procedural deficiencies and irregularities in the handling of the Appellant's rebuttal procedure, most of which ascribable to the weaknesses of the ICTR administrative machinery highlighted by the OIOS investigations and report.

In addition, premature release of largely unfavourable material contained in the Appellant's PER still under rebuttal, in contravention of paragraph 9 of ST/AI/240/Rev.2 [of 28 November 1984], was found by the Panel to have contributed, at least potentially and possibly substantially, to blocking or delaying re-hiring of the Appellant by the United Nations during the nine month period of his unemployment between … assignments.

The Panel further agreed that material detrimental to the Appellant had been included by the ICTR in his official status file without his knowledge or without the opportunity for him to comment on it and that, on one occasion, OHRM had drafted and used an unsigned and undated note. All of these materials taken together were found to have unfairly blocked or delayed the Appellant's re-hiring by the United Nations.

In conclusion, the Panel *unanimously found* these two substantial lapses, that under different circumstances might have been considered small, unimportant, or even excusable since some at least were not intended to cause harm, here had the cumulative impact of negatively prejudicing or endangering the future career prospects of a former staff member.

> 38. In view of the foregoing, the Panel *agreed unanimously* to recommend an award of compensatory damage equivalent to a 9-month net base salary at the rate in effect at the Appellant's separation. … The Panel further *agreed unanimously* to recommend to the Secretary-General that he order the ICTR and OHRM to search their files and remove all adverse materials listed in paragraph 5 above from the Appellant's Official Status file …"

On 12 April 1999, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

> "The Secretary-General has decided to accept the Board's conclusions and its recommendation for compensation and for the removal of the adverse material referred to above from your official status file. However, the amount of compensation recommended by the Board cannot be accepted, primarily because it is speculative that the irregularities referred to above contributed to blocking or delaying your re-hiring by the Organization and, in any event, this was aggravated by your rejection of ICTR's offer of a 6-month extension of your appointment. The Secretary-General has decided to compensate you in the amount of 3 months net base salary at the rate in effect at the time of your separation from ICTR."

On 25 April 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. He was found guilty by ICTR of complaints against him without having been given a chance to defend himself.

2. In contravention of administrative instruction ST/AI/240/Rev.2, OHRM released the Applicant's PER, which then was under rebuttal, to another Department, thereby violating his rights.

3. OIOS refused to give him "whistle blower" status, when requested to do so in November 1996, in accordance with paragraph 18 (f) of administrative instruction ST/AI/273 of 7 September 1994.

4. The Respondent's mishandling of the PER rebuttal procedure violated his due process rights.

Whereas the Respondent's principal contentions are:

1. The Applicant's fixed-term appointment with ICTR was not terminated; rather, it expired, and the Applicant had no legal right or expectation that it would be renewed.

2. The Applicant has failed to establish that any alleged action taken against him was motivated by prejudice or other improper motivation.

3. The amount offered to the Applicant by the Respondent as compensation for the violation of his due process rights in connection with the premature release of his PER and the placement of adverse material in his Official Status file was fair and appropriate under the circumstances.

The Tribunal, having deliberated from 24 June to 25 July 2003, now pronounces the following Judgement:

I. The Applicant was the P-4 Chief of the Budget and Finance Section in ICTR, which recruited him on 27 October 1995 on a one-year fixed-term contract. On 9 October 1996, shortly before his contract was to end, the Applicant was informed that it would be renewed for only six months, because of various complaints about him. On 18 October 1996, however, the Applicant was informed that, because of the above-mentioned complaints and his unsatisfactory performance, the Administration had decided to terminate his contract on 30 November 1996. The Applicant therefore left work on 30 November 1996. He was reappointed to ICTR on 28 August 1997 on a three-month fixed-term appointment, as a P-4 finance officer, transferred on 1 November 1997 to the Department of Peacekeeping Operations in New York and has since been employed on fixed-term appointments by UNMIK. The Applicant lodged various appeals following these events.

II. He rebutted the evaluation made at the mid-point of his first appointment. On 9 October 1996, ICTR transmitted to the Applicant his PER for the period from 27 October 1995 to 26 October 1996. On 10 October 1996, the Applicant signed the PER and invoked his right to rebut. He did rebut the evaluation, in a request submitted on 8 November 1996. However, the rebuttal procedure did not take place until 15 May 1998. The Applicant claims that there were unacceptable delays, while the Respondent criticizes the Applicant for procrastinating.

The Tribunal notes that the procedure for constituting the Rebuttal Panel clearly demonstrates bad faith on the part of the ICTR Administration. On 26 November 1996, the Administration gave the Applicant a list of five members from which he was to choose three, but the Administration then rejected the Applicant’s choice because two of the members chosen by the Applicant did not have the requisite seniority. The Tribunal therefore finds it surprising, to say the

least, that the Administration should have proposed to the Applicant candidates who did not meet the necessary requirements to serve on the Rebuttal Panel. On 8 January 1998, the Administration submitted to the Applicant a new list of four members of ICTR so that he could choose his panel. The Applicant indicates that the reason why he rejected the members proposed was that ICTR had for the second time proposed a person whom the Applicant had accused of corruption as well as another person who had accused the Applicant and his wife of being racist. It is surprising, to say the least, that the Administration should have again proposed persons whom the Applicant had rejected, explaining his reasons. In a letter dated 19 May 1997, the Applicant complained in the following terms about the way in which the rebuttal procedure was being conducted:

> "My PER rebuttal process is currently more like a comedy of errors than a genuine attempt to carry out an important administrative procedure."

In his Application, he again denounces the rebuttal procedure. According to the Applicant, "these actions by the Administration amounted, at the very least, to a lack of care and good faith on the part of ICTR and OHRM and could be construed as an abuse of authority". In addition, when the Applicant proposed the members whom he wanted for the Rebuttal Panel, he was told on 18 July 1997 that one of the persons chosen by him could not serve on the Panel because she was separating from ICTR; yet one month later, on 14 August 1997, she was still on board. On 13 February 1998, ICTR proposed a different Panel to the Applicant, which he accepted on 3 March 1998. The Rebuttal Panel did not meet until 22 March 1998 - in other words, 17 months after the rebuttal procedure had been initiated. Once the Rebuttal Panel was finally set up, matters improved, as the Applicant recognizes:

> "when, eventually, the Applicant was allowed to select an honest and objective Rebuttal Panel, his rebuttal was handled quickly and efficiently, resulting in all eight contested grades and the overall grading being raised in accordance with this request".

Indeed, the Rebuttal Panel submitted its report on 15 May 1998, which was favourable to the Applicant, since it recommended "that the overall performance rating [of the Applicant] be changed [from good] to very good".

III. Evaluating this rebuttal procedure, the JAB considered that due process had not been respected because of the chaotic procedure:

> "The Panel concluded that procedural irregularities and delays had marred the Applicant's PER rebuttal procedure over the period 28 November 1996 to 22 March 1997, in contravention of ST/AI/240/Rev.2."

In view of the factual and legal arguments submitted to it, the Tribunal agrees with the JAB and notes that the delays in setting up the Rebuttal Panel were committed to the detriment of the Applicant and that the procedure followed therefore did not ensure due process. The Tribunal strongly condemns the cumulative delays in this case. It recalls that significant delay is in itself damaging to the conditions of service of United Nations staff members, as it has already stated in *MacMillan-Nihlén* (Judgement No. 880 (1998), para. VI):

> "The Applicant does not have to show any specific damage resulting from the undue delay. As the Tribunal has held, an inordinate delay 'not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant'. (Cf. Judgements No. 353, *El Bolkany* (1985) and No. 414, *Apete* (1988).)"

Moreover, such delays are particularly questionable when they concern a rebuttal procedure, which must be rapid if it is to be meaningful.

IV. However, another issue was raised by the Applicant concerning his PER: he complains to the Administration that "without any proviso whatsoever, OHRM issued his PER, which was then under rebuttal, to another Department on 2 May 1997 contrary to ST/AI/240/Rev.2". The JAB, while considering - quite illogically - that OHRM's intent was laudable in releasing the PER under rebuttal before completion of the rebuttal procedure, nevertheless considered that the action was in contravention of the staff member's recognized rights:

> "The Panel was of the view that, however laudable OHRM's intent was in seeking alternative employment for the Applicant, the release of the PER under rebuttal was in contravention of paragraph 9 of ST/AI/240/Rev.2 which states: 'If a rebuttal is subsequently submitted, the report will not be filed in the official status file until such time as the rebuttal procedure has been completed …'."

In his answer, the Respondent offers a strange justification based on an examination of the file that is, to say the least, superficial, since it gives a date that is incorrect by one year, and thus minimizes the action of the Administration:

> "Even before Applicant signed the PER and requested rebuttal proceedings in or about October 1996, the UN Office of Human Resources Management … had issued Applicant's PER to another office within the Organization on 2 May 1996".

The Tribunal takes note of the fact that an examination of the file shows that the date of release of the PER is actually 1997, and that it was released *during* and not before the rebuttal procedure. On this point, therefore, the Tribunal confirms the JAB position and considers that the Administration violated the circular protecting staff against untimely release of their PERs, when the reports are under rebuttal.

The Tribunal has confirmed on many occasions the importance of respect for the rebuttal procedures, which are part of due process. As an example, reference may be made to the *Beliayeva* case (Judgement No. 826 (1997)), in which the Tribunal found that:

> "Having undertaken a consideration of the Applicant's situation, it was incumbent upon the Respondent to make his determination in accordance with fair procedures. Because the evaluation of the Applicant's performance was a factor, it is unacceptable that the decision as to her future was taken before the rebuttal procedure was finalized."

In the case under consideration, the Tribunal considers that the fact that the Administration released the Applicant's PER before its rebuttal is a violation of the Applicant's right to due process.

V. Linked to the issue of the release of the PER under rebuttal is the issue of the transmittal, at the same time as this PER, of an undated and unsigned note from OHRM, detrimental to the Applicant, in the context of a recruitment procedure for the two-month temporary replacement of a DPKO staff member. According to the Applicant,

> "adverse material has been drafted and used by OHRM in their undated note estimated to be drafted in February/March 1997, without the Applicant's knowledge, without him having the opportunity to comment on it, and without including that material in his Official Status file, contrary to ST/AI/292".

The Tribunal has examined this note. It is clear that the note is based on mere allegations and accepts at their face value complaints which have never been investigated, concluding from these unproved elements that "OSD did not feel comfortable enough to endorse [the Applicant's] recruitment for the DPKO temporary post".

The Tribunal considers that the improper release of the PER, like that of this undated and unsigned note, undermines the Applicant's right to due process.

VI. The Tribunal now turns to the allegations that documents were placed in his file without the Applicant being notified, so that he was unable to refute them. The Applicant also claims that there were defamatory documents concerning his wife and complains of

> "unsubstantiated allegations and derogatory remarks made against Mrs. J. R. Goddard, his wife, who is not a staff member, including the drafting and passing on of such documents, by OHRM as their undated note estimated to have been drafted February/March 1997".

The JAB had already criticized the Administration for this action in these terms, but without specifically mentioning the documents concerning the Applicant's wife, to the disappointment of the Applicant:

> "The Panel further agreed that material detrimental to the Appellant had been included by the ICTR in his official status file without his knowledge or without the opportunity for him to comment on it and that, on one occasion, OHRM had drafted and used an unsigned and undated note. All of these materials taken together were found to have unfairly blocked or delayed the Appellant's re-hiring by the United Nations."

The Respondent does not contest this fact, which he acknowledges in his answer:

> "During the period from 14 February through 31 July 1996, six memoranda setting forth complaints by other staff members of ICTR against Applicant were placed on Applicant's official status file without such 'adverse' material being brought to Applicant's attention."

While acknowledging the facts, however, the Respondent denies that they could have injured the Applicant:

> "[the] Applicant has failed to demonstrate that he suffered any injury from allegedly defamatory materials having been placed on his Official Status File".

VII. The Tribunal considers that the improper release of the PER, like that of the undated and unsigned note, as well as the placement in his file of adverse material and the circulation of defamatory documents concerning his wife, should be considered not separately but as a whole. What then emerges is not a pattern in the Applicant's behaviour, which the Registrar alleged with no more supporting evidence for this allegation than unverified complaints. On the contrary, what emerges is a pattern of unfair treatment of the Applicant on the part of the ICTR Administration.

On this point, the JAB also found that there was a kind of cumulative effect of the various behaviours of the Administration:

> "The Panel determined that this material that was not brought to the attention of the Appellant who therefore, did not have the opportunity to comment on it, and that this material was actually and potentially damaging to the Appellant.
>
> The Panel further agreed that material detrimental to the Appellant had been included by the ICTR in his official status file without his knowledge or without the opportunity for him to comment on it and that, on one occasion, OHRM had drafted and used an unsigned and undated note. *All of these materials taken together* were found to have unfairly blocked or delayed the Appellant's re-hiring by the United Nations."

The Tribunal considers that a major procedural irregularity - such as placing documents in a personnel file without informing the staff member concerned - in itself undermines conditions of service and injures the Applicant. Here it refers to the decision of the ILO Administrative Tribunal in its Judgement No. 495, *Olivares Silva* (1982), which clearly stated this principle, a principle already incorporated in Tribunal case law in its Judgement No. 1060, *Baddad* (2002), para. III:

> "… the first and greatest safeguard against the operation of prejudice lies in the procedural requirements which every set of staff regulations contains and whose main objective is to exclude improper influence from an administrative decision. … [P]roof of prejudice is rendered unnecessary when procedural requirements have not been observed".

The Tribunal condemns these practices in the strongest terms and believes that the Applicant should receive compensation for this violation of his rights to due process. Here the Tribunal refers to Judgement No. 569, *Pearl* (1992), para. V, in which substantial compensation was awarded for the use during a promotion procedure of a document not transmitted to the Applicant;

> "The Tribunal is in accord with the view that the Applicant should have been made aware of and given an opportunity to comment in writing on the statement in the evaluation sheet that he 'might have a certain difficulty in maintaining harmonious relations with his colleagues in a high-stress managerial post when human-relations skills are of paramount importance'."

The Tribunal considers that the Applicant should be compensated for the serious professional, moral and material injury that he suffered as a result of the malevolent attitudes and arbitrary decisions of the Administration, which resulted in violations of his conditions of employment.

VIII. The Applicant also challenged the Administration's decision to terminate his contract in the JAB, which submitted its report on 14 September 2000. As indicated above, the JAB report stated that the Applicant had not been treated properly, from two main points of view. Firstly, as regards the over-lengthy PER rebuttal procedure, which resulted in the premature release of his uncorrected PER; and, secondly, as regards the inclusion in his file of a whole series of unfavourable documents without informing him. The JAB conclusions are therefore as follows:

> "In conclusion, the Panel *unanimously found* these two substantial lapses, that under different circumstances might have been considered small, unimportant, or even excusable since some at least were not intended to cause harm, here had the cumulative impact of negatively prejudicing or endangering the future career prospects of a former staff member.
>
> In view of the foregoing, the Panel *agreed unanimously* to recommend an award of compensatory damage equivalent to a 9-month net base salary at the rate in effect at the Appellant's separation. This 9-month period corresponds to the Appellant's unemployment, which the Panel found attributable to: (a) the improper and premature release of the PER he was rebutting, which was subsequently and substantially corrected in the Appellant's favour; and (b) to the compilation and release of various actual and potentially damaging materials not properly brought to his attention. The Panel further *agreed unanimously* to recommend to the Secretary-General that he order the ICTR and OHRM to search their files and remove all adverse materials listed in paragraph 5 above from the Appellant's Official Status file, including the unsigned and undated note."

On 9 January 2001, the Under-Secretary-General transmitted the Panel's report to the Applicant but agreed to grant the Applicant compensation equivalent to only three months' salary, believing that the injury to the Applicant could not correspond to nine months of unemployment, since the Applicant had declined the proposed six-month extension.

IX. The Applicant, firstly, appeals to this Tribunal against the Secretary-General's decision to accept the JAB report only partially and, secondly, complains that the JAB did not respond to all his complaints, namely the challenge to 11 administrative decisions or actions.

X. The Tribunal will begin by considering the Applicant's principal plea concerning "(t)ermination of his contract by memorandum, dated 18 October 1996, by ICTR, which did not have delegated authority and lack of compliance with rule 110.4". The Applicant thus claims, firstly, lack of competence of ICTR and, secondly, abuse of this improperly exercised authority. On the principal issue of

substance concerning the termination of the Applicant's contract, it is the Tribunal's task to determine, firstly, whether the ICTR Administration had the authority to terminate the Applicant's fixed-term contract and, secondly, assuming it is determined that it did have such authority, whether it exercised the authority in an arbitrary manner, basing itself on improper motives.

XI. The first question to be answered by the Tribunal is therefore whether ICTR was invested with the necessary authority to terminate the Applicant's contract. This issue is examined in detail in *Sirois* (Judgement No. 1138 (2003)) and the Tribunal refers to the considerations contained therein. It is sufficient to recall here that it appears from an examination of the file that authority was indeed delegated to ICTR, initially in October 1997, in other words well after the Applicant's termination. The Tribunal concludes from its examination of the facts of the case that ICTR did not have the legal competence to terminate the Applicant's contract.

Indeed, such abuse of authority was condemned by the United Nations General Assembly in its resolution 53/213 of 10 February 1999, which states:

> "The General Assembly,
>
> …
>
> 11. *Emphasizes* that the delegation of authority for human resources management should be strictly in accordance with the existing Staff Regulations and Rules of the United Nations."

XII. The Tribunal is then asked to state that, even if ICTR had been competent, it used its authority in an abusive manner and based its decision on motives extraneous to the interests of the service. The Respondent's answer to this is that the Applicant had no entitlement or legal expectancy of renewal of his contract, that the Administration has the discretionary power not to renew fixed-term contracts, and that the exercise of this power was not vitiated "by prejudice, discrimination, bias or other extraneous factors".

XIII. It therefore follows from the conclusion previously reached by the Tribunal - that ICTR had no competence to decide to terminate the Applicant's contract - that it is not in principle necessary for the Tribunal to embark on an examination of the internal functioning of ICTR, which has already been very severely evaluated by OIOS, in order to know whether ICTR - if it had had the competence to do so - should be considered to have used its authority in an abusive and biased manner, basing its decision on motives that had no substantial existence. However, the

events which occurred in Kigali are so opposed to what is to be expected of the United Nations Administration that the Tribunal believes it is its duty, if not to engage in a detailed investigation into everything that happened, at least to consider the process which culminated in the Applicant's termination.

XIV. The Tribunal first recalls that it is true that a staff member with a fixed-term appointment is not generally entitled to expect an extension: this is apparent from Staff Rule 104.12 (b). The Administration has the discretionary authority not to renew or not to extend the contract, without having to justify this decision. However, the Tribunal affirms that there is abuse of authority when the Administration does not renew a fixed-term contract, on the basis of accusations that are within the purview of the disciplinary bodies, without involving those bodies, which deprives the staff member concerned of due process (see Judgement No. 576, *Makwali* (1992)). This is all the more true when the case concerns not non-renewal of a fixed-term contract but termination during a contract, which the Tribunal believes is what happened here, as it will demonstrate.

XV. The Tribunal will now consider carefully the conditions in which the Applicant's contract was terminated. The Applicant believes, firstly, that he was terminated and, secondly, that this termination did not respect disciplinary procedures. The Respondent maintains that this is simply a non-renewal of a fixed-term contract and that "the Applicant has failed to establish that any alleged action taken against him was motivated by prejudice or other improper motivation".

XVI. The first question that the Tribunal must therefore ask itself is whether there was indeed a termination, as the Applicant maintains, or whether the fixed-term contract simply expired and was not renewed, as the Respondent maintains: the facts in this case are somewhat confused, but a number of unchallengeable elements emerge from the examination of the file.

The Tribunal first notes the very summary manner in which the JAB dealt with the issue of the non-renewal of the Applicant's contract, whereas it appears to the Tribunal that the complexity of the events that occurred, as well as the importance of the stakes for the Applicant, deserved more than the simple paragraph reproduced below:

> "The Panel considered first the issue of whether the Appellant's fixed-term appointment was 'terminated' by [ICTR] on 18 October 1996 or, simply not renewed upon expiration on 30 November 1996. The Panel noted that the

> Appellant was offered on 9 October 1996, a six-month extension which he turned down on 22 October 1996. The Panel agreed, therefore, that, upon expiration, the Appellant's fixed-term appointment had no expectancy of renewal in accordance with Staff Rule 104.12(b)(ii)."

The facts which emerge from the file, as examined by the Tribunal, are as follows. In a letter dated 9 October 1996, the Officer-in-Charge, Personnel Section, ICTR, informed the Applicant that, following the complaints made about him by other staff members, ICTR was going to grant him only a six-month extension (fixed-term contracts are generally extended for one year). On 18 October 1996, she informed him that his contract would end on 30 November 1996, in the following terms:

> "Taking into consideration all of the above, we regret to inform you that your contract with [ICTR] will be *terminated* on 30 November 1996" (emphasis supplied by the Tribunal).

"All of the above" referred, firstly, to complaints from other staff and, secondly, to unsatisfactory performance. As is emphasized by the Respondent, on 22 October 1996 the Applicant refused the offer initially made on 9 October by the Administration to extend his contract. However, this refusal can hardly be considered as the reason why the Applicant's contract came to an end: his refusal was given after 18 October. The Tribunal considers that the Applicant's response of 22 October 1996 is not really a refusal because, if the Applicant had wanted to frustrate any effort by the Administration to keep him on board, he would have refused the one-month extension until 30 November. The Applicant accepted what the Administration granted him and refused what the Administration took back from him - no more, no less (cf. Judgement No. 530, *Salinas* (1991)). According to the Applicant, the reason for accepting the offer of an extension was primarily his desire to be present in Arusha during the OIOS investigations.

Undoubtedly, the Administration possesses discretionary authority as regards decisions to extend fixed-term contracts. Staff with such contracts have no entitlement to renewal of their appointments. However, arguably certain rights should be respected when the Administration has granted an extension. The Administration has the right not to extend but, once it has extended, can it withdraw its offer? The Tribunal will therefore consider whether this offer of extension is such as to create for the Administration a good faith execution obligation or whether, as the Respondent implicitly maintains, the Administration retains its discretionary

authority and may thus terminate the staff member's contract. More specifically, the Respondent's position is not all that clear and in fact the explanations given of the conditions in which the Applicant's contract came to an end seemed to the Tribunal particularly embarrassed. In defiance of all logic, the Respondent states:

> "On 27 October 1996, Applicant's fixed-term appointment was extended for a little more than one month, through 30 November 1996, when Applicant separated from the service of ICTR."

Why would the contract have been renewed "for a little more than one month"? What document allows this strange renewal for an imprecise duration, "approximately one month", as the Respondent admits in another part of his answer?

XVII. The Tribunal therefore has a duty to clarify what actually happened. After examining the entire file, the Tribunal notes that the Applicant's fixed-term contract normally ended on 27 October 1996; that the Applicant had questioned the Administration in a letter dated 16 September 1996 as to whether his contract was going to be renewed; that the letter dated 9 October 1996 appears as a commitment on the part of the Administration, which by that letter was replying to the Applicant's questions about the extension of his contract, whereby ICTR granted him a six-month extension, until 27 April 1997; that the Administration could not withdraw its offer, since the very definition of the fixed-term contract (from 27 October 1996 to 27 April 1997) implies that the parties are bound by it for its entire duration; that on 18 October 1996 the Applicant was informed that his contract was to end on 30 November 1996; and, that the Applicant's refusal of 22 October cannot be considered as the reason for the termination of his contract.

The Tribunal deduces from this chain of events that the Applicant's contract did not end because of the normal expiration of a fixed-term contract, but that the Administration terminated the Applicant's contract after having granted him an extension of his contract. The Tribunal thus considers that the Administration's decision of 18 October 1996 is a termination decision.

XVIII. The Tribunal will therefore consider whether the requirements of form and of substance for the serious act of terminating an international civil servant were met by the Administration in the present instance.

The relevant regulation is Staff Regulation 9.1:

"**Regulation 9.1**

(a) The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory or if he or she is, for reasons of health, incapacitated for further service;

The Secretary-General may also, giving the reasons therefor, terminate the appointment of a staff member who holds a permanent appointment:

(i) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(ii) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

No termination under subparagraphs (i) and (ii) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Secretary-General;

…

(b) The Secretary-General may terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in subparagraph (a) above, or for such other reason as may be specified in the letter of appointment."

The letter clearly uses the word "termination" and cites two grounds, as previously indicated: complaints against the staff member from certain members of the ICTR Administration, and unsatisfactory performance. The Tribunal will consider whether there were grounds for terminating the Applicant, by examining successively these two reasons given by the ICTR Administration.

XIX. The Tribunal will first consider the statement in the letter dated 18 October 1996 that "your performance in the capacity of Chief, Budget and Finance Section (at the P-4 level) is below the standard required by the United Nations". If the Administration wished to terminate the Applicant's contract before its expiration date, the ground of unsatisfactory performance by the Applicant had to be well-founded. Yet it has been indicated above that his PER, on which the Administration allegedly based its action, was very substantially revised upwards, after the rebuttal procedure. In addition, the Tribunal is surprised that the United Nations should have availed itself of the Applicant's services without interruption from 28 August 1997 to date, if his performance was so far below the desired level

as to justify termination! This point strengthens the Tribunal's conviction regarding the fallacious nature of the ground invoked, and it therefore concludes that this first ground was devoid of substance and could not justify termination of the Applicant.

XX. The Tribunal will then consider the second ground invoked: the various complaints regarding the Applicant's behaviour and the importance attached to these complaints by the Registrar, whose letter states that "the Registrar viewed them as a pattern that was emerging". According to the Respondent's own assertions, the Administration's decision not to extend the Applicant's contract is partly based on the complaints about the Applicant, which other members of ICTR made between 14 February and 31 July 1996. The complaints in question referred to interference by the Applicant in personnel recruitment issues and the Applicant's use of abusive language in his relations with the other members of staff. The Tribunal notes that the Respondent took these complaints into consideration in terminating the Applicant's contract and that no preliminary investigation was conducted.

The Applicant considers that these complaints should have been the subject of disciplinary proceedings in his case, so that he could clear his name. The Applicant complains that he was found guilty of what he was being accused of by other ICTR staff, without the least investigation being conducted or the least procedure being followed. The Applicant states:

> "at no point have the procedures given in the Staff Rules, Chapter X and Revised Disciplinary Measures and Procedures (ST/AI/371 dated 2 August 1991) been carried out … Two of the complaints against me are based upon racism, which I consider to be the most serious charge and yet, I have not been given the opportunity to clear my name. I have simply been found guilty summarily. … I … request that the matter be investigated and I be given the opportunity to clear my name".

The Tribunal takes note of the JAB position on this problem:

> "The Panel noted also that the ICTR had decided not to take any disciplinary action against the Appellant for his conduct towards ICTR management and some staff members who had complained against him. ICTR stated it did not take such a disciplinary action because it determined that the incidents involving the Appellant and other staff members were not of such a magnitude as to warrant recourse to disciplinary measures and proceedings for misconduct as provided for in Staff Rule 110.4 and ST/AI/371. Under these conditions, the Panel agreed that the Appellant's due process rights concerning disciplinary proceedings could not have been violated."

The Tribunal believes that this JAB reasoning is completely misguided. It is true that, if no disciplinary proceedings are brought against an appellant about

whom accusations are made, there can be no violation of his due process rights regarding a non-existent procedure. But this is not what the Applicant is maintaining: he states that his termination is in fact a disguised disciplinary measure, adopted without the holding of disciplinary proceedings that would have enabled him to defend himself. Indeed, the Applicant complains that the Administration did not follow Staff Rule 110.4.

The Tribunal disagrees with the Applicant on this issue and does not believe that disciplinary proceedings, which moreover are left to the discretion of the Administration, were required in this instance. However, this does not mean that the action of the ICTR Administration can be justified simply on the basis of complaints from colleagues, particularly in the very tense situation prevailing in ICTR and acknowledged by OIOS as indicated in the OIOS report annexed to the report of the Secretary-General on the Activities of the Office of Internal Oversight Services (A/51/789 of 6 February 1997). OIOS recalled the context in which the events giving rise to this case had occurred, even if the terms used seem to be an understatement in the light of the incidents described: “The relationship between the Registry and the Office of the Prosecutor was often characterized by tension rather than cooperation”.

It appears from Staff Regulation 9.1 that the staff member’s conditions of service imply that he cannot be terminated on the basis of mere unverified allegations, without an investigation involving adversarial proceedings, as was the case here.

It is established jurisprudence, when serious accusations about a staff member may lead to termination, that the Administration proceeds to verify the veracity of such allegations. For example, in Judgement No. 569, *Pearl* (1992), the Tribunal stated:

> “If legitimate complaints against staff members exist …, they should be promptly brought to the attention of a responsible official …, for investigation and resolution, within the framework of the ongoing performance evaluation system which is designed to provide important protections to all staff members.”

The Tribunal has even found, in Judgement No. 576, *Makwali* (1992), para. VI, that this type of investigation was necessary if a fixed-term contract was not to be renewed on grounds of reprehensible behaviour:

> "… the Administration erred in not making the charges of gross misconduct the subject of an investigation under PD/1/76. This it should have done before deciding not to extend the Applicant's contract. The Tribunal need not speculate as to the likely outcome of such proceedings; it is sufficient to establish that the Administration did not follow the procedure it had itself prescribed, thereby depriving the Applicant of whatever safeguards that procedure would have afforded him. The Tribunal does not consider this omission to be a minor matter."

The need to respect this type of procedure is equally or even more vital when a contract is to be terminated prematurely. In this case, the Administration should not only have conducted an investigation but should also have informed the Applicant of these complaints so that he could, if he wished, challenge them. The Administration's position is particularly questionable since the Applicant had requested an investigation. In a letter dated 10 October 1996, the Applicant asked for explanations concerning the memorandum dated 9 October 1996, which mentioned colleagues' complaints about the Applicant, and he asked the Administration whether he had been found guilty of the deeds alleged and, if so, on what basis. And on 11 October 1996 the Applicant had written to OHRM contesting the memorandum from the Officer-in-Charge dated 9 October 1996 and had requested the assistance of OHRM. No action was taken on this memorandum.

The Tribunal concludes from this that the second ground invoked to justify termination of the Applicant had no more justification than the first one and that consequently the decision to terminate the Applicant's fixed-term contract prematurely was prejudiced, arbitrary and based on abuse of authority and improper motives.

XXI. The Tribunal must now consider certain pleas of the Applicant, who complains that they were not considered by the JAB or that they were rejected. The Tribunal has duly examined them all, but does not consider it necessary to elaborate in detail on all those which it rejects.

XXII. One plea concerns the fact that "OIOS refused to give him whistle blower's status, when requested to do so in November 1996, in accordance with paragraph 18 (f) of ST/AI/273 and OIOS Operating Procedure 'M'". Another plea of the Applicant concerns the fact that "OIOS misrepresented his qualifications and ability in A/51/789, dated 6 February 1997".

The OIOS decision not to grant him whistle blower status is challenged by the Applicant, who is asking the Tribunal to consider that OIOS should have granted

him the protection to which he was entitled by virtue of whistle blower status. The OIOS Investigations Section Manual states in Operating Procedure "M":

"**Definition and Handling of Whistle Blower Complaints/Issues of Retaliation**

1. 'Whistle blowers' who provide information to OIOS are protected against any reprisal under ST/SGB/273 'Establishment of the Office of Internal Oversight Services' dated 7 September 1994 paragraph 18 (f) which states:

> 'No action may be taken against staff or others as a reprisal for making a report or disclosing information to, or otherwise cooperating with, the Office. Disciplinary proceedings shall be initiated and disciplinary action shall be taken in respect of any staff member who is proven to have retaliated against a staff member or other person who has submitted suggestions or reports to the Office or otherwise cooperated with the Office.'

2. As a general definition, a 'whistle blower' is a staff member who refuses to engage in and/or reports illegal or wrongful activities of his/her employer or fellow staff member; subsequently and as a result, the staff member's chain of command or his/her fellow staff members retaliate against that staff member.

More precisely, a 'whistle blower' in the UN is a UN staff member who renders information to the IS on misconduct, mismanagement, waste of resources and/or abuse of authority (as referred to in ST/IC/1996/29: "Terms of Reference") within the UN, reflecting sincerity and honesty and thus revealing his/her good faith in the allegations he/she makes; subsequently, that UN staff member is made subject to selective, arbitrary and/or exaggerated administrative and/or disciplinary action for making the report (retaliation, reprisal) by his/her chain of command, senior management official(s) or his/her fellow staff members.

A 'whistle blower' reprisal case, consequently, involves two elements: (1) a UN staff member reports on an alleged wrongdoing in good faith; (2) following this event in time and as a direct consequence, the UN staff member is retaliated or reprised against.

3. If the UN staff member who has reported on the alleged wrongdoing is threatened with retaliation or reprisal, this shall also constitute a 'whistle blower' reprisal case as defined in paragraph 2.

4. The designation as a 'whistle blower' is subject to the Section Chief's approval.

5. The above said also refers to 'whistle blower' reprisal cases which involve a non-UN staff member as the party reprised or retaliated against (paragraph 18 (f) of ST/SGB/273).

6. Such reports by 'whistle blowers' will receive the prompt and careful attention of and response by the Section, including the taking of interim steps to protect the 'whistle blower'."

The Applicant therefore considers that, by virtue of the above-mentioned texts, he was entitled to whistle blower status.

In its report, the JAB stated:

> "With regard to OIOS refusal to grant the Appellant 'whistle blower' status when he requested it, the Panel agreed that OIOS acted within its discretionary power, in consonance with its terms of reference. … But whatever those discretionary choices and the rationale behind them were, the Panel agreed that the least one could expect is consistency in the way OIOS dealt with the Appellant whose position in ICTR had became ipso facto precarious."

The Tribunal does not intend to contest the refusal of OIOS to grant the Applicant the protection that he was requesting. The Tribunal considers that, in any case, the evaluation of factual data, in order to establish whether the Applicant could be given whistle blower status, is solely within the competence of OIOS. However, the Tribunal considers that, without interfering in the sphere of competence of OIOS, it is its duty to point out some illogicalities in the attitude of OIOS towards the Applicant. In addition, after mentioning the poor performance of ICTR staff and citing the Applicant as an example (report dated 6 February 1997), OIOS then changed its attitude. On 21 April 1997, the Chief of the Investigations Section, OIOS, wrote to DPKO, to confirm that nothing in the OIOS report should be considered as prejudicial to the Applicant in his search for another post in the United Nations:

> "OIOS can confirm that [the Applicant] was not found by OIOS to have engaged in any acts of wrongdoing which would preclude his employment with the UN. On a more focused issue, while OIOS confirms the findings as to [the Applicant's] qualifications as ICTR's Chief Finance Officer, his qualifications and background indicate that he has skills to offer the UN as a staff member in a mission or office that is more established than was clearly the case with ICTR, that is fully functioning and that has sound financial leadership; in such circumstances he should be able to serve as a contributing staff member.
>
> Further, having reached the conclusion that the information provided by [the Applicant], which we now report to you with his authorization, during the ICTR review was valuable to assist in the formulating corrective actions, we believe that no impediment should be put in [the Applicant's] way to continuing his career in the UN system. We should not like to see staff members who provide information to OIOS pursuant to our mandate be penalized for so doing."

In addition, the Tribunal has found other contradictions in the JAB report, which states that OIOS acted within its discretionary authority in not giving the

Applicant protected status. And in the same paragraph, the JAB said that: "it [OIOS] stood firmly behind him [the Appellant] in taking a position that subsequently facilitated his re-employment by the United Nations …". And the following paragraph contains an implicit disagreement on the part of the JAB with the OIOS refusal to grant the Applicant protected status, because "the Applicant's position in ICTR had become ipso facto precarious".

Reasonably, the Tribunal notes the illogicality both in the JAB report and in the report of OIOS. Why did OIOS change its mind about the skills of the Applicant? Did it realize that it had erred in accusing the Applicant of incompetence and forcing him into a situation that was precarious, to say the least? And did the Board carefully analyse all the facts when, in the same report, it managed to state both that OIOS had noted the Applicant's lack of professional skills and that OIOS had supported the Applicant's re-employment in the Organization?

In view of the factual and legal issues set out above, the Tribunal is in a position to find that OIOS injured the Applicant, not because it did not grant him protected status but because it was not consistent in its allegations, contradicting the position it had initially adopted towards the Applicant.

XXIII. For the above reasons, the Tribunal:

1. Declares that the termination of the Applicant must be regarded as null and void, having been decided by an authority that was acting *ultra vires* and in a particularly arbitrary manner;

2. Notes that reinstatement of the Applicant would be meaningless in view of the circumstances;

3. Orders payment to the Applicant of the termination indemnity payments to which he is entitled under the relevant rules;

4. Orders the Administration to pay the Applicant compensation for his termination in the amount of nine months' salary with all allowances at the rate in effect on the date of the judgement;

5. Orders payment to the Applicant of compensation in the amount of $5,000 for all the irregularities noted in the treatment of his case in this judgement;

6. Orders the removal from the Applicant's personnel file of any adverse material contained therein, including the anonymous undated note, and orders the Administration to send the Applicant written confirmation that it has actually done so, with the precise list of the documents concerned, within six months;

7. Rejects all other pleas.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Brigitte **Stern**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Secretary