



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1134

Case No. 1201: GOMES

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Brigitte Stern; Ms. Jacqueline Scott;

Whereas at the request of Joao Carlos Gomes, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 May 2001 and once thereafter until 30 September 2001;

Whereas the Applicant filed an undated Application which was received by the Tribunal on 5 July 2001, requesting the Tribunal, inter alia, to:

“... [D]eclare the present Application receivable ... and grant oral proceedings;
... [O]rder the Respondent to take the following actions:

- Immediate retroactive reinstatement, as of the date of the expiration of my contract;
- Determine that [the Applicant] was wrongly terminated ...
- Payment of all salaries, benefits and other entitlements up to date;

- Compensation in an amount equivalent to three times the gross salary owed to date;
- Compensation for moral and material damages, including loss of home and all personal belongings;
- Payment for damages resulting from the lack of assistance for evacuation both from Guinea-Bissau and Portugal;
- Payment of punitive damages;
- Reinstatement in the Pension Fund;
- Measures to prevent the recurrence of the issues involved as well as to prevent adverse effects from this case from affecting [the Applicant's] career prospects in the future;
- Completion of the two pending Performance Appraisal Systems;
- Completion of the investigation of the charges of discrimination filed against superiors on 17 February 1998 which was ongoing;
- Review of the overall treatment given to [the Applicant] by [the Department of Information (DPI), the Office of Human Resources Management (OHRM) and the Department of Management during the entire period of appointment with the Organization;
- Pay for a complete medical check up to determine whether or not [the Applicant's] placement in an office containing possible cancer-causing and other harmful agents - for a period of eleven months - had any impact on [his] health and well-being;
- Review and correction of the contents of [his] Official Status File;
- Double promotion to P-4 (long overdue);
- Investigation of the manner in which this entire case was handled, including lack of assistance to evacuate [the Applicant's] family and [himself] from [his] country at war, and later, from Portugal;
- Apology from DPI, OHRM, [and the] Department of Management."

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 January 2002, and once thereafter until 30 April 2002;

Whereas the Respondent filed his Answer on 23 April 2002;

Whereas the Applicant filed Written Observations on 30 August 2002;

Whereas, on 10 October 2002 and 12 June 2003, the Applicant submitted additional statements;

Whereas, on 26 June 2003 the Tribunal decided not to hold oral proceedings in the case;

Whereas on 30 June 2003, the Tribunal put questions to the Respondent, to which he provided answers on 3 July;

Whereas the facts in the case are as follows:

The Applicant joined the Organization under a two-year, fixed-term appointment, as an Associate Radio Producer in the Information Products Division, Radio/Central Programmes Unit, DPI, at the P-2 level, on 30 October 1989. His appointment was extended for a number of times, the last one until 28 February 1999, when he was separated from service.

On 10 June 1998, while on annual leave in Portugal, the Applicant advised DPI that he was going to travel to his home country, Guinea-Bissau, which was then engaged in a civil war, in order to evacuate his children, and requested DPI's assistance. On 11 June 1998, DPI relayed the Applicant's request to the Deputy United Nations Security Coordinator. On 26 June 1998, DPI also requested OHRM to assist in the evacuation of the Applicant's family.

On 23 July 1998, the Applicant informed Headquarters by phone that he was trying to return to New York. However, on 31 July 1998, the Applicant's supervisor was advised that the Applicant could not leave the country. On the same date, DPI, requested the Deputy United Nations Security Coordinator to send another cable to Guinea-Bissau to inquire about the Applicant and his family. On 2 September 1998, the Applicant advised his supervisor from Guinea-Bissau that he hoped to find a flight to New York in two weeks and to return to work by the end of the month.

On 7 October 1998, in view of the Applicant's prolonged and unauthorized absence, DPI instructed OHRM to stop payment of the Applicant's salary as of 1 October 1998, in accordance with Staff Rule 105.1(b)ii and informed OHRM that the Applicant would be warned that his continuing absence from work without authorization would be treated as abandonment of post.

On 8 October 1998, further efforts were made to assist the Applicant in returning to New York.

On 12 October 1998, the Deputy United Nations Security Co-ordinator briefed DPI on the situation in Guinea-Bissau and stated that there had not been any fighting in the country for the past 3 months and that there was movement of United Nations staff between Bissau and Senegal.

On 23 October 1998, a meeting was convened in DPI to discuss the Applicant's performance. All of the Applicant's past and current supervisors concurred that there had been no improvement in the Applicant's job performance over time, and recommended the non-renewal of his appointment. However, in order for the Applicant to make personal and other arrangements, his appointment was extended for two months upon its expiration on 31 December 1998. The Applicant was advised accordingly.

On 30 November 1998, the United Nations Security Co-ordinator in New York was advised that the Applicant had refused the offer to immediately evacuate him to Senegal, because he did not want to leave Guinea-Bissau "until a book he ha[d] just written [was] published". The Applicant apparently planned to "wait for the opening of the airport to humanitarian flights from Europe" and had "personally arranged for his safe passage on one of these planes to Europe".

On 3 February 1999, DPI advised OHRM that action was being taken to separate the Applicant from service at the end of his fixed-term contract and stated for the record that DPI had not heard from the Applicant "for over five months".

On 10 February 1999, the Applicant returned to Portugal and contacted the Organization, requesting assistance to return to New York. On 15 March 1999, DPI replied that, as he was no longer a United Nations staff member, it was neither possible for the Organization to assist him financially nor to assist him with obtaining visas or documents that would allow him to travel as a staff member. The Applicant responded to DPI on 17 July 1999, claiming that he had not received any information about the non-extension of his contract until the last week in January 1999. He requested payment of his salary for the period 1 October 1998 through 28 February 1999, "a repatriation grant", "a one-way ticket to 'my country'" and an amount to cover replacement of household effects.

On 2 August 1999, the Applicant wrote to the Secretary-General requesting an administrative review of "the decision to terminate his contract on grounds of abandonment of post". On 24 August 1999, OHRM informed the Applicant that:

“the reason why your contract was not renewed was solely based on poor performance”. OHRM stated further that the Organization was of the opinion that, as early as August 1998, he could have left the country and returned to work; that he chose not to do so; and, that therefore, no further salary payments would be made to him beyond 30 September 1998.

On 14 November 1999, the Applicant filed an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 12 September 2000. Its considerations conclusions and recommendations read, in part, as follows:

“Considerations

...

(d) The Panel agreed, therefore, that the Appellant’s fixed-term appointment was simply not extended upon its expiration on 28 February 1998 in accordance with Staff Rule 104.12(b)(ii).

...

54. The Appellant’s contention that the reasons for termination of his contract were not communicated to him is not substantiated by facts.

55. With regard to the Appellant’s contentions that “the termination of his contract without due process for rebuttal constituted a violation of the rules provided in ST/SGB/1998, rule 101.3(c) and ST/AI/400, para 5”, the Panel reviewed carefully these rules and found they had no relevance to the Appellant’s PER rebuttal.

56. The Panel considered next the Appellant’s contentions that the Administration had abandoned him while he was in Guinea-Bissau on annual leave. The Panel found no evidence to this effect. On the contrary, it found abundant evidence that the Organisation had showed a great deal of concern for the Appellant ...

The Panel found there was evidence that the Appellant had leveraged the situation he found himself in Guinea-Bissau to his own advantage for the writing of a book for which no authorization had been sought or obtained and for other outside activities. In so doing, in the views of the Panel, he undermined the family argument. His two daughters had been evacuated safely on 21 July 1998 and his son on or about 2 September 1998.

57. The Panel considered the Appellant’s request for remedies. ... The Panel felt that for the period from 1 October to 17 November 1998, however, during which his salary had been withheld, the Appellant was therefore entitled to a remedy.

58. ... The Panel reviewed *seriatim* the other remedies sought and found they were outside its purview.

Conclusions and recommendations

59. In the light of the foregoing, the Panel *unanimously agreed* that the Applicant's fixed-term appointment was not wrongfully terminated but simply not renewed upon expiration on 28 February 1999, in accordance with Staff Rule 104.12(b)(ii) and that there was no violation of either the Applicant's rights under his terms of appointment or the applicable rules as a result of decisions taken by the Administration.

60. The Panel *unanimously agreed* that, as a result of a premature decision by the Administration to place the Applicant on Special Leave Without Pay without a more thorough investigation for the period from 1 October to 17 November 1998, when the Applicant turned down the Organization's offer for immediate evacuation to resume his duties, the Applicant should be entitled to the payment of his full salary and benefits for the period from 1 October to 17 November 1998."

On 3 November 2000, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had accepted the findings and conclusions of the Board and, in accordance with its unanimous recommendation, decided that he be paid his full salary and benefits for the period from 1 October to 17 November 1998.

On 31 May 2001, the Applicant filed an Application with the United Nations Administrative Tribunal.

Whereas the Applicant's principal contentions are:

1. There is no negative completed performance report in the files that can legally be used by the Respondent to justify non-renewal of contract based on poor performance.

2. The decision not to renew the Applicant's fixed-term appointment was tainted by prejudice and other extraneous factors.

3. The Respondent has produced no evidence that the Applicant refused to be evacuated, and therefore the decision to stop payment of the Applicant's salary as of 1 October 1998 "in view of his prolonged and unauthorized absence", violated his rights.

Whereas the Respondent's principal contentions are:

1. The Applicant served on a fixed-term appointment, which does not carry any expectancy of renewal. The decision not to renew the Applicant's appointment did not violate his rights.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives or any other extraneous factors.

3. Many of the Applicant's pleas, such as the request for a promotion to the P-4 level, are not receivable and time-barred.

The Tribunal, having deliberated from 26 June to 25 July 2003, now pronounces the following Judgement:

I The Applicant appeals the decision of the Respondent not to renew the Applicant's fixed-term contract for employment. The Applicant asserts that the Respondent had no justification for failing to renew his contract, allegedly for abandonment of post, and that the decision not to renew the contract was tainted by prejudice and discrimination. The Applicant asserts that the Respondent's decision to withhold his pay, from 1 October 1998 to 17 November 1998 was improper. The Applicant further asserts that the Respondent abandoned him in his home country of Guinea-Bissau during a civil war and refused to provide aid of evacuation to him.

II. The Respondent asserts the Secretary-General's discretionary power not to renew fixed-term contracts, which, it alleges, was based, not on abandonment of post, but on the Applicant's poor performance. The Respondent further asserts that the Administration did provide evacuation aid to the Applicant, and the Respondent denies any allegations of prejudice or discrimination. The Respondent also asserts that the Applicant's Application to the Tribunal is time-barred and that many of the issues raised by the Applicant are not receivable.

III. The Tribunal first addresses the issues of timeliness and receivability of claims. The Tribunal agrees with the JAB's conclusions, that the exceptional and gruelling circumstances of the Applicant's stay in Guinea-Bissau, as well as the Respondent's delayed response to the Applicant's request for assistance once he got to Portugal, warrant waiving the time-limits set forth in staff rule 111.2(a). As to the issue of receivability, the Tribunal notes that in his letter to the Secretary General, the Applicant sought administrative review of only two issues: (1) the decision not to renew his fixed-term contract and (2) the withholding of salary from 1 October 1998 to 17 November 1998, while he was allegedly involved in a civil war in Guinea-Bissau. As corollaries to these two issues, the Applicant also sought a

determination from the Secretary-General that (1) the Respondent had failed to investigate a discrimination claim that the Applicant had previously filed with the Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat (the “Grievance Panel”) and (2) the Respondent had improperly abandoned the Applicant in his home country of Guinea-Bissau during the civil war. These issues and the matters related thereto are the only issues presented to, and addressed by, the JAB, and these are the only issues that this Tribunal will consider. All other pleas and requests of the Applicant are rejected as not receivable.

Staff Rule 104.12 (b)(ii) specifically provides that a “fixed-term appointment does not carry any expectancy of renewal ...” The same language is included in the Applicant’s letter of appointment. The Tribunal has consistently held that no legal expectancy of renewal is created with respect to a fixed-term contract, even in the case of performance that is exceptional. (See Judgment No. 1049, *Handling* (2002).)

The discretion of the Secretary-General, however, to renew a fixed-term contract, while broad, is not unlimited (see Judgment No. 981, *Masri* (2000)). In *Masri*, para. VII, the Tribunal held that “[a]dministrative decisions affecting a staff member must not run counter to certain concepts fundamental to the Organization. They must not be improperly motivated, they must not violate due process, they must not be arbitrary, taken in bad faith or discriminatory”.

IV. The Tribunal first addresses the reason the Respondent failed to renew the Applicant’s fixed-term contract. Although the Applicant alleges that the Respondent failed to renew his contract because he abandoned his post, the Respondent asserts that its decision not to renew was based on poor performance. The Tribunal finds that the Respondent’s decision not to renew the Applicant’s fixed-term contract was motivated by the Applicant’s poor performance, not an alleged abandonment of post. In reaching its decision, the Respondent relied on numerous evaluations of the Applicant’s performance, assessed over several years of service with the United Nations, by multiple supervisors in several departments, both at Headquarters and at mission locations. The Respondent determined not to renew the Applicant’s contract because of the Applicant’s documented and substantiated performance deficiencies.

The Applicant further alleges, however, that the Respondent's decision was tainted by prejudice, discrimination and improper motive. Specifically, he alleges that the Respondent's decision not to renew was made in retaliation for his earlier filing of a discrimination charge against his supervisors. He accuses the Respondent of closing its investigation of the discrimination case without completing its investigation or reaching a conclusion on the merits of the case.

Where a staff member seeks to vitiate the Respondent's decision on the basis of prejudice, improper motive or other extraneous factors, the burden of proving such prejudice or improper motive is on the staff member, who must adduce convincing evidence. (See Judgment No. 834, *Kumar* (1997).)

The Tribunal finds that the Applicant has not provided any evidence of discrimination, and without more, the Tribunal ordinarily would sustain the Respondent's decision not to renew. However, this Tribunal has also found that "... 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", and, thus, "[p]roof of prejudice is rendered unnecessary when procedural requirements have not been observed". (Judgement No. 1060, *Baddad* (2002), paragraph III, citing ILO Judgement No. 495, *Olivares Silva* (1982).)

V. For more than 25 years, the Respondent has had a procedure for the staff of the Secretariat to submit grievances arising from their employment, including allegations of discriminatory treatment, to the Grievance Panel. According to the rules of procedure governing the Grievance Panel (ST/AI/308/Rev.1 of 25 November 1983), the Grievance Panel "shall endeavor to act expeditiously in bringing its cases to conclusion. To this end, the Grievance Panel shall set up, for each case, a schedule *normally not to exceed eight weeks* (emphasis added), in order to facilitate the timely completion of necessary investigations and to ensure earliest possible conclusion of the [P]anel's review". (*Ibid.*, paragraph 10.) The Grievance Panel is also required to "recommend appropriate action regarding the case to the Assistant Secretary-General for Personnel Services [now called Office of Human Resources Management] as well as to the Head of the Office. Action on the [P]anel's recommendation shall be taken in consultation with the Head of the Office. *A copy of the [P]anel's recommendation shall be provided to each of the parties*

concerned". (*Ibid.*, paragraph 14.) (Emphasis added.) Finally, "[t]he [P]anel may, in exceptional cases recommend ... an extension of a staff member's fixed-term contract by not more than two months if the [P]anel finds, on the basis of the preliminary investigation, that such extension is justified and necessary to enable it to complete the investigation". (*Ibid.*, paragraph 15.)

VI. The Respondent concedes, as the Applicant has alleged, that the Respondent did not fully investigate and bring to completion the Applicant's claim of discrimination. The Respondent asserts that the "Panel on Discrimination and other Grievances case was closed *on the merits* (emphasis added) due to the fact that the Applicant's contract was not extended and that the Panel could not intervene if the Applicant was no longer a staff member". The Respondent also asserts that the Panel was informed that the Applicant's contract would not be renewed and that the Panel did not "make any further investigation". The Respondent's assertion that the matter was closed "on the merits", however, is misleading. In a letter from the Director, General Legal Division, Office of Legal Affairs, sent in response to this Tribunal's earlier request regarding the status of the Applicant's discrimination claim, the Director confirmed that the Applicant's case was "officially closed *due to his separation from the Organization on 28 February 1999*[,] (emphasis added)[and] consequently, the investigation was not completed and no report was issued". Thus, the investigation was not closed "on the merits"; it was closed merely because the Applicant no longer worked for the United Nations.

VII. In the instant matter, the Tribunal finds that the Respondent's failure to complete his investigation of the Applicant's claim, to reach a decision on the merits of the claim and to communicate that decision to the parties, as required by its regulations, violated the due process rights of the Applicant to have his claim adjudicated. Although the Respondent had the power to extend the Applicant's contract for a period of up to two months in order to complete its investigation, it chose not to. Instead, it simply dropped the investigation without conclusion. The Tribunal finds that the Respondent's procedural failures constitute a violation of the Applicant's rights to due process, for which this Tribunal will award compensation to the Applicant. In addition, because of such procedural irregularities, the Applicant is not required to provide any evidence of prejudice to make his case, and the Tribunal must impute prejudice where otherwise it would find none. The

Tribunal finds that the Applicant is entitled to compensation on the basis of imputed prejudice.

VIII. The Tribunal next addresses the Applicant's allegations that the Respondent did not provide sufficient or appropriate aid of evacuation when he was in Guinea-Bissau. The record is replete with evidence that the Respondent did indeed provide significant aid, on several different occasions, including an airline ticket and money, to the Applicant in an attempt to help the Applicant evacuate from Guinea-Bissau. This aid was provided in accordance with advice from the Office of the United Nations Security Coordinator, an office which possessed both expertise and experience in security matters. It also appears from the record that the Applicant refused the United Nations-provided aid and chose to stay in Guinea-Bissau for personal, professional or monetary gain relating to the publication of his book. It is clear that his children had been evacuated long before he refused aid from the Respondent and longer before he actually left in 1999. The Tribunal finds no evidence to support the Applicant's allegations that the Respondent did not provide reasonable evacuation aid.

IX. Finally, with respect to the Applicant's challenge of the Respondent's decision to place the Applicant on special leave without pay ("SLWOP") as of 1 October 1998, the Tribunal agrees with the conclusions of the JAB. The JAB noted that the Respondent made the decision to place the Applicant on SLWOP status prematurely, without conducting an investigation to ascertain whether the Applicant was voluntarily present or involuntarily detained in Guinea-Bissau. When the Applicant refused United Nations-provided aid, however, on 17 November 1998, it became clear that the Applicant, at least from that point forward, was remaining in Guinea-Bissau voluntarily and was, therefore, choosing not to return to work. From that date, the Respondent had the right to place the Applicant on SLWOP. The Tribunal finds that the Applicant was entitled to receive his salary for the period from 1 October to 17 November 1998.

X. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant the sum of \$ 1,001 as compensation for the Respondent's violation of the Applicant's due process rights and for the Respondent's imputed prejudice;

2. Orders the Respondent to pay to the Applicant, if he has not already paid, the Applicant's salary, as in effect at the time, for the period from 1 October to 17 November 1998;
3. Rejects all other claims.

(Signatures)

Julio Barboza
President

Brigitte Stern
Member

Jacqueline R. Scott
Member

Geneva, 25 July 2003

Maritza Struyvenberg
Executive Secretary

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