



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1137

Case No. 1237: WHITE

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 Mr. Anthony White, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 January 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 24 January 2002, the Tribunal received an undated application from the Applicant, the pleas of which read as follows:

“II. PLEAS

1. With regard to its competence and to procedure, the Applicant respectfully requests the Administrative Tribunal:

...

(ii) *to decide:*

(a) to call and hear witnesses, or alternatively to take written depositions from them, before considering the merits of the case ...

...

2. On the merits, the Applicant respectfully requests the Tribunal *to find*:

(a) that, while Applicant's fixed-term contract did not carry any expectancy of renewal, Applicant was nonetheless wrongly denied his right to reasonable consideration for reappointment;

...

(c) that the Executive Director did act in a totally arbitrary manner devoid of good faith in declining to renew Applicant's contract beyond 23 May 2000;

(d) that the decision not to extend Applicant's contract was in fact 'motivated by prejudice or by some other extraneous factor' within the meaning of staff rule 111.2 (k);

(e) that the JAB, although exercising its unquestioned right to decide not to hold oral hearings, did by so doing in fact create a situation in which Applicant was denied due process.

3. Whereafter the Applicant respectfully requests the Tribunal *to order*

(a) that Applicant be reinstated in his former position or in one that is fully equivalent in function and grade; and

(b) that Applicant be paid a fair compensation for lost salary, allowances and other benefits for the period beginning 24 May 2000 until 1 December 2001 ...;

or failing that, *to order*

(c) that Applicant be paid for salary lost between the time of separation and that of taking up a new full-time assignment in his professional field, i.e. 23 May 2000 until 1 December 2001, and, in addition, an adequate compensation for damage to his reputation and United Nations career prospects under normal circumstances."

Whereas, at the request of the Respondent, the President of the Tribunal extended until 31 May 2002 the time limit for the submission of the Respondent's answer;

Whereas the Respondent submitted his answer on 22 May 2002;

Whereas the Applicant filed his written observations on 16 July 2002;

Whereas, on 18 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations International Drug Control Programme (UNDCP) in Vienna on 24 March 1997 on a two-year fixed-term appointment at the P-5 level, as Chief of the Supply Reduction Section in the Office for Drug Control and Crime Prevention.

On 21 January 1999, the Applicant had a meeting with the Executive Director of UNDCP.

On 8 February 1999, the Applicant wrote a memorandum to his first reporting officer suggesting several possibilities regarding the envisaged extension of his contract.

On 24 March 1999, the Applicant's appointment was extended for one year, until 23 March 2000.

On 28 September 1999, the Applicant's second reporting officer and acting supervisor was requested to submit a recommendation within 30 days on a further extension of the Applicant's appointment. On 14 January 2000, he recommended a two-year extension of the appointment. The Applicant's second reporting officer subsequently received a reprimand from the Executive Director of UNDCP for his delay in submitting his recommendation. He replied that, because of structural changes, he had been unsure that he retained the authority to make such a recommendation.

On 21 January 2000, the Executive Director of UNDCP decided not to grant a further extension of the Applicant's appointment. The Applicant was notified by his second reporting officer. On 23 January, the Applicant wrote to the Executive Director of UNDCP, explaining why he had earlier sought only a one-year extension, and describing the hardship that having to leave the Organization at the expiration of his appointment would cause him personally, and also cause the Supply Reduction Section.

On 10 February 2000, the Human Resources Management Section was informed that the Executive Director of UNDCP had decided to extend the Applicant's appointment for two months, until 23 May.

On 22 May 2000, the Applicant filed a request for administrative review of the decision not to renew his fixed-term appointment.

On 23 May 2000, the Applicant left the service of the Organization.

On 31 August 2000, the Applicant filed an appeal with the Joint Appeals Board in Vienna, which adopted its report on 9 May 2001. The Board's findings and recommendations read, in part, as follows:

“Findings

...

14. ... the Panel concludes that there was no legal expectancy of renewal of the fixed-term appointment of the Appellant. First, the Appellant does not have the requisite seniority of five years of continuous service under the 100 series of the staff rules to make a *prima facie* claim to a career contract with the Organization. Second, the Panel found determinative ... an 8 February 1999 memorandum from the Appellant to his acting supervisor ...

The Panel feels that this letter expresses the position of the Appellant as of the date of the writing of the memorandum that he did not foresee being with the Organization for much longer. While it is true that the ... documents that were used to process the one year extension from 24 March 1999 to 23 March 2000 did not state that the extension was a ‘final’ one, the Panel is of the opinion that ODCCP management could reasonably believe in the light of [the memorandum of 8 February 1999] that the Appellant was planning to depart the Organization soon. In any event, the Appellant did not appear to the Panel to expect to be staying for any prolonged period with the Organization at the time the memorandum was written, and cannot be said to have had any expectation of a contract the duration of which would be longer than the one year extension to 23 March 2000.

15. With respect to abuse of discretion, the issue is whether the decision not to extend further was carried out in good faith. In this regard, the Panel wishes to focus on the events leading to the final two-month extension of contract from 24 March 2000 to 23 May 2000. The Panel is of the opinion that the issue of extension beyond the one year given to the Appellant was poorly managed.

16. The record shows clearly that this situation could have been avoided. Indeed, there appears to have been many lapses that may have affected the ability of management to arrive at a rational settlement of this case. Based on the documentary evidence of both the Appellant and the Respondent, there appear to be no reasons why, based on performance reasons, the Appellant could not have been extended, as the Executive Director has the authority to extend should he wish to do so given the broad delegation of authority he has in respect of UNDCP Fund posts. However, the burden of proof is on the Appellant to establish that this delegation was not exercised in good faith in his specific case, and in the opinion of the Panel, the Appellant has not provided evidence to substantiate this claim. While it is surprising to the Panel that the Executive Director of ODCCP would have met a senior officer in supply reduction only once during a three year period, that in itself does not mean that the decision not to grant a two-year extension from 24 March 2000 was an arbitrary abuse of discretion. Indeed, management appears to have been working under the assumption that the Appellant would be leaving, which is reasonable given the position the Appellant took in early 1999. As a result of the above, the Panel has no choice but to reject the claims of the Appellant.”

On 29 June 2001, the Under-Secretary-General for Management forwarded the report to the Applicant and informed him that “the Secretary-General support[ed] the Board’s findings and conclusions” and had decided to take no further action on his appeal.

On 24 January 2002, the Tribunal received from the Applicant the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. He does not claim to have had a legal expectancy of renewal of contract, but he maintains that he was not given reasonable consideration for reappointment.
2. The decision not to extend his appointment was motivated by prejudice or by some other extraneous factor.
3. The Respondent acted in bad faith towards the Applicant.
4. The Joint Appeals Board denied the Applicant due process, especially when it decided not to hold oral hearings.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the legal expectancy of continued employment with the Organization under his fixed-term appointment.
2. The decision not to convert or renew the Applicant's fixed-term contract was not vitiated by bias or other extraneous factors.
3. The Applicant was not denied due process by the Joint Appeals Board when it considered his appeal.

The Tribunal, having deliberated from 8 to 25 July 2003 in Geneva, now pronounces the following judgement:

I. This Application challenges the non-renewal of a fixed-term contract. The Applicant was employed as Chief, Supply Reduction and Law Enforcement Section (SRLES), from 24 March 1997 to 23 May 2000 on the basis of several fixed-term contracts. On 28 September 1999, a request for an extension of appointment was sent to the first reporting officer, who, on 14 January 2000, recommended an extension for a further two years. The Applicant's contract, however, was not renewed and he left the Organization on 23 May 2000.

II. An initial point which the Tribunal must recall is that it is the established jurisprudence, as in the *Bonder* case (Judgement No. 1052 (2002)), that, even where there is no acquired right to renewal of a fixed-term contract, the Tribunal monitors

the way the Administration exercises its discretion not to renew a contract, in order to prevent a discretionary measure from becoming arbitrary. It is specially important for the Tribunal to ensure this right of staff members to an equitable procedure when discretionary decisions are taken by the Administration, in order not to leave them entirely to the mercy of caprice. The Tribunal has many times affirmed the imperative need to monitor the discretionary decisions of the Administration, seeking a delicate balance between the need to allow the Secretary-General of the United Nations room to exercise judgement and the need to provide an essential protection to the staff members working in the service of the Organization. This well-known approach is illustrated by a relatively recent case, Judgement No. 981, *Masri* (2000), in which the Tribunal clearly set out the parameters of its monitoring role:

“Staff rule 104.12 (b) (ii), invoked by the Respondent provides that fixed-term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment. The discretion of the Secretary-General to renew or not to renew a fixed-term contract is wide, but it has, however, its limits. Administrative 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 be discriminatory” (para. VII).

This monitoring role thus does not extend to the merits of the non-renewal decision, but focuses on guarantees of due process in the broad sense, a concept crucial to the rule of law. The Tribunal stresses that the requirement to respect due process becomes even more imperative as the prospects for renewal are strengthened. In such a situation, the loss of an opportunity to renew a fixed-term contract is a more serious blow for the Applicant to the extent that the likelihood of renewal has become greater. The Tribunal has to take this factor into account, among others, including the seriousness of violations committed by the Administration, in reaching a decision in the case before it. Depending on the extent to which proper procedures have been ignored and on the existence of solid prospects for renewal, the Applicant could, where appropriate, receive compensation or have his contract renewed.

III. However, in the instant case, the request of the Applicant is not based on elements of fact or law of a kind that might justify a renewal. Moreover, no promise to that effect was made by the Administration and no wrongful conduct which might have given rise to false hopes can be alleged against it.

IV. The Tribunal recalls that the Applicant had neither a right nor a legal expectancy of continued employment with the United Nations under his fixed-term contract. As indicated above, the Applicant worked between 24 March 1997 and 23 May 2000 on the basis of several fixed-term contracts.

The provisions of the Staff Rules are as follows:

Rule 104.12 (b) (ii)

“(ii) The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment;”

Rule 109.7

Expiration of fixed-term appointments

“(a) A temporary appointment for a fixed term shall expire automatically and *without prior notice* [emphasis added by the Tribunal] on the expiration date specified in the letter of appointment.”

It is therefore clear, in the view of the Tribunal, that the Applicant had no right to the renewal of his contract.

V. The Tribunal will next consider whether the circumstances of the case are such that they conferred on the Applicant a right or a legal expectancy of renewal of his fixed-term contract.

VI. The Tribunal points out, in the first place, that outstanding performance cannot in itself create such a right or such a legal expectancy.

The Tribunal has frequently affirmed that duties within the Organization terminate on the date of expiry of the fixed-term contract and that a legal expectancy of renewal cannot be created by very good or excellent performance (Judgements No. 173, *Papaleontiou* (1973) para. II; No. 440 *Shankar* (1989), para. IV). More recently, in *Handelsman* (Judgement No. 885 (1998)), the Tribunal took the view that:

“The rules thus permit the Respondent to separate a staff member ... even without prior notice and without regard either to the quality of the services that the staff member rendered or the staff member’s personal attributes. The Tribunal has consistently upheld the application of these rules. (Cf. Judgement No. 610 *Ortega*, para. VII (1993), Judgement No. 614, *Hunde*, (para. IV (1993)).”

VII. In the second place, the Tribunal will consider whether a specific action by the Administration might have given the Applicant a legal expectancy. The Applicant finds fault with the Respondent on the grounds that, during his interview with the Executive Director on 21 January 1999, the latter did not inform him that the extension of his contract for one year would be the last, a claim which the Respondent challenges.

The Tribunal considers that even if the allegation of the Applicant were correct, the Administration can in any case terminate the staff member's contract, upon expiry, without prior notice, as indicated above. The Applicant in this case cannot claim any injury on the grounds that there was no specific notification of the expiry of the fixed-term contract, since it is inherent in such a contract that it expires on the due date and the incumbent cannot claim any right to renewal. Furthermore, he has provided no evidence of any commitment on the part of the Administration to renew his contract.

VIII. Thirdly, the Tribunal will consider the statements made by the Applicant himself before the expiry of his fixed-term contract. It notes that the Applicant himself acknowledged that he was not claiming the right to automatic renewal of his contract.

The facts in the case, in the view of the Tribunal, tend not to create such a right but, on the contrary, to support the idea that the Applicant knew very well that he had no such right. Indeed, it emerges from the file that the Applicant himself was not hoping for too long a renewal, so that he could leave the Organization at the end of his fixed-term contract receiving the relevant allowances, rather than leaving it during the contract without being able to claim the allowances.

The fact which leads the Tribunal to conclude that there was no evidence of injury to the Applicant is a letter of 8 February 1999 sent to his supervisor, the officer-in-charge, the terms of which show the indecisiveness of the Applicant with respect to his remaining in the Organization:

“You will recall that my existing contract expires on 22 March 1999, but that we had concluded it would be in the best interests of UNDCP that I then carry on in my present post until my successor had been recruited and was in a position to take up appointment.

“You had proposed a flexible arrangement whereby I be given an extension of contract for a period of three to six months, which might prevent any loss of financial benefit to me should I terminate any longer term contract

prior to its scheduled completion date. However, [the Human Resources Management Section of the United Nations Office at Vienna] [has] assured me that no such loss of benefit would ensue in these circumstances provided that I gave the customary one-month's notice of termination, which I of course ... would.

“In the circumstances, it appears that the most expedient solution would be for me to be given a new fixed term contract of at least one year. The only foreseeable difficulty in respect to this could be that [the Human Resources Management Section of the United Nations Office at Vienna] would then decline to place any vacancy announcement in respect of my post, on the grounds that my date of departure from the Programme was not certain.”

It emerges from that letter that the Applicant was undecided as to the continuation of his contract and that its terms do not indicate a belief on the part of the Applicant in a right or legal expectancy of continued employment with the Organization.

IX. The Applicant also complains of the way in which his case was handled, and accuses the Administration, in particular, of delay in carrying out certain procedures. In that connection, the Tribunal must consider the request for an “extension of appointment” of 28 September 1999 sent to the first reporting officer, the Applicant’s supervisor, who subsequently made a recommendation for the extension of the fixed-term contract for two additional years on 14 January 2000. According to the Applicant, that recommendation of an extension arrived late since a “decision” had already been taken by the Executive Director.

However, the Applicant does not show that the delay by the reporting officer caused him any injury. In any case, the recommendation was delivered on 14 January 2000, which was before the end of the contract on 23 March 2000: the delay was therefore not such as to vitiate the decision not to renew.

X. Lastly, the Tribunal turns to a final criticism of the Administration made by the Applicant, who complains that the Joint Appeals Board did not study the report of the Office of Internal Oversight Services (A/56/83). However, that critical report on human resources management was made public only after the decision by the Board and it is even doubtful whether earlier issuance would have changed matters. How could the Applicant have provided evidence of certain and specific injury caused by the Executive Director’s actions solely on the grounds of the criticisms made by the

Office of Internal Oversight Services? The Tribunal does not therefore see any cause of injury to the Applicant in the criticisms he has put forward.

XI. For the above reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Brigitte **Stern**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary
