



# Administrative Tribunal

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## ADMINISTRATIVE TRIBUNAL

Judgement No. 1173

Case No. 1265: GUERRERO

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr.  
Spyridon Flogaitis;

Whereas, on 26 August 2002, Luis Felipe Guerrero, a former staff member of  
the United Nations, filed an Application containing pleas which read, in part, as  
follows:

### “Pleas

...

6. ... [T]he Applicant most respectfully requests the Administrative  
Tribunal to order the Respondent:

- a. *to rescind* the decision not to renew the Applicant's contract  
beyond 31 December 1999;
- b. *to retroactively reinstate* the Applicant ... as [of] 1 January  
2000, to a suitable post within the Organization under at least a four-  
year contract and *to pay* him all retroactive entitlements in  
connection with said reinstatement;
- c. *to reimburse* ... the Applicant [for] the direct financial loss he  
suffered as a result of his questionable transfer from Geneva to

Nairobi in August 1999 which the Applicant estimates at US\$ 11,000; and

d. *to compensate* the Applicant in an amount deemed appropriate by the Administrative Tribunal for the actual, consequential and moral damage suffered by him ...

Failing 6.b above, the Applicant respectfully requests the Administrative Tribunal to order the Respondent:

e. *to compensate* him in the amount of four years' net base salary."

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 2003 and thereafter until 31 March 2003;

Whereas the Respondent filed his Answer on 7 March 2003;

Whereas the Applicant filed Written Observations on 16 May 2003;

Whereas on 24 June 2004, the Applicant submitted two additional communications;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Environment Programme (UNEP) on a fixed-term appointment on secondment basis for a period of two years as a Programme Management Officer at the P-3 Level, on 21 March 1975. In August 1979 he resigned, having reached the P-4 level. On 8 October 1986, the Applicant re-joined UNEP in Nairobi on a three-month short-term appointment as Chief, Programme Coordination Unit, at the P-5 level. Subsequently, the Applicant was granted a two-year fixed-term appointment, which was renewed for several times and, on 1 April 1992, he was promoted to the D-1 level as Chief, Fund Programme Management Branch. In March 1997, the Applicant accepted a transfer to Geneva to the post of Chief, Programme Support Unit (PSU), UNEP, at the P-5 level, with effect from 6 April 1997.

In an attempt to streamline the administrative services of UNEP, effective 1 July 1998, PSU became part of the administrative services of the United Nation Office at Nairobi (UNON). On 8 January 1999, UNON Administration submitted to the Executive Director, UNEP, a proposal which included, inter alia, the abolition of PSU, indicating that this would lead to greater efficiency and to savings exceeding US\$ 400,000. As a result of the abolition of PSU one P-5 post would be abolished. This proposal was not copied to the Applicant.

On 20 January 1999, the Applicant wrote to the Executive Director, UNEP, stating that he had seen a copy of the above-mentioned proposal and requested clarification as to his contractual status, considering that his appointment with UNEP was until the end of December 1999. In response, on 26 January, the Applicant was informed that the Executive Director had decided to abolish PSU and that the Applicant would be contacted in order to reach an agreement on early retirement or another suitable arrangement.

On 4 February 1999, the Applicant wrote to the Deputy Executive Director, expressing his objection to the abolition of his post and his consequent separation from service.

On 16 February 1999, the Applicant wrote to the Chief, Division of Administrative Services, UNON, referring to their meeting of 12 February and expressing his interest in relocating to any other suitable vacancy in UNEP or Habitat.

On 4 March 1999, the Chief, Division of Administrative Services, informed the Deputy Executive Director, UNEP, that the Applicant understood that “in the light of the abolition of his post, his contract [had] to be terminated” and that if agreed termination would be offered to him, he would accept it. He further stated that the Applicant’s preference was to continue his service with UNEP and therefore it had been agreed that due consideration would be given to his applications to vacant posts. On 9 March, the Applicant advised the Chief, Division of Administrative Services, that the 4 March memorandum did not properly indicate his priorities and reiterated that he preferred continued employment with the Organization.

On 24 March 1999, the Applicant met with the Deputy Executive Director who, according to the Applicant, reassured him that eventually a suitable post will be found within UNEP. On 22 April, the Applicant was informed by e-mail that the Executive Director had rejected a proposal to reassign him to a post in Mexico; that he wanted him back in Nairobi; and, that options for his duties were being considered. The Applicant received official notification of his reassignment to Nairobi, effective 1 June until the end of his contract, on 3 May 1999. On 27 May 1999, the Executive Director, UNEP, approved the creation of a P-5 post to accommodate the Applicant up to 31 December 1999.

On 31 May 1999, the Deputy Executive Director, UNEP, informed all UNEP staff of the “revised policy on initial appointment, extension and reinstatement/reappointment”. This revised policy stated, inter alia, that the appointments of staff members, whose PAS reflected performance that fully met expectations, could be

extended, subject to the requirements of the programme, by two years, after initial appointment and by four years, after the first extension. Additionally, based on the same criteria, appointments of staff members, who had completed four years of service with UNEP, could be extended up to four years at a time.

On 29 July 1999, the Division of Environmental Conventions, UNEP, requested that the Applicant be temporarily assigned to them .

In a handwritten note dated 18 August 1999, on a memorandum dated 13 August, regarding the Applicant's assignment for the remainder of his contract, the Chief, Office of the Executive Director, stated as follows: "The [Executive Director] has made it clear that there will be no further extensions. Hence, [the Applicant] should be notified accordingly."

Upon assuming his duties in Nairobi on 31 August 1999, the Applicant was informed of the decision not to extend his fixed-term appointment beyond its expiry date on 31 December.

On 27 October 1999, the Applicant requested the Secretary-General to review the decisions to abolish his post and not to renew his contract.

On 27 January 2000, the Applicant lodged an appeal with the Joint Appeals Board in Nairobi (JAB). The JAB adopted its report on 4 December 2001. Its considerations and recommendations read, in part, as follows:

***"Considerations***

In the light of the totality of evidence before the panel, it could not conclude that the decision not to extend the staff member's fixed-term contract was tainted by arbitrariness, prejudice or other extraneous motives. ...

...

... [T]he evidence before the panel suggests that the staff member was informed as early as 20 January 1999 of the intended abolition of his position and that he was informed on 12 February 1999 ... that there was a distinct possibility that his contract might not be renewed at the end of 1999 ...

...

... From the totality of the evidence, the panel discerned that while UNEP/UNON Management made real efforts to find a position for the Appellant the latter had been instructed in no uncertain terms of the real possibility that, should his applications to other positions not be successful and lateral transfers not possible, he would no longer be employed beyond 31 December 1999.

...

The panel is further of the opinion that the staff member's contention that he was not given reasonable consideration for other available and suitable

positions in UNEP cannot be upheld. ... [T]he documentation available suggests that there were serious attempts on behalf of the Deputy Executive Director to find a solution that would allow continued employment of the Appellant. ... [T]he Appellant was given the 'due consideration' that he had been promised previously for lateral transfers. ...

...

However, the panel took note of a Personal Action Form of 29 May 1999 which ... had been copied to the Appellant on 22 July 1999 ... The effective date of that Personal Action Form is 1 August 1999. ... The duration is described as six months. In the panel's opinion the transmittal of this document did create a reasonable expectancy on the part of the Appellant that his assignment to the aforementioned post would last six months from 1 August 1999 onwards and would therefore end on 31 January 2000 and not on 31 December 1999 as it eventually did. For the frustration of this particular expectancy the staff member is entitled to compensation.

In deciding on the amount of compensation the panel also took into account the length of the recourse proceedings which, ... also justify compensation.

#### ***Recommendations***

... the panel recommends to the Secretary-General

1. That the Appellant be paid three months' net base salary compensation.

..."

On 27 May 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's conclusions and, in accordance with its unanimous recommendations, to compensate him in an amount equivalent to three months' net base salary at the time of the expiration of his appointment.

On 26 August 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's contract, based on the abolition of his post, was illegal; it prejudiced the Applicant, was tainted by procedural irregularities, by violation of the Applicant's rights of due process and by lack of transparency.

2. The Applicant was not given full and fair consideration for future employment. The Respondent failed to conduct good faith efforts to find him alternative employment.

3. The Applicant had a legal expectancy of renewal of his contract for at least four years as of 1 January 2000.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right or expectancy of continued employment with the Organization under his fixed-term appointment.

2. The decision not to extend the Applicant's appointment due to the abolition of his post was not taken arbitrarily, but as part of a general streamlining process regarding outposted offices. There is no evidence that such decision was tainted by arbitrariness, prejudice or other extraneous motives or that it lacked due process.

3. The Applicant has already been adequately compensated.

The Tribunal, having deliberated from 29 June to 23 July 2004, now pronounces the following Judgement:

I. The Applicant appeals from the Respondent's decision not to renew his fixed-term appointment. He is requesting the Tribunal to order his retroactive reinstatement with effect from 1 January 2000 as well as compensation for the material and moral damages suffered. The Applicant contends that he had a legal expectancy of renewal of his contract for at least four years as of 1 January 2000.

II. The Applicant served on a series of fixed-term contracts, at the P-5 level, beginning on 8 October 1986. In 1992 he was promoted to the D-1 level and in 1997, the Applicant accepted a transfer to Geneva at the P-5 level. The Applicant's last fixed-term appointment expired on 31 December 1999, at which time the Applicant separated from service. The reason given for the non-renewal of the Applicant's appointment was the broad scope restructuring plan within UNEP, which included the abolition of the Programme Support Unit, where the Applicant was serving as Chief, and with it, the abolition of the Applicant's post.

III. The Tribunal notes that the Applicant does not contest the terms of employment under fixed-term appointments and the provisions in respect of such appointments, as contained in the Staff Regulations and Rules, nor the established jurisprudence of the Tribunal regarding legal expectancy of renewal of fixed-term

contracts. However, in line with the Tribunal's jurisprudence, the Applicant submits that legal expectancy can sometimes be learned from the circumstances of the case.

Indeed, a legal expectancy will often be based on an informal promise. It is these informal situations which the Tribunal has to address. In its recent Judgment No. 1081, *Zakharov* (2003), the Tribunal referred to the Report of the Secretary-General on Human Resources Management (A/C.5/51/34 of 22 November 1996) stating that the legal principles involved in expectation of continued employment were cogently explained to the General Assembly:

“While reaffirming that the fixed-term appointment by its terms, does not create an expectancy of renewal, the Tribunal examines all the surrounding circumstances to determine whether an expectancy of renewal was created in the particular case – for example through a verbal or written commitment, albeit informal, made to the staff member by the programme manager that the appointment would be renewed. In addition staff members who have served on fixed-term appointments for an extended period (usually five years or more) are recognized by the Tribunal as having the right to receive every reasonable consideration for further employment. Even though this does not amount to a legal expectancy of continued employment, which would be contrary to the specific terms of a fixed-term appointment, a finding that the Organization failed to give every reasonable consideration for further employment will result in the award of damages which may be substantial.”

Furthermore, the Tribunal had also outlined the same position in Judgment No. 647, *Pereyra* (1994), in which the Tribunal stated that:

“The Applicant was employed continuously and gave satisfactory service for more than six years. Her contracts were renewed 12 times and, even though she did not have a right to their renewal, the Tribunal finds that in the particular circumstances of this case, the Applicant had a reasonable expectation of renewal. This would justify the payment of some compensation.”

The Applicant contends that the circumstances in his case led to his legal expectancy for the renewal of his appointment for at least four more years. In support of this contention, the Applicant refers to a memorandum issued by the Deputy Executive Director, UNEP, on 31 May 1999, by which all UNEP staff members were informed of the revised policy on initial appointments, extensions and reappointments. The memorandum provides that: “The appointments of staff members who *fully met the performance expectations* (as reflected in their PASs) may be extended, subject to the requirements of the programme ... [for] [f]our years after the first extension.” The

Applicant maintains that his performance throughout his career with the Organization was rated “excellent”, “very good” and “fully meeting performance expectations”. He further maintains that there were needs within the Organization for staff with his professional background. Therefore, he submits that the conditions of the revised policy were fulfilled in his case. Furthermore, the Applicant refers to several informal indications which he received, all of which suggested that his contract would be renewed. For example, on 24 March 1999, he met with the Deputy Executive Director, UNEP, following which, on 26 March, the Applicant wrote expressing his appreciation for the meeting and stating “it was reassuring to hear that eventually a suitable post will be found within UNEP for my reassignment”; and, on 22 April, in an e-mail addressed to the Applicant from the Special Assistant to the Deputy Executive Director, while expressing disappointment that the Executive Director did not accept the recommendation to appoint the Applicant to a post in Mexico, the Special Assistant stated that “although the original plan did not work out, I would like to [assure] you that we will try our best to come up with a good second option.” Moreover, the Applicant claims that upon his reassignment to Nairobi, he was allowed a weight allowance of 1,000 kilograms for unaccompanied luggage, which is the allowance for staff members assigned for a period of at least one year.

The Tribunal notes that the Respondent did not offer an explanation for the fact that the Applicant was granted 1,000 kilograms for unaccompanied baggage and that in accordance with staff rule 107.21 (i), such entitlement is indeed granted only to staff members appointed or assigned for one year or longer.

The Tribunal considers that the totality of the circumstances in this case, as described above, could reasonably have led the Applicant to expect continued employment with UNEP.

IV. The Tribunal also finds that the Respondent failed to prove that good faith efforts were made to try to find the Applicant alternative employment once it was decided that his post would be abolished.

In keeping with staff rule 109.1(c) and the established jurisprudence of the Tribunal, staff members, including those serving under a fixed-term contract, whose posts are abolished, should receive full and fair consideration for other vacancies. The Tribunal has recently reaffirmed this position in Judgment No. 982, *Hernandez-Correa* (2000), and in Judgment No. 954, *Saaf* (2000), the Tribunal stated that the Organization must make every good effort to find alternative employment for



incumbents of abolished posts. The Tribunal notes that the Respondent failed to provide adequate information regarding the efforts made to find the Applicant alternative employment and to afford him full and fair consideration for available posts. It seems that the Executive Director had made up his mind not to renew the Applicant's appointment, as evidenced, *inter alia*, by his refusal to transfer the Applicant to Mexico despite a recommendation to this effect from the Deputy Executive Director, without giving any explanation for this refusal; and, by the 13 August reply to the request of 29 July 1999 from the Division of Environmental Conventions (CED), that the Applicant be temporarily assigned to them. Of particular interest is the handwritten note, stating: "The [Executive Director] has made it clear that there will be no further extensions. Hence, [the Applicant] should be notified accordingly".

The Tribunal notes the Respondent's claim that his conduct showed a genuine concern for providing the Applicant with alternative options, including early retirement. The Tribunal, however, finds that the facts of the case do not corroborate this claim and that the Respondent did not show that genuine efforts were made to find the Applicant alternative employment and that in cases where the Applicant applied for specific posts, full and fair consideration was not extended to the Applicant.

V. The Tribunal took note of the document entitled "Minutes of BFM Professionals' Meeting" of 24 April 2004, which states that the Executive Director of UNEP had approved the creation of an Administrative Service Centre in Geneva. It seems that this new centre was to have functions very similar to those of the PSU which was headed by the Applicant and which was abolished. This raises questions as to the whole exercise of the abolition of PSU. Particularly, the Tribunal is concerned that the Applicant, who was the Chief of the abolished Unit, was not at all consulted about this move. Besides the obvious issue of lack of transparency in the decision-making process, which the Tribunal believes to be maladministration, the Applicant might have been able to explain the functions of the Unit and, as he claims, the errors in the financial calculations which ultimately led to its abolition. Moreover, it could have potentially saved the Organization the expenses involved in re-creating the Unit, albeit under another name.

VI. In conclusion, the Tribunal finds that the Applicant had a legal expectancy of renewal of his appointment for at least one year and that the Respondent did not afford

the Applicant his rights following the abolition of his post. However, the Tribunal believes that at this point, it would not be practical to order the Respondent to reinstate the Applicant and that compensating the Applicant is the appropriate solution in this case. The Tribunal is of the view that the compensation awarded should be more substantial than the three months' net base salary awarded by the Secretary-General.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation equivalent to one year's net base salary at the rate in effect at the time of this Judgement, to be paid in US Dollars, in addition to the amount paid by the Secretary-General; and,
2. Rejects all other pleas.

*(Signatures)*

Julio **Barboza**  
President

Omer Youssif **Bireedo**  
Member

Spyridon **Flogaitis**  
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**  
Executive Secretary