



## Administrative Tribunal

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### ADMINISTRATIVE TRIBUNAL

Judgement No. 1177

Case No. 1269: VAN EEDEN

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 28 March 2002, Brenda van Eeden, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 22 July 2002, the Applicant, after making the necessary corrections, again filed an Application;

Whereas, on 8 January 2003, the Applicant modified her Application as follows:

“... I would like the Tribunal to [order that]:

- (a) [The Applicant] *be paid nine months' salary and allowances (one year less the three months actually served under [a fixed-term contract])*. The nine months' salary and allowances should [be calculated using] the salary scale [in effect] at the time the Tribunal makes [its] decision;

- (b) *The year of service be made fully pensionable, on the understanding that [the Applicant] will make her required contribution to the [United Nations Joint Staff Pension Fund] (UNJSPF), subject to reduction by any subsequent overlapping period of pensionable employment by an agency of the [United Nations] system;*
- (c) *[The Applicant] be paid one month salary in lieu of notice of termination of her appointment. ...;*
- (d) *[The Applicant] be paid the sum of US\$ 1,000 as a symbolic recognition of the moral and psychological damage inflicted;*
- (e) ...
- (f) *[All documents referring to poor performance be removed from her Official Status file.]”*

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 June 2003 and periodically thereafter until 30 November 2003;

Whereas the Respondent filed his Answer on 28 November 2003;

Whereas the Applicant filed Written Observations on 8 June 2004;

Whereas the facts in the case are as follows:

In 1974, the Applicant joined the Food and Agriculture Organization, in Rome, and subsequently the World Health Organization, in Geneva.

In the spring of 1996, the Applicant applied for the G-6 level post of Assistant to the Deputy Executive Coordinator and Management Officer, UNDP/United Nations Volunteers (UNV), Bonn, Germany. On 15 April the Applicant was informed that recruits from the United Nations system would be given a one-year contract (non-United Nations staff recruited in Germany would be appointed for an initial trial period of three months followed by one year subject to satisfactory service). Subsequently, on 28 June, a Certificate of Service was issued in her name, indicating that she was a UNDP staff member and that she would be on mission in Bonn, Germany, effective 3 July. On the same date, the Applicant assumed her duties in Bonn.

On 12 July 1996, the Applicant signed a Special Service Agreement (SSA) to act as temporary Assistant to the Deputy Executive Coordinator and Management Officer, UNV, commencing 3 July 1996 and expiring 2 September 1996. On 21 August, the Applicant was offered “an initial fixed-term appointment for three

months, as of 3 September 1996, which would be extended up to one year, subject to satisfactory performance and medical clearance, at the level G-5 step VI”.

On 11 September 1996, the Applicant wrote to the Chief, Headquarters Administration, UNDP/UNV, stating, *inter alia*, that, while the position she was offered was advertised at the G-6 level, she had only been awarded the G-5, step VI level and that neither the step nor the grade were acceptable to her. In response, the Applicant was informed that the awarded level would be maintained. She was further informed that her contractual status was that of a locally recruited staff member.

On 2 October 1996, the Applicant signed a letter of appointment for an initial fixed-term period of three months, at the G-5 level, effective 3 September 1996.

On 4 November 1996, the Applicant received an official communication referring to a meeting between her and her supervisors, held in September 1996, during which the Applicant’s was informed of the necessity to improve her performance, and a subsequent meeting held in October 1996, when she was informed that, as there had been no marked improvement in her performance, her fixed-term contract would not be extended beyond its expiration date of 2 December 1996.

On 7 November 1996, the Chief of Administration, UNV, confirmed that, in connection with UNV’s move to Bonn, newly recruited General Service staff from other United Nations Agencies, had been granted a one-year fixed-term appointment.

On 10 November 1996, the Applicant responded to the 4 November memorandum, contesting the assessment of her performance as “unsatisfactory” and stating, *inter alia*, that she had received no guidance or directions from her supervisors.

On 2 December 1996, the Applicant’s fixed-term appointment expired.

On 22 December 1997, the Applicant addressed a letter to the Administrator, UNDP. On 9 January 1998, the Applicant was informed that this letter would be considered as her request for administrative review of the decision not to extend her contract. She was advised that there were no grounds to overrule the UNV administrative decision.

On 6 February 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in New York. The JAB adopted its report on 24 May 2001. Its considerations, conclusions and recommendations read, in part, as follows:

***“Considerations***

18. The Panel first noted that, while the events leading up to the decision which is the subject of the appeal took place in June through December 1996,

the appeal was not filed until February 1998. ... Having reviewed the correspondence [in the file] ... the Panel concluded that the appeal was timely and receivable.

...

21. ... [T]he Panel learned that [the] Appellant had been employed in the [United Nations] system for 22 years when she was recruited by UNV ... In the view of the Panel, this lengthy employment by other [United Nations] system organizations was one of the circumstances that might justify a reasonable expectation of renewal in another.

22. Moreover, the Panel could only conclude on the basis of the length of that service and of the favorable evaluations of former supervisors in both Specialized Agencies that [the] Appellant had been a satisfactory employee. In the light of these 22 years of satisfactory service, the Panel felt that a degree of scepticism was warranted on the unfavorable evaluation based on four months of service ... Indeed, that evaluation seems to have been arrived at in only two months. ...

23. ... [The] Appellant has stated that she was asked to sign an SSA (eight days after her arrival in Bonn) ... The Panel noted that an SSA carries none of the protections and benefits accorded to staff members, and concluded that Appellant, to the extent that she was aware of those deficiencies, faced by a *fait accompli* had no choice but to accept whatever assurances were offered by the UNV administration. ... To continue, as did [the Chief, Headquarters Administration, UNV] in her memorandum of 24 September 1996 that 'your contractual status with UNV in Bonn is that of a locally recruited staff member,' is, at the most charitable, disingenuous. [The] Appellant had been interviewed *in Geneva*, and told to report to Bonn *in Geneva*, and given a certificate *in Geneva* on 28 June 1996 that she was 'a staff member of the United Nations Development Programme'.

...

25. ... Requiring [the] Appellant to accept an SSA which deprived her of the status of staff member and the subsequent decisions and lack of action by UNV to restore that status retroactively did not, in the view of the Panel, constitute the fair treatment to which she was entitled. [The] Appellant's dissatisfaction can be easily discerned in the record, and may well have contributed to the hasty assessment of unsatisfactory performance by her supervisors. ...

### ***Conclusions and Recommendations***

26. On the basis of its review of the totality of circumstances, the Panel concluded that [the] Appellant had a legitimate expectancy of one year of service under [a fixed-term appointment].

27. The Panel also concluded that her treatment by UNV/UNDP and the manner of her separation had caused her moral and psychological damage.

28. The Panel recommends that

- (a) [The] Appellant be paid nine months' salary and allowances (one year less the three months actually served under [a fixed-term appointment]);
- (b) the year of service be made fully pensionable, on the understanding that [the] Appellant will make her required contribution to the UNJSPF, subject to reduction by any subsequent overlapping period of pensionable employment by an agency of the [United Nations] system;
- (c) she be paid one month salary in lieu of notice of termination of her appointment;
- (d) she be paid the sum of US\$1,000 as a symbolic recognition of the moral and psychological damage inflicted;
- (e) a copy of this report be put on her Official Status file."

On 23 January 2002, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General is not in agreement with the Board's conclusions that, because you had worked previously in other parts of the UN system, you had a legitimate expectancy of renewal of your fixed-term appointment with the UNDP/UNV, or that because other recruits of the UNDP/UNV in Bonn were given a one-year contract, you had a legitimate expectancy of a one-year fixed-term appointment. Prior service in other organizations does not, in and of itself, create a legal expectancy for service in another. Moreover, as it was made clear by the record, the UNDP/UNV's offer to you of a [three-month] appointment was in order to further assess your performance following your service under an SSA. You accepted that offer and you were notified well in advance of the non-renewal of your appointment due to unsatisfactory performance. Moreover, you have produced no evidence of expectancy based on formal or informal promises made to you, which might be grounds for 'legal expectancy' of continued employment after the expiration of your fixed-term appointment. The Secretary-General also does not agree with the finding that your initial appointment under an SSA and the subsequent lack of action to make you a staff member retroactively constituted unfair treatment. No staff has a right to a particular type of appointment and, in the absence of a commitment by the Administration, no legally cognisable right exists to retroactively converting an SSA to a fixed-term appointment. The Secretary-General further notes, in this regard, that none of the other UNDP/UNV staff who were initially appointed under an SSA and were subsequently given a fixed-term appointment had that fixed-term appointment cover also their SSA period. Therefore, the claim that you were treated unfairly in relation to others similarly situated is unfounded. For all these reasons, the Secretary-General does not accept the conclusions of the Board and its recommendation for compensation and has decided to take no further action on your appeal. ..."

On 22 July 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. There was no basis for, and the Respondent failed to substantiate, the conclusion that the Applicant's performance was not satisfactory. The Applicant received no guidance from her supervisors and the negative appraisal of her performance was based on criteria other than an objective evaluation of her work.
2. The Applicant should have been offered an initial one-year fixed-term contract.
3. The post that the Applicant had occupied is a core post of UNV; therefore the Applicant had an expectation of continued employment.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment.
2. The decision not to renew the Applicant's fixed-term appointment was justified in light of the Applicant's performance.
3. The Applicant was not entitled to an initial fixed-term appointment for one year and was not treated unfairly by UNDP/UNV.

The Tribunal, having deliberated from 28 June to 23 July 2004, now pronounces the following Judgement:

I. The Applicant appeals from a decision not to extend her fixed-term contract. In support of her claim, the Applicant contends that there was no basis for the assessment that her performance did not meet the required standards and, additionally, that she should have been offered an initial fixed-term contract for one year. Furthermore, the Applicant claims that the post that she had encumbered was a core post, and that, therefore, there was an expectation of continued employment. The Applicant asserts that she suffered financial and moral damages, for which she should be compensated.

The Respondent maintains that the Applicant was appointed on a fixed-term contract which does not carry any expectancy of renewal and, moreover, based on the Applicant's performance, he was justified in his decision not to extend her contract.

II. The Applicant was recruited in Geneva to the post of Assistant to the Deputy Executive Coordinator and Management Officer with UNV, Bonn, Germany. The vacancy announcement for the post listed it at the G-6 level. At the time of her recruitment, the Applicant was a staff member of the World Health Organization. However, to facilitate her transfer to Bonn, she was provided with a Certificate of Service which stated that she was a UNDP staff member and that she would be going on mission to Bonn. The Applicant was initially employed under an SSA, from 3 July to 2 September 1996. She subsequently served on a three-month fixed-term appointment from 3 September to 2 December 1996, when she separated from service. Throughout her employment with UNV, the Applicant's level was G-5.

III. Staff rule 109.7 (a) provides that "[a] temporary appointment for a fixed-term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". The Tribunal has reaffirmed this in numerous Judgements (See Judgements No. 205, *El-Naggar* (1975); No. 440, *Shankar* (1989); and, No. 1057, *Da Silva* (2002).) However, the Respondent's discretionary authority in deciding on the non-renewal of appointments is to be exercised free of prejudice and other extraneous factors. In Judgement No. 885, *Handelsman* (1998), the Tribunal stated:

"The Respondent's exercise of his discretionary power in not extending a ... contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors".

The Tribunal has also consistently held that while fixed-term appointments do not carry a legal expectancy of renewal, such expectancy may, in some cases, be deduced from the totality of the circumstances surrounding the case. (See *Handelsman* (*ibid.*); and, Judgement No. 1052, *Bonder* (2002) citing Judgement No. 142, *Bhattacharyya* (1971).)

In this context, the Tribunal will address two issues which it considered to have been central to the Applicant's case, and which ultimately led to her separation from service: the negative appraisal of her performance and the duration of the fixed-term appointment offered to the Applicant, compared with that offered to other recruits to the UNV Bonn office.

IV. The Tribunal notes that, on 23 September 1996, approximately three months after her appointment, the Applicant was informed by her supervisors that her performance needed improvement. The Tribunal further notes that, one month later, she was informed that since no improvement in her performance had been observed, her contract would not be extended. However, the JAB determined that there was no evidence in support of this negative evaluation of the Applicant's performance. Furthermore, the Applicant claims that no explanation was provided as to what precisely was not up to the mark, nor was she given guidance or direction as to how to go about her duties. The Respondent attempts to refute these claims, relying on a 4 November 1996 letter, by which the Applicant was officially informed of the non-renewal of her appointment due to unsatisfactory performance. However, any such explanations, concerning the Applicant's areas of weakness in her performance, should have been provided to the Applicant at an earlier stage.

Furthermore, the Tribunal finds it difficult to accept that a new employee's performance can be so negatively evaluated in such a short period of time, particularly when considering that during part of this period, the Applicant's supervisors were away, either on home leave or on mission. The Tribunal has also noted that the Applicant had been employed in the United Nations system for approximately 22 years prior to her recruitment by UNV, during which time she had a record of satisfactory service. In light of the foregoing, the Tribunal concurs with the JAB that "a degree of skepticism was warranted on the unfavourable evaluation based on four months of service". The Tribunal recalls its Judgement No. 1003, *Shasha'a* (2001), in which it stated that:

"[W]hen the Administration gives a justification for [the] exercise of discretion, the reason must be supported by the facts ... in this case the failure to renew the contract was claimed to be the result of unsatisfactory performance. This reason must be borne by the evidence ... The Tribunal finds that the Respondent offered an unsupported reason for his failure to offer the Applicant a new contract. He thus improperly exercised his discretion ..."

V. Concerning the issue of the fixed-term contract which was granted to the Applicant, the Tribunal notes several issues of concern.

The Applicant successfully responded to a vacancy announcement which advertised the post at the G-6 level. However, despite the Applicant's complaints concerning both the level and the step, she was awarded only the G-5 step VI level. Furthermore, despite having been recruited for the post in Geneva, the Applicant was



informed that her contractual status was that of a locally recruited staff member, thereby significantly reducing her entitlements. The Tribunal concurs with the JAB's characterization of this statement as "at the most charitable, disingenuous".

Additionally, the Applicant was initially employed under an SSA, rather than as a staff member and, subsequently, was granted a fixed-term appointment for a period of only three months. Having considered the documentation before it, the Tribunal considers that in so doing, the Applicant was unfairly treated. The Tribunal notes the correspondence from the Chief, Administration Section, UNDP/UNV, of 15 April 1996, in which it is stated that "recruits from the [United Nations] system will be given a one-year contract, while non [United Nations] staff recruited in Germany will be appointed for an initial trial period of three months, followed by one year, subject to satisfactory performance". This policy was confirmed in a letter to the Applicant of 7 November 1996. There can be no doubt that the Applicant filled the above requirement for a one-year fixed-term contract, having been recruited to the UNV Bonn office from within the United Nations system.

The Tribunal also finds that it would have been reasonable for the Applicant to rely on this in deciding to move to another country. It is doubtful that the Applicant would have left her previous job and country of residence had she not been promised at least a one-year contract.

VI. In light of the totality of the circumstances in this case, the Tribunal finds that the Applicant had a legal expectancy of one year employment with UNV. The Tribunal further finds that there was no evidentiary basis for the Respondent's negative assessment of the Applicant's performance, which served as the reason for the non-extension of her contract.

VII. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid nine months of all salary and allowances to which she would have been entitled had she been employed (one year less the three months that she had actually served under the fixed-term appointment), paid at the rate in effect at the date of this judgement;
2. Orders that the year of service be made fully pensionable, on the understanding that the Applicant will make her required contributions to the United Nations Joint Staff Pension Fund, subject to reduction

- by any subsequent overlapping period of pensionable employment by any other agency in the United Nations system;
3. Orders that the Applicant be paid one month net base salary paid at the rate in effect at the date of this judgement in lieu of notice of termination of her appointment;
  4. Orders that the Applicant be paid the sum of US\$ 1,000 as compensation for the moral and psychological damage inflicted; and,
  5. Rejects all other pleas.

*(Signatures)*

Brigitte **Stern**  
Vice-President, presiding

Omer Youssif **Bireedo**  
Member

Spyridon **Flogaitis**  
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**  
Executive Secretary