



Administrative Tribunal

Distr.: Limited
30 September 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1232

Case No. 1313

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Jacqueline R. Scott; Mr. Goh Joon Seng;

Whereas, on 7 October 2003, a staff member of the United Nations filed an Application, requesting the Tribunal, inter alia:

“2 ...

(a) *To set aside the contents of [Joint Appeals Board (JAB)] Panel Report No. 1584 and the accompanying recommendation* (due to procedural errors as well as errors in the admission and interpretation of facts);

(b) *To direct* that the decision not to renew the Applicant's contract beyond 31 December 2002 be rescinded;

(c) *To further direct* that the Applicant be deemed to be in the service of the United Nations from ... [1] January 2003 ... to 5 June 2003 ...;

...

(e) *To further direct* that the Applicant be awarded moral damages equivalent to two years' net base salary ...;

(f) *To further direct* that the actual performance of regional advisers (...) should *remain the decisive* factor in the renewal of regional advisers' contracts, instead of such decisions resting on the personal whims and preferences of the Executive Secretary;

(g) *To further direct* that the Secretary-General institute a high-powered panel comprising men and women of integrity to investigate the charges of abuse of office and sundry ethical violations levied against the [Economic Commission for Africa (ECA)] Executive Secretary ...”

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 2004 and periodically thereafter until 30 September 2004;

Whereas the Respondent filed his Answer on 28 September 2004;

Whereas the Applicant filed Written Observations on 27 October 2004;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

“Employment history

... On 26 August 1983, the [Applicant] was appointed as Regional Advisor in the Public Administration and Management Section of [ECA] at the L-5, step I level, under the 200 series of the Staff Regulations and Rules. ... [After a break in service from January 1986 until May 1987, on 23 May the Applicant resumed his position at the L-5, step V level.] On 1 May 1992, his appointment was converted to a fixed-term (long-term status) ... In January 1996, his post was reclassified to L-6. On 30 September 2002, he was notified in writing that his services would no longer be needed after 31 December 2002, when his fixed-term contract expired. On 5 June 2003, the [Applicant] was appointed as Inter-Regional Advisor in the Department of Economic and Social Affairs [(DESA)] ...

Summary of the facts

...

... On 8 January 2002, a group of Regional Advisors sent a letter to ... the Human Resource Service Section (HRSS), requesting that, if rumors about the non-renewal of contracts of selected Regional Advisors, including the [Applicant's], were to materialize, the ECA administration should ensure that, in accordance with Staff Regulations and Rules, due process was followed when determining which contracts should be terminated and that the process was transparent.

... On 10 January 2002, ... HRSS ... informed the Regional Advisors that ECA was undertaking a review of regional advisory services.

... On 14 January 2002, the [Applicant] ... [sought] ... clarifications on the renewal of contractual status of Regional Advisors.

... On 4 April 2002, the Executive Secretary held a meeting with Regional Advisors to explain the rationale for the review of the regional advisory services and the possible implications of the exercise for the work of the advisors, including the rationalization of a number of advisory posts.

[On 19 June 2002, the Executive Secretary informed the Regional Advisors that their appointments would be all extended until 31 December 2002, and that those whose appointments would not be extended beyond that date would be notified accordingly by the end of September 2002.]

... On 30 September 2002, five Regional Advisors, including the [Applicant], were notified in writing ... that their services would no longer be required after 31 December 2002.”

On 18 November 2002, the Applicant requested the Secretary-General to review the administrative decision taken not to renew his appointment.

On 10 December 2002, the Applicant submitted an appeal to the JAB in New York, requesting suspension of action. In its report dated 24 December 2002, the JAB recommended that the request for suspension of action be denied. On 26 December, the Under-Secretary-General for Management, advised the Applicant that the Secretary-General had accepted the JAB’s recommendation.

On 31 December 2002, the Applicant separated from service with ECA at the expiration of his final contract.

On 29 January 2003, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 2 September 2003. Its considerations and recommendation read as follows:

“Considerations

14. The Panel considered first whether the 200-series rules that govern the terms and conditions of service of Regional Advisors were ‘flexibly’ used by the Executive Secretary of ECA, as contended by the Appellant, and found no evidence to this effect. Neither did the Panel find that there was any violation of the rules, especially the rules governing the allocation of resources and the Regional Advisors’ terms and conditions of service.

15. The Panel considered next the Appellant’s contention that technical cooperation resources were ... [inappropriately] ... diverted ... The Panel found no evidence in this regard. ...

16. With regard to the exercise by the Executive Secretary of his discretionary powers, the Panel found no evidence of inappropriate use as contended by the Appellant.

17. The Panel considered next the Appellant’s claim to a reasonable and legal expectancy for further employment. ... The Panel found no evidence of legal expectancy ... As far as reasonable consideration for further employment is concerned, the Panel noted that the Appellant was considered for the post of Inter-Regional Advisor[, DESA], to which he was subsequently appointed in June 2003.

18. The Panel observed finally that, contrary to the Appellant’s contentions, the reason his fixed-term contract was not renewed was because

of the review of regional advisory services at ECA which was necessitated by the need to refocus ECA's regional advisory services in a few core areas in line with the priorities of the Millen[n]ium Declaration and the emerging priorities of [M]ember States. As a result of this restructuring, five regional advisory posts had to be rationalized and the related resources moved to the new areas of concentration.

Recommendation

19. In light of the foregoing, the Panel *agreed unanimously* to make no recommendation in favour of the present appeal.”

On 10 September 2003, the Officer-in-Charge for the Department of Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

On 7 October 2003, 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 was tainted by impure motive and was unsupportable.
2. The Applicant had legal and reasonable consideration for further employment.
3. The JAB erred in fact, law and procedure in its consideration of the case.

Whereas the Respondent's principal contentions are:

1. The Applicant's fixed-term appointment with ECA was not renewed because the Executive Secretary refocused the resources of the programme under which such appointment had been made.
2. The Applicant had no legal right or expectation that his appointment would be renewed.
3. The Applicant failed to establish that the decision not to renew his fixed-term appointment was motivated by prejudice or other improper motivation on the part of the administration of ECA.

The Tribunal, having deliberated from 24 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant appeals to the Tribunal the decision not to renew his fixed-term contract following a review conducted at ECA in 2002. That review is also the subject of Judgement No. 1254 (2005), which is being rendered by the Tribunal during this session.

II. The Applicant entered the service of the United Nations on 26 August 1983 on a one-year intermediate-term appointment under the 200 series of the Staff Regulations and Rules, as Regional Adviser with the Public Administration and Management Section at ECA. His appointment was subsequently extended and, other than a break in his service from January 1986 until May 1987, the Applicant held this position until 31 December 2002, when his final 200 series fixed-term appointment expired.

On 10 January 2002, ECA informed its Regional Advisers that it was undertaking a thorough review of regional advisory services. On 4 April, the Executive Secretary of ECA held a meeting with the Regional Advisers in order to explain that he was reviewing “the changing needs and priorities” of the Commission and, on 19 June, he informed the Regional Advisers that each of their appointments would be extended until 31 December. He indicated that the Regional Advisers whose appointments would not be extended beyond that date would be notified accordingly by the end of September. Thereafter, on 30 September, the Applicant was formally notified that his contract would not be extended after 31 December of that year.

On 2 September 2003, the JAB adopted its report in the Applicant’s case, making no recommendation in favour of his appeal. Citing the provisions of staff rule 204.3, that project personnel, including those in immediate or long-term status, are granted only temporary appointments which carry no expectancy of renewal, the Panel “found no evidence of legal expectancy for further employment”. The JAB considered that the Applicant had received “reasonable consideration for further employment” as he was considered for, and subsequently appointed to, the post of Inter-Regional Advisor, DESA. Insofar as the Applicant’s allegations concerning abuse of power at ECA were concerned, the JAB found no evidence that “the 200-series rules that govern the terms and conditions of service of Regional Advisers were ‘flexibly’ used by the Executive Secretary of ECA” or that technical cooperation resources were being

diverted to substantive programmes or to perform support or service functions. It identified “[no] violation of the rules, especially the rules governing the allocation of resources and the Regional Advisors’ terms and conditions of service” and rejected the Applicant’s contention that the Executive Secretary had inappropriately exercised his discretionary powers. Finally, the JAB found that

“contrary to the [Applicant’s] contentions, the reason his fixed-term contract was not renewed was because of the review of regional advisory services in a few core areas in line with the priorities of the Millen[n]ium Declaration and the emerging priorities of [M]ember States. As a result of this restructuring, five regional advisory posts had to be rationalized and the related resources moved to the new areas of concentration.”

On 10 September 2003, the Applicant was advised that the Secretary-General had decided to accept “the reasoning behind and the conclusions of the Board as well grounded in fact and in law” and to take no further action in his case. It is this decision which the Applicant now appeals to the Tribunal.

III. The Applicant asserts that the JAB failed to give him a fair hearing by “ignoring the contents of [his] appeal” and “by openly and unabashedly siding with [the] Respondent”. Accordingly, the Applicant requests the Tribunal to set aside the JAB’s report. He asks the Tribunal to find that the reasons provided by the Executive Secretary of ECA for the non-renewal of his fixed-term appointment were “inconsistent” and “disingenuous and unconvincing”, such that the Executive Secretary forfeited his discretion with respect to the non-renewal of the Applicant’s fixed-term appointment. The Applicant contends that he had a legal consideration for further employment; that the decision not to renew his fixed-term appointment was improperly motivated; and, that the Tribunal should decide the criteria upon which the appointments of Regional Advisors should be based. Accordingly, the Applicant requests the Tribunal to rescind the decision not to renew his fixed-term appointment with ECA; to direct the Respondent to pay him salary and emoluments for the five-month period from 1 January until 4 June 2003, when the Applicant re-entered the service of the Organization; to award the Applicant compensation equivalent to two years’ net base salary for the injury caused by his non-renewal, as well as the “humiliation”, “pain”, and “anguish” caused both by that decision and by the actions of the JAB in considering his appeal; and, requests that the Tribunal order an

investigation into the allegations of abuse of authority by the Executive Secretary of ECA that were cited in the Applicant's appeal to the JAB.

IV. The Applicant's fixed-term employment was governed by staff rule 204.3, which provides as follows:

"Project personnel shall be granted temporary appointments as follows:

- (a) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letter of appointment. They may be for service in one or more mission areas and may be for short, intermediate or long term, as defined in rule 200.2(f).
- (b) Project personnel who are initially granted appointments for less than one year but whose appointments are subsequently extended so that the total continuous service is one year or more but less than five years shall be considered to be in intermediate-term status with effect from the date from which their appointment is extended or converted to intermediate status.
- (c) Project personnel in intermediate-term status who complete five years' continuous service and whose appointments are extended for at least one further year shall be considered to be in long-term status with effect from the date on which they complete five years' continuous service.
- (d) A temporary appointment does not carry any expectation of renewal."

The terms of this rule are clear: the Administration of the United Nations has the discretionary authority to renew or extend fixed-term appointments, or not to do so, without having to justify its decision.

V. The Tribunal has repeatedly held that an Applicant has no legal expectancy to renewal with respect to any fixed-term contract, "even when the employee has enjoyed a lengthy term of service". (See Judgement No. 1163, *Seaforth* (2003), citing Judgements No. 466, *Monteiro-Ajavon* (1989); and, No. 496, *Mr. B.* (1990).)

Staff members on 200 series contracts enjoy fewer rights regarding future employment than their counterparts with 100 series contracts. In *Seaforth*, the Tribunal recalled Judgement No. 885, *Handelsman* (1998), stating

"Since 200 series appointments are

'entirely dependent on contingencies such as the requests of Governments and the availability of funds ... [t]he 200 series system simply could not function as intended, if staff members appointed under the 200 series had the same guarantees concerning employment

and career development as staff members appointed under the 100 series'. (...)

Thus, generally, the rules of the 200 series do not provide for career appointments, like the rules of the 100 series do, but merely provide for the granting of temporary appointments.”

This does not, however, mean that the Secretary-General has unfettered discretion in deciding on the renewal of fixed-term appointments, whether under the 100 or 200 series:

“The Tribunal has consistently held that fixed-term contracts do not carry any right of renewal and that no notice of termination is necessary in such cases. Exceptions to this rule may be found in countervailing circumstances, such as an express promise or an abuse of discretion including bias, prejudice or other discrimination against the staff member, or any extraneous or improper motivation on the part of the Administration. (See Judgements No. 205, *El-Naggar* (1975); No. 614, *Hunde* (1993); and [*Handelsman* (*ibid*)].) Obviously, the *onus probandi* is on the Applicant ...” Judgement No. 1057, *Da Silva* (2002).

The burden of proof in establishing such “countervailing circumstances” lies with the Applicant. The Tribunal agrees with the JAB that the Applicant has not discharged his burden in this case. It notes that ECA was open in its efforts, informing the Applicant as early as January 2002 that the review was being undertaken, and that it provided periodic updates throughout the year. It also notes that a number of staff members were affected by the exercise, and does not find it credible that the entire exercise was concocted to target the Applicant, or any other individual staff member.

VI. As stated above, the Administration is under no obligation to notify a staff member that his fixed-term contract will not be renewed; the contract is considered to end automatically. (See Judgement No. 1216, *Reddy* (2004).) In the instant case, however, the Applicant *was* alerted to the fact that his fixed-term contract would not be extended by a letter dated 30 September 2002, in which he was advised that, due to the review of the regional advisory services and subsequent reorganization which had taken place, his “skills and experience [were] no longer commensurate with the capacities required by the Commission to meet the demand of these emerging priorities”.

The Tribunal has consistently held that the Administration is not obliged to explain its decision not to renew a fixed-term contract, but that when a reason is given, however,

“the reason must be supported by the facts. (See ... *Handelsman* [(*ibid*)).) Under such circumstances, the exercise of discretion is examined ... for consistency between the reason offered and the evidence”. (See Judgement No. 1003, *Shasha’a* (2001) and, generally, Judgement No. 1135, *Sirois* (2003).)

The Applicant has made some very troubling accusations, but the Tribunal is not satisfied that there exists sufficient evidence to support his claims. The Tribunal does not consider the reasons provided by ECA to have been vitiated in any way. The Applicant is clearly dissatisfied with the ECA review in question and, indeed, with the management of ECA generally. However, the purpose or efficacy of the said review is not for the Tribunal to address: “it is not the function of the Tribunal to substitute its views for those of the General Assembly or the Respondent on how best to manage the Organization”. (See Judgement No. 722, *Knight et al* (1995).) The Administration has the discretion to make managerial decisions, and the Tribunal does not substitute its judgement for that of the Administration in such matters. The role of the Tribunal is to review the administrative process and identify any breaches thereof.

VII. The Tribunal turns now to the Applicant’s contention that, as his contract was not renewed due to the effective abolition of his post, he had a right to reasonable consideration for future employment with the Organization. The JAB found that the Applicant received reasonable consideration when he was considered for the post to which he was subsequently appointed, i.e., the post of Inter-Regional Advisor, DESA. This finding was subsequently accepted by the Secretary-General who “accept[ed] the reasoning behind and the conclusions of the Board as well grounded in fact and in law”. The Tribunal, however, disagrees, finding that the Applicant had no legal right to reasonable consideration, *ab initio*.

In Judgement No. 1173, *Guerrero* (2004), the Tribunal held:

“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.”

Staff rule 109.1 (c) reads, in relevant part, as follows.

- “c) *Abolition of posts and reduction of staff*
- (i) ... [I]f the necessities of the service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. ...”

However, in this case, as the Applicant was a 200 series staff member, these provisions do not apply to him and the Administration was under no legal obligation to extend the coverage of 109.1 (c) to him. As the Tribunal held in *Seaforth*,

“The Tribunal first notes that Respondent obligations stemming from an ‘abolition of post’ are addressed in the rules of the 100 series, not the rules of the 200 series. ... Thus, where there is an abolition of a 100 series post, the Respondent has an obligation to make a bona fide effort to find staff members another suitable post, assuming that such a post can be found, and with due regard to the relative competence, integrity and length of service of that staff member. There is no comparable rule for 200 series staff members, because, in theory, every 200 series post is created with the expectation that it will end at some point, either when the project it supports is finished or when the funding for such project no longer exists. It would be unreasonable and unwieldy for the Respondent to incur obligations similar to those required under 109.1 (c) for a 200 series post, which, again, is inherently temporary.”

Accordingly, the Applicant had no rights under staff rule 109.1 (c), and this claim is rejected.

VIII. Finally, the Tribunal wishes to address the criticism leveled at the JAB by the Applicant in this case, as it notes with concern the rhetoric employed by the Applicant in making serious allegations regarding the JAB’s impartiality. Whilst staff members who genuinely consider their rights of due process were violated by the JAB are certainly entitled to bring such violations to the Tribunal, this does not mean that applicants have *carte blanche* to make wild accusations. In the instant case, the

Applicant has failed to satisfy the Tribunal that his rights of due process were violated by the JAB. The fact that he was unhappy with the outcome of his appeal does not justify impugning the professionalism and neutrality of the JAB. (See Judgement No. 1086, *Fayache* (2002).)

IX. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio Barboza
President

Jacqueline R. Scott
Member

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary