



Administrative Tribunal

Distr.: Limited
30 September 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1234

Case No. 1316

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President;
Mr. Dayendra Sena Wijewardane;

Whereas at the request of a 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 30 September 2003;

Whereas, on 17 September 2003, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“216. ... that the administrative decisions taken by [the Chief of the Office of the High Commissioner for Human Rights (OHCHR) Croatia] and [the Chief, a.i., OHCHR Administration,] be reviewed in consideration of and based on his recognized consistent very good performance as Administrative Officer in the [Office of the High Commissioner for Human Rights (OHCHR)] Croatia since 01 April 1998 ...

Applicant thus seeks the following remedies:

- (a) To establish the personal accountability and individual liability of [the Chief of OHCHR Croatia] and [the Chief, a.i., OHCHR Administration,] in their intentional mal-administration of Applicant's case, with consideration of invoking staff rule 112.3 on 'Financial responsibility' ...
- (b) To consider disciplinary process against [the Chief of OHCHR Croatia] and [the Chief, a.i., OHCHR Administration,] for their

malicious and premeditated plot to arbitrarily separate [the] Applicant from the Office of the High Commissioner ...;

(c) To institute a disciplinary process [against named staff members] ...;

(d) To create an independent panel consisting of management and staff representatives to determine the personal and professional accountability and individual liability of the [Office of Internal Oversight Services (OIOS)] investigators ...;

(e) To clear all the false allegations made by [the Chief of OHCHR Croatia] since 23 June 2000 against Applicant;

(f) To provide Applicant with a financial compensation in the amount equivalent to two (2) years salary based on his status in OHCHR Croatia, for ... psychological, emotional, moral and professional damage ...;

(g) To completely quash the Investigation Report No. 027 dated 26 April 2001 ... and expunge from [the] Applicant's personnel files all references thereto."

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 10 March 2004 and periodically thereafter until 30 July 2004;

Whereas the Respondent filed his Answer on 23 August 2004;

Whereas the Applicant filed Written Observations on 5 November 2004;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"[The Applicant's] Professional Record

... The [Applicant] entered service at the United Nations in September 1990 as a clerk in the Finance Service, [United Nations Office at Geneva (UNOG)], at the G-3 level under a one-month short-term contract. His contract was renewed until 21 June 1991. [Thereafter, the Applicant served the Organization under various short- and fixed-term contracts until March 1996.] ...

...

... In August 1997, the [Applicant] was re-appointed under a three-month short-term contract as an Administrative Assistant at the G-4 level, in ... OHCHR. ... His appointment was extended until 31 March 1998. As of 1 April 1998, the [Applicant] started working as an Administrative Assistant (FSL-5) in the Office for Human Rights Field Operation in the Former

Yugoslavia, in Zagreb. ... His initial appointment was of a limited duration, i.e. until 31 December 1998.

... Pursuant to an Interim Memorandum of Understanding between ... OHCHR and [the United Nations Office for Project Services (UNOPS)] dated 6 May 1998, whereby the appointment and administration of personnel serving in [the] field office was transferred from UNOG to UNOPS effective 1 July 1998, ... UNOPS offered the [Applicant] a six-month appointment of limited duration [(ALD)]. ...

... [A] letter dated 1 July 1998 signed by Mr. [A.], Administrative Officer, OHCHR, was sent to the [Applicant] to confirm his selection 'to fill the P-2 post of Administrative Officer in the [OHCHR] in Zagreb, Croatia, effective 1 July 1998'.

... On 22 July 1998, a letter of appointment was signed by the Chief, [Human Resources Management Section (HRMS)], UNOPS, offering the [Applicant] an [ALD] as referred [to] above but with the functional title of Administrative Assistant and without any mention of the level of the post. The [Applicant] accepted this offer, which he signed on 11 August 1998. However, the letter of appointment had been corrected by [Mr. A.] (hand-written note) in order to reflect the change in the [Applicant's] functional title to Administrative Officer.

... The [Applicant's] appointment was extended by UNOPS every six months until 31 December 2000. It is only by letter dated 20 July 2000, [however,] ... that UNOPS granted the [Applicant] the title of Administrative Officer. ...

... As of 19 October 2000, the [Applicant] was reassigned to the Administrative Section, OHCHR, in Geneva until the end of his contract, on 31 December 2000.

... [On] 15 June 2001, the [Applicant began] working as General Services Assistant in the United Nations Office of the Humanitarian Coordinator for Iraq (UNOHCI) under successive [ALDs]. ...

...

Summary of Facts

... During his assignment in Zagreb, the [Applicant] began to disagree on office management issues with his supervisor, [the] Chief of OHCHR Croatia ...

... On 23 June 2000, an incident occurred between the [Applicant] and his supervisor on the question of [keeping attendance records] ..., following which the situation deteriorated.

... By fax dated 28 July 2000, the [Applicant] informed [the] Chief, a.i., OHCHR Administration, about 'the false accusations made against him' by his supervisor.

...

... On 23 August 2000, the [Applicant] submitted ... a formal complaint against his supervisor, accusing him of harassment and mismanagement and requesting that an investigation be carried out by an independent panel or internal auditors.

...

... On 20 September 2000, [the Chief, a.i., OHCHR Administration,] contacted the [Applicant] by telephone and offered him to be transferred on mission assignment to the Administration Section in Geneva until the end of his contract (31 December 2000). She also offered him a general temporary assistance (GTA) post GL-6 as of 1 January 2001.

... On the same date, [the Chief, a.i., OHCHR Administration,] sent an e-mail to the Deputy High Commissioner, OHCHR, and to the Chief, a.i., Activities and Programmes Branch Support, OHCHR, ... on the management situation in Croatia, [in] which she mentioned her [offer to the Applicant ...

... By fax dated 2 October 2000 ... the [Applicant] accepted to be redeployed [to] Geneva. ...

...

[On 9 October 2000, the Chief, a.i., OHCHR Administration, advised the High Commissioner that the Applicant would 'be granted a new appointment effective January 2001'. The High Commissioner subsequently indicated his approval.]

... By memorandum dated 10 October 2000, [the Chief, a.i., OHCHR Administration,] wrote to the [Applicant] that 'upon the creation of a General Service post in the General Service Unit, it [was] envisaged that [he would] occupy that post'. She also mentioned ... possibilities for the [Applicant] to receive training in finance and budget.

... As of 19 October 2000, the [Applicant] was effectively reassigned to Geneva.

...

... During the months of October and November 2000, two OIOS investigators conducted an investigation at the Zagreb OHCHR Field Office and at the OHCHR headquarters in Geneva. ...

... On 11 December 2000, ... [the Applicant was advised] that his current contract, ending 31 December 2000, would not be extended [and that,] ... due to the current unavailability of funds, '[he would not be offered] a contract in 2001'. The [Applicant] was effectively separated on 31 December 2000."

On 8 February 2001, the Applicant requested administrative review of the decisions taken by the Chief of OHCHR Croatia and the Chief, a.i., OHCHR Administration.

In its report dated 26 April 2001, OIOS noted that the Applicant had not acted in accordance with his general obligations as an international civil servant and recommended that a copy of the report be placed in his official status file “in order to prevent any future recruitment with the Organization”.

On 1 May 2001, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 14 April 2003. Its considerations, conclusion and recommendation, and special remark read, in part, as follows:

“Considerations

...

Merits

...

51. ... [T]he Panel recognized that the Respondent did not provide its comments to one of the main allegations in the case, i.e. that the decision to ‘revoke the official offer of [a] new fixed-term appointment with OHCHR ... was linked to the OIOS investigation’. ...

52. The Panel then addressed the issue of harassment ... [and decided] ... that it was not competent to examine the Appellant’s contentions of discrimination or harassment.

...

54. The Panel ... addressed the question of the non-renewal of the Appellant’s [ALD] ...

...

56. In the Panel’s view, ... the Appellant implicitly agreed to the non-extension of his ALD in the OHCHR Zagreb office but with the prospect of another employment opportunity in Geneva. Following this reasoning, the Panel thus found that the non-renewal of the Appellant’s contract had not been taken as a retaliatory measure as alleged by the Appellant, nor was it tainted with prejudice and motivated by extraneous factors, but was part of an arrangement that had been jointly decided by the Appellant and the Administration of the OHCHR.

...

58. The Panel ... went on to ascertain whether an offer had effectively been made to the Appellant and whether a legitimate expectancy for continued employment had been created in his favor.

59. Having examined the supporting documentation and evidence provided in the file, as well as the information conveyed during the hearing, the Panel confirmed that the Appellant had been offered a new appointment by [the] Chief of Administration of the OHCHR. ...

...

61. The Panel's attention was drawn to the nature of the offer, a General Temporary Assistance (GTA) contract. The Panel stressed the fact that this type of contract is always subject to the availability of funding. Nevertheless, the Panel found no written evidence to indicate that it had been made clear to the Appellant in September 2000 that the creation of the post he was offered was contingent upon the receipt of extra-budgetary funds. Moreover, the Panel recalled that 'a staff member is normally entitled to expect the Organization to honour commitments on which the staff member has relied in good faith' ... The Panel thus concluded that the proposal made to the Appellant had indeed generated a legitimate expectation for continued employment.

...

63. The Panel went on by examining whether the withdrawal of the offer was tainted by prejudice or motivated by extraneous factors, and more precisely whether '[the] decision to revoke the official offer ... was linked to the OIOS investigation'.

64. ... The Panel ... found that the reason given ... to justify the withdrawal of the offer, i.e. the lack of funds, was not supported by evidence.

...

65. ... {Nevertheless, the} Panel ... found that there was no documentary evidence to substantiate the existence of a direct cause-and-effect link between the on-going investigation and the withdrawal of the offer.

...

Conclusions and Recommendations

67. ... [T]he Panel **concludes** that the Administration violated the Appellant's right to fair and equitable treatment, for which the Appellant is entitled to compensation. The Panel thus **recommends** that the Appellant be paid two months' net base salary payable at the rate in effect on the date of his separation from service.

Special remark

68. Having examined the case, the Panel wishes to express its perplexity regarding the circumstances surrounding the Appellant's past and present recruitment to the various posts he occupied. The Panel also found disturbing elements concerning the Appellant's promotions to the professional level and wishes to outline the fact that the Appellant was hired as an Administrative Assistant and retroactively de facto upgraded to Administrative Officer, both in Zagreb and in Baghdad.

69. The Panel also notes with concern the fact that the Appellant was re-hired by [the Department of Peacekeeping Operations (DPKO)] in June 2001, although the OIOS had recommended that 'OHCHR Administration should ensure that a copy of [its] report [be] placed in [his] Official Status File ..., in order to prevent any future recruitment with the Organization ...'.

...”

On 30 July 2003, the Officer-in-Charge of the Department of Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to accept the conclusions of the Board and, in accordance with its unanimous recommendation, to pay him two months’ net base salary at the rate in effect on the date of his separation from service.

On 17 September 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent erred in accepting the JAB’s findings that the Applicant had implicitly agreed to the non-renewal of his ALD and that the said non-renewal was not tainted with prejudice.
2. The non-renewal of the Applicant’s ALD and the revocation of his official offer of a new contract were based on reprisal, prejudice and arbitrary decision-making.
3. The Applicant was not sufficiently compensated for the wrongs he suffered.
4. The Applicant’s rights of due process were repeatedly violated.

Whereas the Respondent’s principal contentions are:

1. The Applicant has failed to meet his burden of establishing that his treatment was tainted by improper motive.
2. The compensation recommended by the JAB was adequate and consistent with the practice of the Tribunal.
3. The Secretary-General enjoys broad discretion regarding disciplinary matters, and it is not within the power of a staff member to compel him to pursue disciplinary proceedings.
4. The OIOS investigation was conducted with due regard for the rights of the Applicant.

The Tribunal, having deliberated from 23 June to 22 July 2005, now pronounces the following Judgement:

I. This apparently complex case essentially concerns the non-fulfillment of an express, legal promise made to the Applicant by competent authorities of OHCHR that he would be granted a GTA post in Geneva at the GL-6 level as of 1 January 2001. On the strength of that express promise, and in expectation of his forthcoming appointment, the Applicant agreed to a transfer to Geneva.

II. The Applicant contends that the non-renewal of his ALD under the 300 Series was an act of reprisal and was vitiated by prejudice and arbitrariness. Whilst the jurisprudence of the Tribunal on the issue of non-renewal of fixed-term contracts relates primarily to appointments under the 100 and 200 Series, it recalls the basic principles it has repeatedly affirmed:

“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 No. 885, *Handelsman* (1998).) Obviously, the *onus probandi* is on the Applicant ...” Judgement No. 1057, *Da Silva* (2002), paragraph IV.

Given the circumstances of this case, however, it is quite unnecessary for the Tribunal to engage in a review of any countervailing circumstances surrounding the non-renewal of the Applicant’s ALD, as it is clear from the file that he agreed to transfer to Geneva on the promise of a new, different appointment upon the expiration of his existing contract. The Applicant could not logically have contemplated a situation where he encumbered two posts, and the exchange of correspondence concerning his reassignment to Geneva makes it clear that he understood the consequences of the transfer. The Tribunal finds it peculiar that the Applicant simultaneously claims that the non-renewal of his ALD *and* the rescission of the express offer of a GTA post were legally improper, as these options were mutually exclusive. The Tribunal agrees with the JAB that the Applicant implicitly agreed to the non-renewal of his ALD.

III. Whilst the Applicant may not have had a legal expectancy in regards to his ALD, the Tribunal finds that he *did* have a legitimate expectation of continued employment as he had an express promise of a new position in Geneva. This promise

is unusually well-documented; as the following overview of the circumstances of the situation demonstrates, it is clear that there was a meeting of the minds of all parties concerned and that a formal offer was made to the Applicant, accepted by him, and acted upon by the Respondent.

In August 2000, whilst serving with the OHCHR Field Operation in Zagreb, the Applicant submitted a formal complaint accusing his supervisor of harassment and mismanagement. Thereafter, on 20 September, the Chief, a.i., OHCHR Administration, telephoned the Applicant and offered to transfer him to the Administration Section in Geneva for the remainder of his ALD, which was due to expire on 31 December. She offered him a GTA post at the GL-6 level as of 1 January 2001, and recorded this proposal in an email sent later that day to the Deputy High Commissioner, OHCHR, and the Chief, a.i., Activities and Programmes Branch Support, OHCHR. On 2 October, the Applicant accepted the offer. On 9 October, the Chief, a.i., OHCHR Administration, advised the High Commissioner, in writing, that the Applicant would “be granted a new appointment effective January 2001”, and the High Commissioner subsequently approved the decision. On 10 October, the Chief, a.i., OHCHR Administration, informed the Applicant that “upon the creation of a General Service post in the General Service Unit, it [was] envisaged that [he would] occupy that post” and mentioned possible training he could complete in finance and budget matters.

The Applicant was reassigned to Geneva as of 19 October 2000. On 11 December, however, the Chief, a.i., OHCHR Administration, met with the Applicant and advised him that his ALD would not be renewed and that, due to the unavailability of funding, she could not offer him a new contract. As a result, the Applicant separated from service on 31 December 2000.

In Judgement No. 440, *Shankar* (1989), the Tribunal found that “a claim to renewal, to be valid, must be based not on mere verbal assertions unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case”. In the instant case, the Tribunal has no doubt whatsoever that the Applicant had a “firm commitment” to, or, in the words of *Handelsman*, an “express promise” of, future employment with the Organization.

IV. The explanation for the curious sequence of events may be found in the following detail. In October and November 2000, an OIOS investigation was conducted at the Zagreb Field Office of OHCHR and at OHCHR, Geneva. In its report

of 26 April 2001, OIOS stated that the Applicant had not acted in keeping with his obligations as an international civil servant and recommended that the report should be placed in his official status file in order to prevent future recruitment. The Tribunal takes this opportunity to note, however, that the report was never placed in the Applicant's file and that he was subsequently rehired by the Organization in June 2001.

Whilst the OIOS report came well after the decision not to appoint the Applicant on the GTA post, and there is no direct evidential link presented, it seems a likely assumption that the initial findings or approach taken during the investigation influenced the decision to renege upon the offer made to the Applicant, and the Tribunal certainly finds that hypothesis more persuasive than a sudden, unexpected lack of funding, especially as the Respondent did not substantiate his allegation regarding the unavailability of funds with any evidence at all. If indeed the Applicant's offer of employment was withdrawn based on the OIOS activity, such action would be clearly improper, denying the staff member of his rights of due process and effectively imposing a disguised disciplinary sanction upon him. (See Judgements No. 610, *Ortega et al.* (1993) and No. 877, *Abdulhadi* (1997).)

V. The Tribunal notes that the JAB recommended that the Applicant be paid two months' net base salary in compensation for breach of promise, which recommendation was accepted by the Secretary-General. Given the circumstances of the case, the Tribunal finds that the harm done to the Applicant justifies a larger award and has decided to award him an additional four months' net base salary.

VI. The Applicant repeatedly contends that he has been the victim of harassment, discrimination, malicious acts and false accusations. The Tribunal recalls its consistent jurisprudence that "the *onus probandi*, or burden of proof, is on the Applicant where allegations of extraneous motivation are made". (See Judgement No. 1069, *Madarshahi* (2002), paragraph III, and Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); and, No. 870, *Choudhury et al.* (1998).) Whilst the Applicant's claims, if verified, would prove extremely troubling, the mere repetition of such assertions does not, in and of itself, convince the Tribunal of their worth. Accordingly, the Tribunal finds that the Applicant has not succeeded in discharging his burden of proof in this regard.

VII. In his Application, the Applicant entered a number of pleas requesting the Tribunal, *inter alia*, to “establish the personal liability and individual accountability” and to “consider disciplinary process” against two senior OHCHR staff members, and to “create an investigative panel ... to determine the professional and personal accountability and individual liability” of the OIOS investigators involved in the case. The Tribunal wishes to affirm its position, as stated in paragraph V of Judgement No. 1086, *Fayache* (2002), that

“the instigation of disciplinary proceedings against an employee is the privilege of the Organization itself. The Organization, responsible as it is for personnel management, has, among other rights, the right to take disciplinary action against one or more of its employees and, if it does that unlawfully, the Administrative Tribunal will be the final arbiter of the case. It is not legally possible for anyone to compel the Administration to take disciplinary action against another party.”

In the instant case, the Tribunal considers that the Applicant receives satisfaction for the wrongs done to him through this Judgement. His injury is imputed to the Organization, which is responsible for the actions taken by individual staff members. Whilst the institutional importance of the accountability of managers cannot be overstated, the Applicant has no right to have action initiated against other staff members. It is the Organization which has a legal interest in taking such action as it deems necessary. With reference to the OIOS investigators, the Tribunal notes that the OIOS Manual provides for, in effect, a code of conduct for its investigations. The Tribunal takes no position on the allegations presented by the Applicant, but wishes to affirm that, if a staff member believes that OIOS has acted improperly, the correct course of action is to bring his complaint to the attention of the Administration. Thereafter, the decision on whether, or how, to proceed lies with the Organization itself.

Accordingly, the pleas presented by the Applicant concerning these issues must fail.

VIII. In view of the foregoing, the Tribunal

1. Orders the Respondent to pay the Applicant compensation in the amount of four months’ net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as

from 90 days from the date of distribution of this Judgement until
payment is effected; and,

2. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Kevin Haugh
Vice-President

Dayendra Sena Wijewardane
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary