



Administrative Tribunal

Distr.: Limited
30 September 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1237

Case No. 1321

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 former 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 31 August 1999 and periodically thereafter until 30 June 2003;

Whereas, on 27 June 2003, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 October 2003, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

“PLEAS

The Applicant respectfully requests the Tribunal:

- a) To find that although the Secretary-General had taken note and agreed with the findings of the Joint Appeals Board [(JAB)] panel, he had failed to take either the recommended or an alternative appropriately proportionate remedial action;

- b) To find that ... the Secretary-General's steadfast refusal to reconsider his position ... was both unreasonable and arbitrary ...;
- c) To order, therefore, that the Applicant be given a letter of apology ...;
- d) To confirm that the invalidated [performance evaluation report (PER)] has been expunged from the record and that the [United Nations] will not badmouth him;
- e) To consider that the ... Secretary-General's offer of special consideration for vacancies in his professional field, is invalidated by its evident ineffectualness ...;
- f) ... [T]o order the status quo ante in terms of lost emoluments and expectations be restored at a minimum from 6 September 1994 to the date of judgement;
- g) To award maximum damages for the harm inflicted to the Applicant both as regards his professional standing and for the moral and psychological suffering engendered by the Respondent's actions;
- h) To award cost[s] in an amount of £15,000 to cover fees for legal advice, telephone and postal charges etc. ..."

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 April 2004 and periodically thereafter until 30 September 2004;

Whereas the Respondent filed his Answer on 31 August 2004;

Whereas the Applicant filed Written Observations on 3 February 2005;

Whereas, on 12 June 2005, the Applicant submitted an additional communication;

Whereas the statement of facts, including the Applicant's professional record, contained in the report of the JAB reads, in part, as follows:

"[Applicant's] Professional Record

... The [Applicant] entered service at the United Nations on 7 September 1993, as a Finance Officer, [United Nations High Commissioner for Refugees (UNHCR)], at the L-3 level. His intermediate-term contract expired on 6 September 1994, [on] which date he was separated from the Organization.

Summary of Facts

... By memorandum dated 21 October 1993 to the members of UNHCR's Senior Management Committee, the Controller, UNHCR, announced a review of existing financial processes and procedures undertaken through the Division of the Controller, UNHCR (hereinafter: the review). As part of his duties, the

[Applicant] was to submit a report on the area of field accounts processing (hereinafter: the field accounts report).

... In January 1994, the [Applicant] produced a first draft of the field accounts report ...

...

... By memorandum dated 1 July 1994 to the [Applicant], the Chief, Finance and Project Control Section (FPCS), UNHCR,, expressed her 'main points' of concern with respect to the [Applicant's] performance.

...

... By memorandum dated 5 August 1994, the Chief, FPCS, UNHCR, informed the [Applicant] that she was not in a position to recommend extension of his contract beyond its expiry date of 6 September 1994.

... On 21 September 1994, the [Applicant] received his PER ... [In her assessment as first reporting officer, the Chief, FPCS, UNHCR, evaluated the Applicant with ratings from 'C' (good) to 'E' (somewhat below standard), giving him an 'E' rating in 8 of the 13 categories. The then Controller, UNHCR, as second reporting officer, assessed the Applicant's overall performance as 'does not fully meet standards' (5 on a scale of 1 to 6, with 1 being the highest grade), and noted '[a]fter careful consideration, I support the conclusion that [the Applicant's] contract with UNHCR should not be extended'.]

... On 7 October 1994, the [Applicant] submitted a rebuttal against the abovementioned PER.

... A rebuttal panel was constituted on 25 September 1995. It adopted its report on 23 November 1995. [The rebuttal panel found certain comments 'harsh' and questioned some of the low ratings the Applicant had received, but did not proffer suggested ratings.]

... On 11 December 1995, the [new] Controller, UNHCR, submitted his final appraisal ... on the [Applicant's] performance ... [He noted that he had not been Controller at the time, and was therefore not acquainted with the Applicant's performance, and concluded 'it is my opinion that the PER is by and large an accurate, reasonable and fair reflection of the supervisor's evaluation of [the Applicant's] performance'.] The [Applicant's] PER remained unchanged."

On 25 February 1996, the Applicant requested administrative review of the Controller's decision to accept his PER without change.

On 12 June 1996, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 1 December 1998. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

Discussion

...

41. The JAB Panel [had] to consider whether the appraisal itself satisfied the minimum requirements of fairness, consistency, objectivity and due process set forth by the [Administrative Tribunal].

...

44. It appeared *prima facie* to the JAB Panel that the PER failed one of the [Tribunal’s] criteria for due process, since the rebuttal panel’s report demonstrated that the supervisor’s comments and ratings had not been properly documented and explained. ... The JAB Panel felt that the rebuttal panel’s implicit accusation - that the PER constituted unsubstantiated denigration of the Appellant’s performance - demanded to be addressed in the final appraisal for it could not but reflect on the objectivity of the evaluation overall. In one instance, however ..., the absence of supporting evidence was skirted, and in the others dismissed - inappropriately, in the JAB Panel’s view - by the final appraising officer ...

...

46. The JAB Panel considered that all the Appellant’s assignments needed to be taken into account in evaluating his performance. The Appellant himself did indeed list the filed accounts report among the ‘assignments accomplished’ during the reporting period. However, that report was listed as the tenth of ten assignments and the Appellant and his supervisor agreed that producing such a report was ‘not part of the main and fundamental functions [of a] Finance Officer’. ... Given the rebuttal panel’s other findings, the JAB Panel considered that one questionable assignment among ten should not have had such a disproportionate impact on the evaluation of the Appellant’s overall performance.

...

Conclusions and Recommendations

...

55. The JAB Panel **concludes** that:
- a. the Appellant was not treated fairly and that the final appraisal fell short of the standards set by the [Tribunal];
 - b. contrary to what the Respondent had suggested ..., the final appraising officer did not ensure observance of all the necessary procedural safeguards; and
 - c. the final appraising officer’s failure to exercise due care in his appraisal of the rebuttal panel’s report constituted a denial of due process; as a result, the Appellant’s future employment opportunities with the Organization were unfairly prejudiced.

56. The JAB Panel **recommends** that:
- a. an official letter of apology be sent to the Appellant;
 - b. the Appellant be granted compensation equivalent to one year's net base salary; and
 - c. should the Appellant wish to seek employment with the Organization in the future, his application be considered strictly on its merits and without reference to his alleged unsatisfactory performance in the 1993-1994 period he worked for UNHCR."

On 2 March 1999, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General agrees with the Board's findings but considers that the remedial action recommended is not proportionate to the injury sustained, especially in view of the fact that you had only served one year with UNHCR. He has therefore decided that you should be paid compensation in the amount of three months' net base salary. The Secretary-General has further decided that you shall be given special consideration for future vacancies in the Organization for which you are qualified and in which you are interested."

On 23 October 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was penalised for the findings of "his report". Had it not been for those findings, and the prejudiced appraisal he received as a result, he would, in all likelihood, still be in the employ of UNHCR.
2. The Applicant suffered severe financial hardship, mental anguish and distress as a result of the prejudicial actions of the Organization.
3. The rebuttal panel and the JAB recognized the prejudice and improper motivation which surrounded the Applicant's PER and tainted the decision not to renew his contract.
4. Compensation should not be linked to the Applicant's length of service, but should be proportional to the harm he suffered.
5. "Special consideration" for future employment was not a serious remedy.

Whereas the Respondent's principal contentions are:

1. The question before the Tribunal is the adequacy of the compensation granted by the Respondent for the failure to exercise due care in the rebuttal process of the Applicant's PER: the Applicant did not seek administrative review of the decision not to renew his fixed-term contract.
2. The Applicant was fully compensated with the award of three months' net base salary for the Administration's failure to exercise due care in the rebuttal process of the Applicant's PER.
3. The Applicant did not sustain any material damage to his professional standing or moral and psychological pain as a result of the Respondent's actions.
4. The Applicant has adduced no proof that the Respondent has failed in the exercise of the remedial action ordered and the aspects of the Application concerning events after the Applicant's separation from service are not receivable.
5. There is no justification for an award of legal fees and related expenses.

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

I. The Applicant, a chartered accountant aged around forty at the time of the events which gave rise to his Application, held a one-year intermediate-term project personnel appointment commencing on 7 September 1993 as a Finance Officer for the Regional Bureau for Asia at the UNHCR Headquarters in Geneva. These proceedings arise from the circumstances in which his fixed-term contract came to an end, and his separation from service with UNHCR took place, on 6 September 1994.

II. The Tribunal has repeatedly held that the Respondent has discretion to renew or not to renew a fixed-term contract and that, if the contract is not renewed, it comes to an end with the effluxion of the time set out in the contract itself. (See Judgements No. 440, *Shankar* (1989) and No. 1003, *Shasha'a* (2001).) The established jurisprudence of the Tribunal is that the exercise of this discretion must not, as the Respondent puts it in his pleadings, "be tainted by caprice, prejudice, falsehood or any serious lack of due process".

III. There appears to be no dispute that the decision not to extend the Applicant's contract but to separate him from service was based on his performance evaluation. Exactly a month prior to the separation, the Applicant's immediate supervisor, who was Chief of the Finance and Project Control Section, wrote to the Applicant, referring to previous discussion and correspondence, stating that she was not "in a position" to recommend an extension of his contract beyond the expiry date of 6 September 1994. She asked the Applicant to complete his part of his PER, which had been handed to him earlier. On 1 September, the Applicant's supervisor completed his PER as first reporting officer; thereafter, the Controller, as second reporting officer, signed it on the day before the Applicant's contract ended. The Controller described the Applicant's performance as one that "does not fully meet standards" with an additional handwritten annotation stating that "after careful consideration [she] supported the conclusion that [the Applicant's] contract with UNHCR should not be extended". No sooner had the Applicant received this report than he contested the evaluation. In December 1995, following rebuttal proceedings, the new Controller of UNHCR made what is referred to as the "final appraisal" confirming this evaluation, albeit recording that he was not acquainted with the Applicant's performance.

IV. In December 1998, some four years after the Applicant's separation from service, the JAB considered his case and, after a thorough review of the facts and procedures regarding his performance evaluation, submitted its conclusions and recommendations. In March 1999, the Respondent advised the Applicant as follows:

"The Secretary General ... has taken note of the Board's findings that the final appraisal sought to justify the supervisor's evaluation on the basis of inadequate supporting evidence for some of the supervisor's ratings, disproportionate relevance given to a particular assignment and a selective reading and misinterpretation of the rebuttal panel's report, and that [the Applicant's] views, as well as those of the rebuttal panel, were disregarded without appropriate justification. The Secretary-General has also taken note of the Board's conclusions that the final appraisal fell short of the standards set by the Administrative Tribunal; that all the necessary procedural safeguards were not observed; and that the lack of due care in the appraisal constituted a denial of due process which unfairly prejudiced your future employment opportunities with the Organization.

The Secretary-General has taken note of the Board's recommendations that an official letter of apology be sent to you, that you be compensated in the amount of one year's net base salary and that, should you wish to seek

employment with the Organization in the future, your application should be considered 'strictly on its merits and without reference to your alleged unsatisfactory performance' for the one year you worked for UNHCR.

The Secretary-General agrees with the Board's findings but considers that the remedial action recommended is not proportionate to the injury sustained, especially in view of the fact that you had only served one year with UNHCR. He has therefore decided that you should be paid compensation in the amount of three months net base salary. The Secretary-General has further decided that you shall be given special consideration for future vacancies in the Organization for which you are qualified and in which you are interested."

In the view of the Tribunal, this summary demonstrates that the evaluation process was deeply and seriously flawed. Furthermore, the JAB concluded that it unfairly prejudiced the Applicant's employment opportunities with the Organization. This is a conclusion which the Respondent expressly acknowledged and accepted. The Tribunal agrees with the Respondent in the instant proceedings that the question, then, is the "adequacy of compensation" granted by the Respondent. Herein lies the residual dispute between the parties: the Respondent has sought to minimize the impact of the failure that occurred, whereas the Applicant sees it as having gravely and permanently damaged his career both inside and outside the Organization.

V. The JAB recommended that an official letter of apology be sent to the Applicant; that he be granted one year's net base salary; and, that, should the Applicant wish to seek re-employment with the Organization, his candidature be considered strictly on its merits and without reference to his alleged unsatisfactory performance in the period he had worked with UNHCR. The Administration adopted a more casual view of its responsibilities to adequately respond to the consequences ensuing from the flawed evaluation process, maintaining that the remedial action recommended by the JAB was not proportionate to the injury which the Applicant sustained. The Tribunal takes the view that the conclusions arrived at by the JAB, after a thorough scrutiny of the entire process, were justifiable given the facts of this case and should have been taken more responsibly by the Respondent.

VI. The Respondent is admittedly not bound to follow the recommendations of the JAB. The Tribunal, however, considers it pertinent to examine the reservations which the Respondent may have had. Why did the Respondent consider the JAB

recommendation disproportionate to the injury sustained by the Applicant? This approach is posited on the Respondent's contention that the Applicant had no right to an extension of his contract and that the Applicant cannot be compensated for a non-extension which he had, in fact, not appealed and which now is time-barred. Therefore, the Respondent claims that the only compensation due to the Applicant is for the "failure to exercise due care in the rebuttal process of the Applicant's PER", which is viewed by the Respondent as a relatively technical breach on the part of the Administration.

VII. It is correct that the Applicant had not asked for a review of the administrative decision not to renew his contract and that he would now be time-barred from so doing. It is also the case that, whilst the Applicant did not have a right to extension of his contract, the facts reveal that were it not for the flawed evaluation process, his contract might have been extended. Indeed, as explained in paragraph III above, it appears to have been the only reason which precluded his supervisors from making a recommendation to this effect. The compensation due to the Applicant then cannot be viewed as due only for a technical failure on the part of the Administration to afford due process during the PER procedure and no more. In the Tribunal's view, it was in order for the JAB to try and assess the harm that may have realistically ensued to the Applicant as a result of the failure to have what he was entitled to, *viz* an objective appraisal of his performance in accordance with the standards set by the Organization and upheld by this Tribunal. The remedial action must be proportionate to the harm which the Respondent himself has acknowledged.

VIII. The Tribunal need hardly make the point that the adequacy of compensation must be judged in the light of all the circumstances of each case. Given that the Tribunal has found that the Applicant's performance evaluation was inextricably linked to the decision not to renew his contract, if not providing the sole basis on which that decision was made, and that the evaluation was immediately and unequivocally challenged by the Applicant, it is unclear to the Tribunal why no consideration was given to approving a limited extension of the Applicant's services and why no steps were taken to have the rebuttal procedure swiftly concluded. Instead, this dragged on for four years, precluding the Applicant from making use of the process in any

“meaningful way” in relation to the harm he was substantively complaining of. The Tribunal recalls in this regard its Judgement No. 826, *Beliyeva* (1997):

“Having undertaken a consideration of the Applicant’s situation, it was incumbent upon the Respondent to make his determination in accordance with fair procedures. Because the evaluation of the Applicant’s performance was a factor, it is unacceptable that the decision as to her future was taken before the rebuttal procedure was finalized.”

The institutional indifference to the Applicant’s situation is demonstrated by the Administration’s failure to make an effort to get the process on track when it might have, and this appears to have rather aggravated the consequences of the flawed process.

IX. Whilst good or even outstanding performance does not automatically lead to any conclusion that a fixed-term contract would be extended and creates by itself no entitlement to such an extension, where inadequate performance is the reason for the decision and the process of evaluation is as seriously flawed as in this case, an implication arises that, had a correct evaluation been made, then the Applicant’s contract may or would have been extended. Certainly, the Tribunal finds no difficulty in taking this into consideration for the purposes of assessing compensation payable for denial of due process and, in this context, the fact that the Applicant had only served one year is irrelevant in the particular circumstances of this case. He unfairly lost an opportunity to increase his length of service. As observed above, the unfair prejudice in regard to his future employment opportunities with the Organization was expressly recognized by the Respondent. Consequently, whilst, generally speaking, length of service is undoubtedly a factor in considering compensation, in this case the Tribunal finds the argument to be circuitous when the Respondent claims that three months’ net base salary is sufficient compensation because the Applicant had only served the Organization for one year. The Respondent cannot rely on the Administration’s own flawed process and the impugned decision made on that basis in order to limit the compensation payable.

X. The Respondent also argues that adequate relief has been granted in regard to the consequential effects which the flawed evaluation process may have on the

Applicant's future, because the Respondent ordered that the Applicant be given "special consideration" in relation to future vacancies for which he is qualified and may wish to apply. This was a step in the right direction but the record does not bear evidence of any demonstrable effort to give effect to this gesture and it appears to be a somewhat formalistic response on the part of the Respondent. The Applicant clearly does not consider it a realistic way forward and contends that it lacks any real content. In light of the available evidence, the Tribunal cannot agree with the Respondent's contention that the order made to afford the Applicant "special consideration" in relation to future vacancies, when taken together with three months' net base salary, provides adequate relief or remedial action for the denial of due process suffered by the Applicant in this case and the admitted prejudice caused to him.

There was also prejudicial delay in dealing with the case. The Applicant was separated from service in September 1994. It was four and half years later that the Respondent communicated his decisions pursuant to the JAB recommendations to the Applicant. Given the significance of the issues in contention for the Applicant's future career, the Tribunal is of the view that the process deserved to have been focused on and expedited, which it was not. The Tribunal is not convinced that adequate effort was forthcoming to mitigate the possible harm to the Applicant, and the record reveals that the Applicant was subjected as a result to an extended period of stress, depression and anxiety which might have been avoided.

XI. Since the Tribunal considers that the JAB's recommendation of one year's net base salary was reasonable and appropriate under the circumstances, it has decided to order the Respondent to pay the Applicant nine months' net base salary in addition to the three months' salary he has already been paid. The Tribunal also awards the Applicant another three months' net base salary as compensation for the other denials of due process it has identified. Accordingly, the Applicant is to receive one year's net base salary in addition to the sum he has already received. The Tribunal makes no award in respect of legal costs.

XII. In view of the foregoing, the Tribunal

1. Orders the Respondent to pay the Applicant compensation in the amount of twelve 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;

2. Orders the Respondent to remove the PER in question, and any related documents, from the Applicant's official status file, if it has not already done so; and,
3. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Kevin Haugh
Vice-President

Dayendra Sena Wijewardane
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary