



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1238

Case No. 1322

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, First Vice-President, presiding; Mr. Spyridon Flogaitis, Second Vice-President; Ms. Jacqueline R. Scott;

Whereas, on 1 December 2003, a former staff member of the United Nations filed an Application containing pleas which read as follows:

“II. PLEAS

...

24. The [Joint Appeals Board (JAB)] ... recommended that the Applicant ‘receive one full year of salary at the rate of his last salary in order to compensate for the loss of salary suffered due to the decision to terminate employment; and \$50,000 to compensate for the lost (reduced) pension suffered’. (...)

...

26. On the merits, Counsel respectfully requests the Tribunal to support the [JAB’s] recommendations and to instruct the Respondent to honor them at his earliest convenience.”

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 19 April 2004 and once thereafter until 31 May;

Whereas the Respondent filed his Answer on 28 May 2004;

Whereas the Applicant filed Written Observations on 30 July 2004;

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

“Summary of the [Applicant's] employment

... The [Applicant] was initially recruited on 20 January 1995 as Director of the [United Nations Drug Control Programme (UNDCP)] Regional Office in Riga, Latvia, and was given a two-year intermediate term appointment under the 200 Series [of the] Staff Rules at the L-5 level. His performance during the reported period from January 1995 to February 1998 was rated as ‘a very good performance’. In January 1997 he was given a three-year extension of his appointment [which was subsequently further extended for a final period of six months].

... In March 1998 the [Applicant] was notified that he was to be reassigned to the UNDCP Regional Office in South Africa and that pending his relocation to that office he would be temporarily assigned to the External Relations Unit in Vienna. At the same time, his appointment status was converted to the 100 Series ... at the P-5 level in line with UNDCP policy. The [Applicant] took up his temporary assignment in Vienna on 12 March 1998. The [Applicant] assumed his functions as Representative in the UNDCP [subsequently Office for Drug Control and Crime Prevention (ODCCP)] Regional Office for Southern Africa on 21 July 1998. The [Applicant's] performance during 1998 and 1999 was rated as ‘fully meeting expectations’. [On 4 October 1999, the Applicant was formally notified that his appointment would not be extended beyond 20 July 2000. By letter dated 16 February 2000, this information was reiterated and the Applicant was advised that he would receive separation instructions in due course. On 20 July 2000, the Applicant separated from service at the expiration of his final fixed-term contract.]

Circumstances leading to the decision appealed

... The [Applicant] and the Respondent did not agree on the circumstances prior to and leading to the [non-renewal of the Applicant's contract]. The Respondent contends that this was a legitimate management decision motivated by the fact that the UNDCP South Africa Office's mandate was extended to crime prevention activities and that, therefore, the Representative needed to have specific expertise in this regard, which the [Applicant] did not possess.

... The [Applicant] contends that the ... office in South Africa was, from its establishment in 1998, an integrated ... [o]ffice (covering both drug control and crime prevention issues) and that he had not applied for this position but had been asked by the Executive Director to set up the office. The [Applicant] further stated that when he organised the first visit of the Executive Director to South Africa in March 1999, the latter was frustrated since [the Applicant] had not been able to organize a meeting with President Mandela. ...

... The [Applicant] also claims that he managed the Office in a very satisfactory manner, his performance being rated as ‘fully satisfactory’ both in 1999 and 2000. Further, the [Applicant] claims that in June 1999 he was told by a senior official ... in Vienna that the Executive Director personally felt that he did not ‘project the correct image for a field representative and that he

could never serve again in that capacity'. The [Applicant] claims that he was told that his age and gender were alluded to as 'problems'.

... The [Applicant] claims that the Executive Director had refused to meet him at the Field Representatives Meeting in Vienna in June 1999. ...

... The [Applicant] notes that during his tenure in the ... Office in South Africa, two experts in crime prevention had been appointed to the Office and that at least four new project proposals on crime prevention were submitted to Vienna.

... The [Applicant] finally claims that the real reason for his separation and the selection of an African American [United States] citizen to replace him as of February 2001 was based on the fact the Executive Director thought he would 'look better in the region if he appointed a person of African descent'. ..."

On 30 May 2000, the Applicant submitted an appeal to the JAB in Vienna requesting suspension of the administrative action "to terminate [sic] his appointment". In its report of 16 June, the JAB noted that, while some of the Applicant's rights may have been injured by the contested decision, the irreparability of the injury was not established and, accordingly, recommended that the request for suspension of action be denied. Also on 16 June, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had accepted the JAB's recommendation.

On 19 June 2000, the Applicant requested administrative review of the decision to "terminate [sic] his contract".

On 18 September 2000, the Applicant lodged an appeal on the merits with the JAB. The JAB adopted its report on 6 June 2003. Its findings, conclusions and recommendations read, in part, as follows:

"Findings

...

Merits

53. On the merits of the case, the Panel examined whether any right of the Appellant had been violated by the contested decision. The Panel noted that [General Assembly] resolution 37/126 [of 17 December 1982] established the right for 'staff members on fixed-term appointments upon completion of five years containing good service to be given every reasonable consideration for a career appointment'. It further noted that this was indeed the case with the Appellant as his initial appointment was on 20 January 1995 and the contested decision was taken on 25 February 2000 and his performance during these years was rated as 'very good', 'frequently exceeding expectations' and 'fully satisfactory'. Therefore, the contested decision violated his rights ...

54. Further, the Panel found that the reasons given by the Administration for not renewing the Appellant's contract did not seem the real reasons for the contested decision.

55. The JAB Panel was convinced that, as stated by the Appellant, the presence of two international crime prevention experts in the ... office in South Africa, in addition to the fact that the Appellant's performance had been rated as satisfactory from his entry into function as Representative in the South Africa ... Office, ... and finally his successful management of crime prevention projects until the date of the decision all showed this capacity to continue carrying out his functions properly.

56. The Panel found that the Administration had violated the principle set out by the United Nations Administrative Tribunal ... that it may not be untruthful about the reason for its decisions. Finally, on the Appellant's claim that the Administration and in particular the (then) Executive-Director, had based its decision on a racial/age grounds, the Panel did not find that the elements presented were evidence enough to establish beyond doubt that this was the case.

Conclusions and recommendations

57. The Panel unanimously found that the decision not to renew the Appellant's contract had violated the rights of the Appellant on two grounds: (1) the right established in ... [r]esolution 37/126 ...; and (2) ... the obligation of the Administration not to be untruthful when giving reasons for its decisions.

58. The Panel also found that the financial prejudice suffered by the Appellant was considerable due to his age at the time of the decision and that the decision had injured his professional reputation and his future employment possibilities. As the Appellant has now reached the age of retirement, the remedy could not be re-integration into the Programme. ...

59. The Panel therefore recommends the following financial remedies to be paid to the Appellant:

- (a) One year full salary at the rate of his last salary in order to compensate for the loss of salary suffered due to the decision to terminate employment; and
- (b) \$50,000 to compensate for the lost pension suffered by the Appellant.

..."

On 11 September 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General regrets that he cannot agree with the Board's reasoning and conclusions. Staff rule 104.12(b) provides that consideration for career appointment is not given to staff over the age of 53 years. You were ineligible for such consideration from the beginning of your service with the Organization, as you were already over 53 years old when you were first recruited and almost 60 years old when you completed five years of service. Moreover, even if you were under the age of 53 years old ... such consideration does not automatically translate into an expectancy for continued employment. Indeed, no claim has been made, nor evidence submitted, to the effect that the Administration gave rise, by action or

omission, to an expectancy on your part for continued employment. The Secretary-General therefore does not accept the Board's conclusion that your rights were violated in that regard. The Secretary-General also does not agree with the Board's conclusion that the reasons given for the non-renewal (not termination, as erroneously referred to in your appeal and the Board's report) of your appointment were 'untrue'. The decision by UNDCP management to appoint as head of office someone with expertise in crime prevention neither violates your rights nor is it untrue. Rather, it reflects managerial discretion exercised with respect to the qualifications needed for a particular job. In light of the above, the Secretary-General has decided not to accept the Board's recommendation for compensation and to take no further action on your case."

On 1 December 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The impugned decision was not a valid exercise of managerial discretion and the justification provided was spurious.
2. The burden of proof rests with the Respondent to explain why the Applicant's contract was not extended and why he was not offered an alternative post.
3. Having served for five years, the Applicant was entitled to reasonable consideration for a career appointment.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legitimate expectation of renewal of his contract.
2. The decision of the Respondent not to renew the Applicant's appointment constituted an appropriate use of his discretion with full regard paid to due process, and was not vitiated by prejudice or other improper motives.

The Tribunal, having deliberated from 30 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant was initially recruited on 20 January 1995, as Director of the UNDCP Regional Office in Riga, Latvia, and given a two-year intermediate-term appointment at the L-5 level under the 200 Series of the Staff Rules. His performance from January 1995 until February 1998 was rated as "a very good performance". In January 1997, he was given a three-year extension of his appointment.

In March 1998, the Applicant was notified that he was to be reassigned to the UNDCP Office in South Africa. The Applicant had not sought assignment to South Africa; this reassignment was unprompted by him but, rather, carried out on the

initiative of UNDCP which had selected him to be the first Representative of the newly-established UNDCP office there. At the same time, in accordance with UNDCP policy, his appointment status was converted to the 100 Series and he was assigned to the P-5 level.

The Applicant assumed his functions as Representative in the UNDCP Regional Office for Southern Africa on 21 July 1998. His performance during 1998 and 1999 was rated as “fully meeting expectations”. On 28 September 1999, the Applicant’s fixed-term contract, which was due to expire on 20 January 2000, was extended for an additional six months so that it would expire on 20 July.

By letter dated 4 October 1999, the Applicant received official confirmation that, as he had been told the previous June, his appointment would not be extended beyond 20 July 2000 and, upon the expiration of his fixed-term contract, he would be separated from the Organization and would be repatriated. On 16 February 2000, the Applicant was again informed that no further extension beyond 20 July was foreseen and that he would receive his separation instructions in due course. No further extension was offered to the Applicant and he separated from the service of the Organization on 20 July 2000, on the expiration of his final fixed-term contract.

II. The Applicant’s claims are twofold. He firstly claims that the Administration was in breach of its obligations as owed to him under resolution 37/126 of the General Assembly, which confers upon staff members who have enjoyed more than five years of continuous satisfactory service, consideration for a career appointment. Secondly, he claims that the Administration’s decision not to further renew his contract was unjustified and made in bad faith, and that spurious and untruthful reasons were advanced as justification for the said decision. The Respondent has maintained that the Applicant’s contract was not further extended because the Applicant was considered to be lacking in adequate skill or expertise in the area of crime prevention, which the Administration considered to be necessary or appropriate in light of the additional responsibilities and duties which had been assigned to the post in question.

In essence, the Respondent contends that the decision not to further extend the Applicant’s contract was justified by the needs of the service and was a valid exercise of managerial discretion. The Applicant counters by alleging that the reason given was spurious and designed to conceal a *mala fide* motive. He claims that the Representative would not have personally required particular skill or expertise in crime prevention as the functions of the Representative were, in the main, to represent and

manage both drug control and crime prevention activities in South Africa rather than to be a specialist or expert in crime prevention; that there was sufficient expertise within the office to enable it to perform its duties; that one particular expert was reassigned from the office thereby casting suspicion on the *bona fides* of the reasons advanced; and, that neither the person initially appointed to succeed him on a temporary basis nor the permanent successor appointed thereafter had expertise or experience of the sort which the Respondent says was required. The Applicant contends that these and other matters at a minimum cast grave doubt on the reasons advanced by the Administration as justification and claims that there is no evidence in support of the *bona fides* of these reasons. He asserts that, whilst it is for the Administration to justify the reasons advanced for the decision not to extend his contract rather than for him to establish *mal fides*, the true reason probably arises from the personal antipathy or bias which he believes the Executive Director of UNDCP had against him and by reason of racial prejudice on the part of the Executive Director, whom he believes considered it appropriate to have a person of African descent appointed rather than to have a Caucasian such as the Applicant occupy the Representative post.

The Applicant has further expressed his suspicion or belief that the Executive Director bore spite or ill will against him, blaming him for failing to secure an audience for him with President Nelson Mandela when the Executive Director made his first visit to South Africa in that capacity, and claims that evidence of ill will was further demonstrated when the Executive Director declined to meet with the Applicant for discussions during the Field Representatives Meeting in Vienna in June 1999, but shunned him in an improper way. Finally, the Applicant asserts that there were no “new programme requirements” or “new or shifting mandates” or any other changes which could have justified a decision to replace the Applicant, even if the new appointee enjoyed greater crime prevention experience or skills over and above those enjoyed by the Applicant.

III. The Tribunal must start its analysis of the issues by expressing the considerable sympathy it has for the plight of the Applicant. Here was a staff member whom the Administration had selected to head up the newly-established office in South Africa. The Applicant had not lobbied for the said post. The Applicant’s performance throughout his time with the Organization was assessed either as “a very good performance” or “fully meeting expectations”. One must wonder as to how or why a person hand-picked by the Administration for the Southern Africa post should be told

within nine months of taking up that appointment that, notwithstanding his very satisfactory performance, it was now being decided that his contract would not be renewed after July 2000, not because the post was being abolished but because it was now being alleged that he lacked the expertise required to continue on in the said post, having regard to its changing or expanding roles or responsibilities.

That being said, the Tribunal cannot be influenced by sympathies of this sort and must determine the Application solely on the resolution of the legal issues which arise in the case. The first issue, being the one arising from General Assembly resolution 37/126, is relatively straightforward and can be readily resolved. The text in question, “staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment”, must be read in conjunction with staff rule 104.12 (b) (iii) which provides that consideration for career appointment is not given to staff members over the age of 53. The Applicant was almost 60 years old upon completion of five years’ service, and was more than 60 years old when his final fixed-term contract expired. In these circumstances, the Applicant was never eligible for a career appointment. (See Judgement No. 1040, *Uspensky* (2001) and, also, Judgement No. 712, *Alba et al.* (1995).) The law cannot be construed as requiring the Administration to embark on a futile exercise or to engage in a process which must inevitably fail. Since the Applicant was at all material times ineligible for a career appointment, no right can have been violated because he was never considered for same. Accordingly, this claim must be dismissed.

IV. It must be surely self-evident and recognizable from first principle that where the reason invoked as justifying the making of a discretionary decision transpires to be false or disingenuous, the validity of the decision itself may be rendered invalid or infirm. (See Judgement No. 1003, *Shasha’a* (2001).) For example, if a staff member was terminated, allegedly “in the interest of the Agency” but it transpired that the real reason was on a finding of serious misconduct which had been neither alleged nor proved, the very decision could be nullified or quashed as an abuse of process. (See, for example, Judgement No. 877, *Abdulhadi* (1998).)

Whilst this proposition is relatively straightforward, its application to the facts of this case is somewhat problematical. Problems arise from a variety of factors, not least of which is that the Applicant’s complaints arise from the failure of the Administration to make a decision to prolong his service, rather than from a positive

decision, actually made. This is a real distinction. He was separated, not because of any actual positive decision but rather because his final six-month fixed-term contract expired, and his complaint is that the Administration failed or declined to give him another contract or otherwise to retain him in the employment of the Organization. His various fixed-term contracts had each contained terms specifying that they did not carry expectancy of renewal or conversion or for any other type of appointment with the United Nations. The Applicant has not established any promise made to him or any circumstance whereby a finding that he had enjoyed a legal expectancy to an extension or a renewal could be made. It may well be that the Applicant had entertained a genuine hope that his contract would somehow be extended but he has not sought to adduce evidence of any actual promise, or anything tantamount to a promise, which would have bound the Administration to granting him an extension beyond 20 July 2000. In fact, the evidence indicates that the Applicant had been forewarned as early as June 1999 that his contract was unlikely to be extended.

Difficulties further arise from the question that should there be a legitimate finding that the justification offered *ex post facto* that the Applicant was not granted a further extension because he had lacked the requisite knowledge or experience in crime prevention was disingenuous or even untruthful, how might this entitle the Applicant to compensation for a wrong done, when he was never entitled to an extension of his contract? To put it another way, if the Applicant was never **entitled** to an extension of his contract, how can it be maintained that any right of the Applicant was violated even if an incorrect reason was offered as justification for not offering him an extension thereof?

It appears to the Tribunal that these are difficult and serious questions and that they raise very different issues than those which would arise if spurious reasons had been offered in justification for an action which violated what would undoubtedly be a staff member's right, were it to have been improperly made. If a staff member complains of a decision which has not violated any right, then why should compensation be awarded and, even if compensation should be deemed to be merited, then how should it be calculated for compensation is, by definition, an award made to try in monetary terms to place an Applicant back into the position he would have enjoyed had the **right** not been violated or, to put it another way, to compensate him for the wrong done.

V. The Tribunal should also address the issue as to whether there was sufficient or actual evidence to support the JAB's finding that the justification offered by the Respondent for his failure to extend the Applicant's contract "did not seem the real reasons for the contested decision". The JAB

"was convinced that, as stated by the Appellant, the presence of two international crime prevention experts in the ... office in South Africa, in addition to the fact that the Appellant's performance had been rated as satisfactory from his entry into function as Representative in the South Africa ... Office, ... and finally his successful management of crime prevention projects until the date of the decision all showed this capacity to continue carrying out his functions properly".

The JAB concluded from that finding that "the Administration had violated the principle set out by the United Nations Administrative Tribunal ... jurisprudence that it may not be untruthful about the reasons for its decisions".

The manner in which the JAB's findings and conclusions were phrased does not, in the view of the Tribunal, properly encapsulate what were the true and central issues in those proceedings. The Administration never claimed that the Applicant's performance had been in any way unsatisfactory, nor had it sought to disparage the performance by him of the duties which had been assigned to him when serving in the said post. It merely cited the Executive Director's opinion that "the Representative in the Regional Office for Southern Africa would need to have specific expertise in crime prevention in order to ensure successful implementation of new activities" and that some person other than the Applicant should be assigned the duties of the said post. In the view of the Tribunal, this was an opinion which the Executive Director was entitled to hold as it was he who had overall responsibility for the management and appointment of personnel to positions within the said office. The Applicant and the Executive Director might have held different and opposing views as to what was required of the Representative or whether the Representative himself personally required the expertise in question or whether it was adequate that someone else in the office possessed the requisite experience or skills. Likewise, the JAB was well entitled to conclude that the Applicant had sufficient talent and ability to remain acting as Representative, but where the views of the Executive Director and the views of the JAB were to differ it was the views of the Executive Director which must prevail.

It was the Executive Director who was charged with the responsibility to decide who should be the Representative of the said office and what skills or expertise might be required. The fact that the JAB concluded that the Applicant was capable of

doing the job in a satisfactory or adequate manner does not mean that the opinion expressed by the Executive Director was necessarily erroneous or untrue. These were matters which admitted to different interpretations or to differing conclusions and, in the opinion of the Tribunal, there was no evidence which could have supported a finding that the Executive Director's conclusions were perverse, prejudiced or irrational. In the circumstances, the Tribunal must conclude that the Respondent was entitled to reject the JAB's findings and conclusions and to decline to honour the JAB's recommendation on this aspect.

VI. In the view of the Tribunal, the JAB's conclusion that the Applicant had enjoyed sufficient expertise such as would have enabled him to continue performing the duties of the Representative falls far short of a finding of the type necessary to substantiate allegations of untruthfulness, bias, prejudice or unfairness. For the Applicant to have succeeded in establishing a finding of *mala fides* on the part of the Administration, a properly supported finding of untruthfulness, prejudice or irrationality or like infirmity would have been required. As the Tribunal has consistently held, the Applicant bears the *onus probandi*, or burden of proof, in such cases. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); No. 870, *Choudhury et al.* (1998); and, No. 1069, *Madarshahi* (2002).)

There was nothing in the evidence to support a finding of such a character, particularly where in a case such as this, the Applicant had enjoyed neither a right nor a legal expectancy to have his contract renewed. The net effect of the JAB's conclusions would be that the Administration would always have to establish objective justification for the non-renewal of each and every fixed-term contract, so that, in effect, an expectation of renewal would be implied into all such contracts save where justification for non-renewal could be objectively made out. In these circumstances this claim must likewise fail.

VII. In recent times, the Tribunal, in its Judgements, has dealt with the consequences which may arise when the Respondent provides an inaccurate reason in justification for having made a discretionary decision. (See Judgements No. 885, *Handelsman* (1998); *Shasha'a* (*ibid.*); and, No. 1163, *Seaforth* (2003).) It would seem possible from the award of one year's net base salary recommended by the JAB herein that the JAB misconstrued the jurisprudence of the Tribunal as supporting the proposition that the giving of a false reason for the non-renewal of a fixed-term contract might, *by itself*, require that the Applicant be treated as if he had been wrongly

denied expectancy of renewal. Such an interpretation or understanding would not be justified. Where there is no right, the giving of a wrong reason cannot create such a right nor place an Applicant in a position where he should be treated as if he had enjoyed such a right. Such reasoning would be illogical. However, nothing contained in this present Judgement should be construed as implying that the Administration is automatically immune from the imposition of financial or other consequences where it should seek to explain or justify its decision by proffering a false or disingenuous reason. The giving of a false or invalid reason for a discretionary decision is, in itself, maladministration which may breach a staff member's right to be treated fairly, honestly and honourably. A breach of such a staff member's right may entitle the staff member to compensation for that very wrong, rather than on the basis that the giving of a false reason is evidence in itself that, had it not been given, the staff member would have enjoyed an extension of contract or some other benefit that was "lost" because of the falsity of the reason proffered.

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

(Signatures)

Kevin Haugh
First Vice-President, presiding

Spyridon Flogaitis
Second Vice-President

Jacqueline R. Scott
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary