

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1247

Case No. 1339

Against : The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Brigitte Stern; Mr. Dayendra Sena Wijewardane;

Whereas, on 27 January 2004, a former staff member of the United Nations Population Fund (hereinafter referred to as UNFPA) filed an Application containing pleas which read, in part, as follows:

“II. PLEAS:

1. The decision contained in UNFPA letter dated 28 July 2000 ... and the [decision of the] Under-Secretary-General for Management ... dated 17 November 2003 ... be quashed.
2. Findings of the [Joint Appeals Board (JAB)] Panel ... not be taken into consideration as the JAB ...:
 - a) [Took] three years ... to process the appeal.
 - b) ... [D]id not notify the Applicant [of] the composition of the panel that was constituted to decide the appeal ... and
 - c) ... [D]id not supply the Applicant [with] a copy of the surrejoinder given by the Respondent ...
3. The [A]pplicant be reinstated in UNFPA with effect from [1] September 2000 ...
4. The [A]pplicant requests award of compensation for moral injury for this illegal termination of his services for an amount that may be considered fair and justified by the Tribunal.

5. The [A]pplicant further requests ... legal cost[s] amounting to \$1000.”

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 July 2004 and periodically thereafter until 31 October 2004;

Whereas the Respondent filed his Answer on 29 October 2004;

Whereas the Applicant filed Written Observations on 29 November 2004;

Whereas the Applicant filed an additional communication on 25 May 2005;

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

“Employment History

... [The Applicant] was appointed effective 1 June 1998 on a three-month [fixed-term appointment] as a Typist/Clerk (G-3) in UNFPA project IND/97/P08 in New Delhi; he was a locally recruited staff member, with service limited to the project. His [fixed-term appointment] was extended to 31 August 1999. A Special Service Agreement (SSA) was issued to cover his services as a Secretary for the period 1 September to 31 December 1999. This was subsequently withdrawn and [retroactively] replaced by an extension of [his fixed-term appointment] to 29 February 2000. His [fixed-term appointment] was extended for six months to 31 August 2000, when he separated from ... service.

...

Summary of the facts

...

[In a letter to the Chairperson of the United Nations Staff Association of India dated 23 September 1999, the UNFPA Representative, alluding to complaints regarding the Applicant’s performance, explained that rather than taking harsh action against him by terminating his services, it was decided that his fixed term contract be terminated and that he would be hired instead on SSA for a period of six months. This option was chosen to enable the Applicant to either improve his performance or seek other employment.]

... On 20 October 1999, [the Applicant] addressed to the Secretary-General a request for administrative review of the decision to continue his employment on an SSA, rather than on [a fixed-term appointment]. By letter of 6 December 1999 ... the UNFPA Representative informed [the Applicant] that it had been decided to change his contract from SSA to an extension of [fixed-term appointment].

... On 28 July 2000, [the UNFPA Representative] sent [the Applicant] a letter informing him ‘that it [would] not be possible to extend [his] appointment beyond its expiry date of 31 August 2000’.”

On 17 August 2000, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment.

On 16 November 2000, the Applicant lodged an appeal with the JAB in New York. On 2 March 2001, the JAB was advised that, as the Applicant’s contract specifically stated that his post was with the Development and Support Communication and Advocacy Project, in Delhi, when the funding for this project was reduced, the Applicant’s post was one of many posts that were abolished. The JAB adopted its report on 23 October 2003. Its considerations and recommendation read, in part, as follows:

“Considerations

...

17. [The] Appellant claimed that he had a reasonable expectancy of renewal because his performance had been satisfactory. [The Administrative Tribunal had previously] held that ‘a legal expectancy of renewal would not be created by efficient or even by outstanding performance,’ but could only be based ‘on a firm commitment to renewal revealed by the circumstances of the case’. The Panel found no such commitment in this case.

...

19. [The] Appellant claimed that his due process rights under staff rule 109.1(c)(i) were denied. This claim is clearly invalid. The rule defines the rights of staff members with permanent or probationary appointments; [the] Appellant had neither. Moreover, since his contract was restricted to a particular project, he had no conceivable claim to other posts in the UNFPA, New Delhi office.

20. Finally, [the] Appellant contended that ... UNFPA was guilty of bias and prejudice in its treatment of him. Bearing in mind that it is incumbent on [the] Appellant to prove the existence of bias and/or prejudice, the Panel considered the arguments put forth in support of this contention and found them insufficient.

Recommendation

21. For the reasons set forth above, the Panel makes no recommendation with respect to this appeal.”

On 17 November 2003, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the reasoning and the conclusions of the JAB and had accordingly decided to take no further action on his appeal.

On 27 January 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB violated the Applicant's rights of due process and unduly delayed its report and therefore its findings should not be taken into consideration.
2. The Respondent's contention that the Applicant's post was abolished on account of drastic curtailment of funding in 2000 is factually not correct.
3. The Applicant had a justified expectation of further employment.
4. The Respondent failed to apply the principles contained in staff rule 109.1 (c).

Whereas the Respondent's principal contentions are:

1. The Applicant was employed pursuant to a fixed-term appointment, which carried neither the right to, nor the legal expectancy of, continued employment with the United Nations. The decision not to renew the Applicant's appointment did not violate his rights. The abolition of the Applicant's post was a valid exercise of the Secretary-General's authority.
2. There was no prejudice, improper motive or other extraneous factors behind the decision to abolish the Applicant's post and thus not to extend the Applicant's contract.
3. Neither the contested decision nor the procedures and findings of the JAB were procedurally flawed.

The Tribunal, having deliberated from 20 June to 22 July 2005, now pronounces the following judgement:

I. The present case concerns the non-renewal of a fixed-term contract under the 200 series following the abolition of a post. The Applicant, who objects to the non-renewal, entered the service of UNFPA in 1998 and served on a series of fixed-term contracts until 31 August 2000, when his last contract, of six months' duration, expired.

The Tribunal will first examine the substantive issue regarding the non-renewal of the fixed-term contract after renewals over a period of two years and, second, the procedural problems raised by the Applicant.

II. The Tribunal first reaffirms that, as the Respondent maintains, the Applicant had no "right of renewal" of his contract, pursuant to staff rule 104.12 (b) (ii), which states clearly that "[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". It further observes that staff rule 109.7 provides that "[a] temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". The Applicant's letters of appointment expressly mention the provisions of rule 104.12 (b). The Applicant, by consenting to work under a fixed-term contract, agreed to be bound by the conditions set out in his employment contracts as well as in the Staff Rules. It follows that no right to the renewal of a contract can derive from the mere existence of a series of fixed-term contracts.

III. It is established jurisprudence that even in the event of satisfactory or even outstanding performance a fixed-term contract automatically expires on the expiration date mentioned in it and therefore engenders neither a legal expectancy nor a legal entitlement to its renewal on the ground of quality of performance (see Judgements No. 700, *Benthin* (1995) and No. 1138, *Bonder* (2002)). Consequently, the contentions of the Applicant and the Respondent concerning the quality of the former's performance are irrelevant to the creation of a legal expectancy of renewal. The Applicant cannot therefore invoke the absence of a periodic evaluation report for the year 2000 in support of his contention that he would have had a legal expectancy to the renewal of his contract if the report had been favourable. The absence of a periodic evaluation

report does, however, constitute a procedural irregularity that the Tribunal can take into account in fixing the amount of compensation, if any, to be paid to the Applicant.

IV. Moreover, in the present case, there do not seem to be any special circumstances that could have given rise to a legal expectancy of renewal of the Applicant's contract.

It is, of course, possible for the Administration to create a legal expectancy of renewal by, for example, making specific promises which give a staff member assurances that his contract will be renewed. Such cases are quite few and far between and, in any event, require clear action by the Administration (see Judgements No. 440, *Shankar* (1989); No. 559, *Vitkovsky and Rylkov* (1992), and *Bonder* (*ibid.*)). In the instant case, there are no such circumstances: the Applicant has not presented a single act by the Administration which would give rise to a legal expectancy.

It is equally possible for the Administration to offer an entire category of staff an enhanced opportunity of contract renewal. For example, staff rule 104.12 (b) (iii) affords special protection to staff members who "upon completion of five years of continuous service on fixed-term appointments, ... [have] fully met the criteria of staff regulation 4.2 and who [are] under the age of fifty-three years" by calling on the Administration to give "every reasonable consideration for a permanent appointment" when their fixed-term appointments expire. The Applicant, however, does not invoke this paragraph, and rightly so, for its application is conditional in particular on completion of five years of continuous service, a criterion that is not met here, since the Applicant only worked for UNFPA for two years.

V. The Applicant also contends that the abolition of his post constituted an abuse of authority on the part of the Secretary-General. Staff regulation 9.1 gives the Secretary-General the right to abolish posts if the necessities of service so require. Staff rule 109.1 (c) (i) specifies the protection staff members are to be afforded in the event of abolition of their posts, by providing that

"if the necessities of 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 utilised, 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”.

It follows that the Staff Rules permit the Administration to abolish posts when the necessities of service so require, providing that, if posts corresponding to their abilities are available, staff members with permanent appointments shall be retained in preference to staff members with any other type of appointment. Thus, in accordance with the provisions of this rule, the various categories of staff enjoy differing levels of protection: all other things being equal, viz. competence, integrity and seniority, consideration must be given first to staff members with permanent contracts, then to staff members with probationary contracts, and last to staff members with fixed-term or indefinite appointments.

VI. The Applicant contends that there were no circumstances that justified the abolition of his post. As this is an issue of fact and the Respondent submitted to the Tribunal documents testifying that abolition of the Applicant's post formed part of a general restructuring plan necessitated by a drastic cut in resources, the Tribunal considers that there is nothing in the case file to support the contention that the abolition of the Applicant's post was not warranted by necessities of service. His next contention is that staff rule 109.1 (c) was not properly applied in his case. Not having a permanent appointment, the staff member had no priority over other staff members. Furthermore, his contract was limited to a specific project. The Tribunal concurs with the JAB's findings on this point:

“This claim is clearly invalid. The rule defines the rights of staff members with permanent or probationary appointments; [the] Appellant had neither. Moreover, since his contract was restricted to a particular project, he had no conceivable claim to other posts in the UNFPA, New Delhi office”.

VII. However, it is established jurisprudence that, even where there is no acquired right to renewal of a fixed-term contract, the Tribunal monitors the way the Administration exercises its discretion not to renew a contract. The Tribunal stresses that such monitoring does not concern the substance of the decision, which is a prerogative of the Administration, but only guarantees due process in the broad sense (see *Bonder (ibid.)*).

VIII. The Tribunal will therefore examine the other irregularities to which the Applicant alludes.

IX. In his pleas, the Applicant successively alleges an arbitrary and abusive decision, improper motives, bad faith and procedural irregularities. The Tribunal, in examining the pleas, will not adhere strictly to that classification, but will nonetheless make an exhaustive review of the facts, reserving the right to characterize them as it sees fit.

X. Firstly, the Tribunal observes that it is obligatory for supervisors to evaluate their subordinates' work and that criticism is an integral part of such evaluations (see Judgement No. 594, *Del Rosario-Santos* (1993)). It is established case law that criticism is not, per se, injury and that the burden of proof of an allegation of discrimination or improper motivation in making an evaluation lies with the Applicant (see Judgement No. 312, *Roberts* (1983)). The Applicant must provide clear proof of the Administration's discrimination, bad faith or prejudice. In the documents submitted by the Applicant, the Tribunal does not find evidence to corroborate his accusation of discrimination or improper motivation. On the contrary, UNFPA's letter of 23 September 1999 shows that, by deciding to convert his contract into an SSA rather than purely and simply refusing to renew it, the Administration made sure not to be too harsh on the Applicant. Furthermore, the abolition of a project for reasons of necessity is a valid ground for not renewing a contract. The Tribunal therefore rejects for lack of evidence the allegations of arbitrariness, bad faith or improper motivation.

XI. Second, the Tribunal finds that there were clear procedural irregularities in the consideration of the Applicant's case by the JAB. The Tribunal will successively examine the duration of the appeal procedure before the JAB, the failure to notify the Applicant of the composition of the Panel and the failure to provide him with the Respondent's surrejoinder.

XII. The Tribunal emphatically denounces the time taken to examine United Nations staff members' grievances, which it considers to be a denial of due process. The Applicant filed his appeal with the JAB on 14 November 2000, but it was not until

23 October 2003, almost three years later, that he received its report. The Respondent himself expresses regret at the lengthiness of the proceedings: “[t]he Respondent regrets the delay between the submission of the Applicant’s appeal and the submission of the Panel’s report”. The Tribunal points out that staff rule 111.2 (m) clearly states that “[i]n considering an appeal, the panel shall act with the maximum dispatch consistent with a fair review of the issues before it”. Contrary to what the Respondent claims, excessive delay is an injury in itself when, as a result of the length of the proceedings before the JAB, the Tribunal will only render judgement on the rights of the Applicant five years after the events which led to his appeal.

XIII. The Tribunal also finds that the Applicant’s rights were violated through the failure to inform him of the composition of the Panel. Staff rule 111.2 (e) (iii) states clearly that “[b]efore a panel undertakes consideration of an appeal, the parties shall be notified of the proposed composition thereof”. The Respondent’s presumption that the Applicant had been notified cannot rectify the violation of the Applicant’s rights and has no justification in law.

XIV. On the other hand, in the absence of evidence to the contrary, the Tribunal finds that there was no violation of the Applicant’s rights regarding the Respondent’s surrejoinder, since the latter testifies that he did not submit any surrejoinder to the JAB.

XV. In conclusion, the Tribunal does not find evidence of discriminatory treatment or bad faith in this case. Bearing in mind that the degree of procedural irregularity, while regrettable, was not so serious as to fundamentally vitiate the decision not to renew and bearing in mind the absence of reasonable prospect of renewal, the Tribunal concludes that the procedural irregularities did not fundamentally vitiate the decision that was taken and that the Applicant is therefore entitled only to compensation for the improper handling of his case.

XVI. For the foregoing reasons, the Tribunal:

1. Orders compensation for procedural irregularities in the amount of US\$ 2,000, 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)

Spyridon **Flogaitis**
Vice-President, presiding

Brigitte **Stern**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary