United Nations AT/DEC/1249

# Administrative Tribunal

Distr.: Limited
30 September 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1249

Case No. 1341 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 22 January 2004, a former staff member of the United Nations filed an Application requesting the Tribunal to order:

> "(a) the Secretary-General to indicate in the records of the Organization that the Applicant's period of service with the Organization terminated on 28 February 2001 by reason of expiration of contract;
>
> (b) to pay the Applicant an indemnity in the amount of $20,000 for the harm done to his reputation and the consequent difficulty in finding alternative employment subsequently."

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 1 July 2004;

Whereas the Respondent filed his Answer on 15 June 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:

"***Employment History***

… The [Applicant] joined the United Nations on 3 March 2000 as a Civil Affairs Officer at the P-3 level on an appointment of limited duration under the 300 Series … with the United Nations Interim Administration in Kosovo (UNMIK). His appointment was … renewed until 31 October 2000. Pending investigation of alleged financial irregularities, the [Applicant] was suspended with pay on 31 October 2000. Thereafter, the [Applicant's] appointment was extended on a monthly basis until 28 February 2001. On 3 March 2001, the [Applicant] was summarily dismissed.

***Summary of the facts***

…

… In a Note to the File dated 4 March 2001, [the Chief Civilian Personnel Officer, UNMIK, (CCPO)] stated that on 3 March, the [Director of Administration, UNMIK, (DOA)] informed him that … the Secretary-General had accepted the recommendation to summarily dismiss the [Applicant]. [He further stated that the Applicant] was informed accordingly on 4 March …

… In another Note to the File dated 5 March 2001, [the CCPO stated] that the [Applicant] came to his office on 5 March [and] submitted [a memorandum dated 1 March 2001, submitting his resignation and stating that his 'last contract extension expired on 28 February 2001 and [he did] not wish to accept any further extensions to serve UNMIK'.] … [The CCPO] stated that he made the [Applicant] aware that his resignation would not be accepted since he had already been summarily dismissed. According to [the CCPO, also] on 5 March, the [Applicant] turned in his ID card and signed the written notice of his summary dismissal, dated 3 March …

… On 22 March 2001, [the Applicant's Counsel requested] confirmation that the records of the United Nations indicate that the [Applicant's] contract ended on 28 February 2001 …

… On 1 April 2001, [the CCPO] responded … that the [Applicant] was still a staff member when he was summarily dismissed … Accordingly the [Applicant's] applicable emoluments would be paid through that date. …

[On 18 April 2001, the Applicant requested the Secretary-General to review the administrative decision not to confirm that the records of the United Nations indicate that his appointment expired on 28 February 2001. Subsequently, on 25 June, the Applicant lodged an appeal with the JAB in New York.]

… On 3 July 2001, the [Applicant] wrote to [the] Chief Finance Officer, UNMIK, informing him that he was sending him back a cheque covering a period for which he was no longer employed by the United Nations. ..."

The JAB adopted its report on 10 December 2003. Its considerations, conclusion and recommendation read, in part, as follows:

"***Considerations***

…

21. … [T]he Panel, while acknowledging that under staff regulation 4.1, there is a link between employment and letter of appointment, recognized that in practice … signatures of letters of appointment do not usually coincide with the effective date of appointment. … The Panel noted that the Appellant's letters of appointment were never signed on the actual date of appointment … Furthermore, the Panel observed that such delays never affected the execution of the Appellant's appointments nor had he complained about it. …

22. The Panel agreed with the Respondent that the Appellant's resignation was not valid. Even though it was dated 1 March 2001, it was received only on 5 March ... The Panel noted that in the meantime the Appellant was served notification of his summary dismissal dated 3 March … on 4 March … which he duly signed and received copy of on 5 March ... The Panel questioned the Appellant's willingness to sign the notice, when he claimed to have resigned on 1 March ... The Panel also questioned the timing generally of the Appellant's resignation. In view of the fact that the proceedings took four months to complete, during which the Appellant was suspended with pay, the Appellant could have introduced his resignation sooner had he been sincere.

23. … The Panel was of the opinion that the Appellant by invoking the provision of staff rule 309.5(a) could not reasonably nor legally submit a resignation letter as that supposed the existence of an appointment, which he claimed not to have as of 28 February 2001. The Panel thus noted a lack of consistency in the Appellant's reasoning.

***Conclusion and recommendation***

24. In light of the foregoing, the Panel *unanimously agrees* that there was no merit to the Appellant's case.

25. Accordingly, the Panel *unanimously decides* to make no recommendation in support of this appeal."

On 19 December 2003, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's reasoning and findings and had accordingly decided to take no further action on his appeal.

On 22 January 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent violated staff regulation 4.1 and staff rule 309.5(a) in that he found the Applicant to be a staff member and subject to summary dismissal on 3 March 2001, even though there was no contract of employment subsequent to 28 February.

2. The significance of the Applicant's memorandum dated 1 March 2001 was only that he did not wish any extension of his last contract. The Applicant's use of the word "resignation" was unfortunate and should not be relied on, as it is obvious from the entire memorandum that the Applicant was saying that he would not sign a new letter of appointment.

3. The Applicant's reputation and earning capacity have been seriously harmed by the refusal of the Respondent to indicate in the records of the Organization that the Applicant left the service of the Organization by virtue of the expiration of his contract rather than by reason of summary dismissal.

4. There were inordinate delays in the disposition of the Applicant's case.

Whereas the Respondent's principal contentions are:

1. The Applicant's plea that the United Nations records be changed to show that he left the service of the Organization by virtue of the expiration of his contract rather than by reason of summary dismissal is without merit.

2. The Applicant's claim that this reputation has suffered is glaringly unsubstantiated.

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

I. Central to the present case is the question whether the Applicant was, or was not, still a staff member when he received notice of his summary dismissal on 4 March 2001, that summary dismissal being the consequence of a disciplinary proceeding against him. The Applicant maintains that, having presented his letter of resignation dated 1 March, his relationship with the Organization was terminated on that date, and thus before the sanction of summary dismissal was applied to him, notwithstanding the fact that the resignation was actually presented on 5 March, that is, only one day after he received notice of his dismissal. This contention implies that after termination of the Applicant's relationship with the Administration, no sanction could have been imposed on him by the latter.

II. The Tribunal takes note that the Applicant's contract ended on 28 February 2001; that temporary appointments for a fixed term, such as appointments of limited duration, do not carry any expectations of renewal or conversion to any other type of appointment; and that no notice needs to be given, either by the Administration or the

staff member, for the non-renewal to take effect. This is stipulated in staff rule 304.4 (a) and in the Applicant's letters of appointment. The staff member's relationship with the Organization would have ended on 28 February, had other circumstances not interfered with the general application of that rule.

III. In September 2000, an investigation was conducted to determine whether certain acts committed by the Applicant constituted serious misconduct warranting disciplinary action, possibly even summary dismissal. The Applicant was suspended with pay and, pending the investigation, he was given contracts on a monthly basis. From this the Tribunal can only conclude that the continuation of the Applicant's employment depended on the outcome of the investigation. Naturally, if he were found to be innocent, his relationship with the Organization would have continued pursuant to the terms which existed before the investigation took place. The Tribunal is satisfied that both the Applicant and the Administration considered at the date of expiration of the Applicant's contract on 28 February that that contract was going to be renewed.

In contrast with the reality, the Applicant paints an idyllic picture in which the investigation is barely touched upon. He would have the Tribunal believe that he did not wish to accept further renewals of his contract, because of the deterioration of his health, apparently caused by harassment suffered at the hands of the UNMIK Security Service and gatemen at the Pristina City Hall and Government building. Hence his 1 March memorandum, stating his intention not to accept any further extensions to serve with UNMIK beyond 28 February. The Tribunal notes that, coincidentally, the above-mentioned memorandum was presented on the day following the notification of his summary dismissal by the Administration, an issue which the Applicant completely ignored in the memorandum.

The Tribunal is satisfied, however, that the Applicant continued to be employed solely for the purpose of concluding the investigation and that the only reason the Applicant refused further employment beyond 28 February was to avoid the consequences of the negative outcome of that investigation. It is in this light that the mutual understanding about the successive renewals of the Applicant's contract must be understood: there was a clear understanding - a meeting of the minds - between both parties to the present litigation, that the Applicant's contract would be renewed on a monthly basis until the conclusion of the investigation, whether new letters of appointment were signed on the first day of the month or not. In fact, on several occasions, his monthly letters of appointment were signed well after the date of

expiration of the prior contract: for instance, the letter of appointment for the month of February 2001 was signed only on 16 February, sixteen full days after the date of expiration of the January contract. Moreover, the letter of appointment corresponding to the month of November 2000 appears to have never been signed. Should the Tribunal interpret this to mean that the Applicant had no contract for that month and only resumed employment in December? The record shows that the Applicant continued to collect his salary and acquiesced to the tacit renewal of his contract, just as he did at the beginning of March, until he was notified of his summary dismissal. His "refusal" to accept any future new contracts after February came too late, as did his attempt at resignation. He had plenty of time to take such decision; he could have notified the Administration of his intentions shortly after the incidents with the Pristina gatemen took place which, he considers, constituted a *capitis deminutio*. But as mentioned before, the Applicant only apprised the Administration of his intentions one day after the notification of his summary dismissal, not a minute earlier.

IV. The Tribunal is satisfied that both parties acted upon the conviction that such meeting of the minds referred to above existed. The Administration, by summarily dismissing the Applicant, gave testimony of its conviction that the relationship with the Applicant had not come to an end on 28 February, and the Applicant did the same by presenting his letter of resignation, even if he dated it 1 March and even if he conveniently chose to call it a refusal to accept future renewals of contract. In any case, the legal nature of the memorandum of 5 March is completely irrelevant: if it was meant as a resignation - and there are excellent grounds to consider it as such - it should have included 30 days notice, which it did not. If it was meant only to convey the Applicant's refusal to accept any future engagements, it would have affected only future contracts after the one that commenced on 1 March had ended. The situation would have been no different had the memorandum actually been presented on 1 March, as on 1 March a tacit renewal of the Applicant's contract had already taken place.

V. The letter of appointment is the best proof of employment and its terms establish the obligations of each of the parties. However, employment and its terms may be proved by other means. The Tribunal recalls that in its Judgement No. 95, *Sikand* (1965) it held that:

> "The Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be

> expressed or implied and may be gathered from correspondence and surrounding facts and circumstances". (See also Judgements No.142, *Bhattacharyya* (1971) and No. 376, *Shatby* (1986).)

In the present case, the Tribunal is satisfied that the Applicant's appointment had been renewed at the end of its fixed-term period - 28 February - by another one-month period with the same terms as the previous letters of appointment, and that such inference may be drawn, not only by the practice established between the Applicant and the Administration as mentioned above, but also by the fact that both parties considered that action was required to terminate their relationship: the Applicant presented his resignation and the Administration summarily dismissed the Applicant. The Tribunal is satisfied, moreover, that the only purpose of the resignation/refusal of further renewals was to avoid the bitter result of the investigation.

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

(*Signatures*)

Julio **Barboza**
President

Jacqueline R. **Scott**
Member

**Goh** Joon Seng
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary