



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No: 1254

Case No. 1328

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis, Vice-President; Ms. Brigitte Stern;

Whereas, on 24 October 2003, a former staff member of the United Nations filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 16 December 2003, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, *inter alia*:

“10. ...

...

- (b) To direct that the decision not to renew the contract of the Applicant beyond 31 December 2002 be reversed.
- (c) To further direct that the Applicant be sent an apology from the Respondent and that the Applicant [be] awarded compensation for the termination [sic] of his contract as well as for damages for the unfair treatment he has received and the mental and psychological anguish he has been subjected to as a result of the decision of the Respondent to terminate his contract.
- (d) To further direct that the amount of such compensation should be the equivalent of four years of his net salary at the time of separation plus the annual education grants of his four children at the time of separation.

- (e) To further direct that the [Applicant] be awarded the sum of \$50,000 for consequential and moral damages ...

...”

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 April 2004 and once thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 23 April 2004;

Whereas, on 18 May 2004, the Applicant filed Written Observations amending his pleas as follows;

“The Applicant further requests the Tribunal to:

...

- (b) Direct that ... the Applicant had legitimate and reasonable expectation for contract renewal up until 2005 as long as his past consistent excellent performance was maintained and that the Applicant is entitled to reasonable compensation.

...”

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

On 15 July 1988, the [Applicant] was appointed under the 200 Series as Regional Advisor on Food and Agricultural Policy and Planning at the Economic Commission for Africa (ECA) at the L-5, step III level. In January 1997, after the re-organization of [the] advisory services at ECA, he was appointed, in long-term status under staff rule 204.3 (c), as Principal Regional Advisor on Food Security and Sustainable Development at the L-6, step VI level, a post he encumbered until 31 December 2002 when his fixed-term appointment expired.

Summary of the facts

In July 1995, the newly appointed Executive Secretary of ECA ... took up his duties.

On 28 August 1996, the Executive Secretary sent a letter to all Regional Advisors at ECA [stating] that all the existing regional advisory posts would have to be revised and new job descriptions prepared. Regional Advisors were advised that their contracts would not be extended beyond 31 December 1996 and were invited to apply for one of the new posts. The [Applicant] applied and was selected.

On 8 January 2002, a group of Regional Advisors sent a letter to ... the Officer-in-Charge [(OiC)] of the Human Resources Service Section (HRSS) requesting that, if rumours about the non-renewal of contracts of selected Regional Advisors, including the [Applicant's], were to materialize, the ECA Administration should ensure that, in accordance with [the Staff Regulations and Rules], due process was followed when determining which contracts should be terminated and that the process was transparent.

On 10 January 2002, [the OiC], HRSS, informed the Regional Advisors that ECA was undertaking a review of regional advisory services.

[On 4 April 2002, the Executive Secretary, ECA, met with the Regional Advisors and provided them with details regarding this review, indicating, inter alia, that as a result of the review, a number of the advisors' contracts would consequentially lead to the expiration of some contracts. On 19 June, the Executive Secretary sent a memorandum to all Regional Advisers giving an account of this meeting and adding that those Advisers who would not have their contracts renewed would be so advised by the end of September.]

On 30 September 2002, five Regional Advisors, including the [Applicant], were notified in writing by [the OiC, HRSS,] that their services would no longer be required after 31 December 2002."

On 18 November 2002, the Applicant requested the Secretary-General to review the administrative decision not to extend his appointment.

On 17 December 2002, the Applicant submitted an appeal to the JAB in New York requesting suspension of action. In its report of 30 December, the JAB noted that the "‘long-term status’ under the 200 Series ... did not confer any special rights or procedures at the end of a fixed-term appointment" and concluded that "there were insufficient grounds to decide that he would be irreparably harmed by his separation". Accordingly, the JAB made no recommendation regarding the Applicant's request for suspension of action. Subsequently, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had accepted the JAB's recommendation.

On 20 January 2003, the Applicant lodged an appeal with the JAB on the merits. The JAB adopted its report on 2 September 2003. Its considerations and recommendation read, in part, as follows:

“Considerations

15. The Panel considered first the question whether the decision not to renew the Appellant's contract was arbitrary and wrongful and found no evidence to this effect. The decision was taken after an in-depth review of

ECA's Regional Advisory Services Programme. ... The Panel noted that all Regional Advisors were kept apprised of the review process ... As a result of the review, the activities under the regional advisory services were clustered around emerging priorities ... consistent with the Secretary-General's emphasis on the need to avoid duplication of work and optimize the use of resources in the delivery of advisory services ...

16. The Panel further observed that the process followed by the Respondent in determining which of the contracts of the 14 Regional Advisors were not to be renewed was transparent and did not appear to be capricious or unfair. The Appellant had not been singled out as four other contracts of Regional Advisors had not been renewed ...

17. The Panel found further that the decision not to renew the Appellant's contract was within the discretionary authority of the Secretary-General and that there was no evidence that the contested decision had been tainted by either improper motive or other extraneous factors.

18. With regard to the Appellant's contention that resources of Section 21 of the regular Programme of Technical Co-operation were inappropriately used or managed, the Panel enquired with OIOS which had conducted a management audit at ECA in February-March 2003. OIOS informed the Panel that the ECA management audit report had not been issued yet but that this report '[would] not conclude that Section 21 resources were inappropriately used or managed. ...

19. The Panel considered next the following question which it put to ECA: at the time that the five (5) [R]egional [A]dvisor posts, including the Appellant's, were abolished in 2002, were the resources for the Appellant's post re-deployed from Section 21 of programme budget to other subprogrammes or sections to carry out functions previously carried out by the Appellant as Principal Regional Advisor on Food Security and Sustainable Development? In its response, ECA, pointed out that '[W]hen the posts were abolished in 2002, the resources were not redeployed to other subprogrammes/sections to carry out the functions previously carried out by [the Appellant]. ... These [functions] are carried out now through various cross-cutting core programmes of ECA. Professional staff members under [regular budget] posts are carrying out the work.'

20. The Panel finally considered the question whether the Appellant was given reasonable consideration for further employment. ... The Panel noted that the highest level post in the section for Food Security and Sustainable Development was a P-5 and that the Appellant was already at the L-6, step VI level. The Panel found no evidence that the Appellant was not considered for further employment or that he applied for suitable posts.

Recommendation

21. In light of the foregoing, the Panel *agreed unanimously* to make no recommendation in favour of the present appeal."

On 10 September 2003, the OiC, Department of Management, transmitted a copy of the report to the Applicant and informed him that the Secretary-General accepted the reasoning and the conclusions of the JAB and, accordingly, had decided to take no further action on his appeal.

On 16 December 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The reasons offered by the Executive Secretary of ECA for terminating the contract of the Applicant are at variance with the facts.
2. The JAB erred in finding that the decision not to renew the Applicant's contract was taken after an in-depth review of ECA's regional advisory services. The decision not to renew his contract, like the process leading thereto, was arbitrary and lacked transparency and constituted an abuse of the Executive Secretary's discretion.
3. The claim by the Respondent and the conclusion of the JAB that the Applicant's post was abolished because it did not fit into the re-focused areas of priority of ECA's regional advisory services has no merit. Similarly, there's no merit to the contention that the Applicant's area of work is performed by staff members under regular budget posts.
4. The Applicant had a legitimate and reasonable expectation for renewal of his contract. The JAB erred in finding that his post was not budgeted for 2003, and could not be justified in the Biennium 2004-2005. The Applicant's area of work was also at the heart of the "Sustainable Development Programme" of the 2002-2005 Medium-term Plan.
5. The Applicant was not given reasonable consideration for further employment.

Whereas the Respondent's principal contentions are:

1. The decision of the Administration not to renew the Applicant's contract constituted an appropriate and fair use of its discretion with full regard paid to due process.
2. The Applicant had no legitimate expectation of renewal.

3. The Applicant was granted reasonable consideration for further employment.

4. The Applicant is not entitled to any compensation, or to an apology, nor should the decision not to renew his contract be reversed.

The Tribunal, having deliberated from 29 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant appeals to the Tribunal the decision not to renew his fixed-term contract following a review conducted at ECA in 2002. That review is also the subject of Judgement No. 1232 (2005), which is being rendered by the Tribunal during this session.

II. The first question the Tribunal must address in order to determine whether the Administration's decision not to renew the Applicant's contract was legitimate is the extent of his rights under his 200 Series contract. The Applicant maintains that he had a legitimate expectation of having his contract renewed; the Administration disputes this, citing the relevant texts.

The Tribunal recalls that the Applicant had a fixed-term appointment in long-term status - that is to say, more than 5 years - under the 200 Series. The Tribunal agrees with the Respondent that the Applicant was not, in principle, entitled to renewal of his appointment, citing staff rule 204.3 (iv) which states clearly that "[a] temporary appointment does not carry any expectancy of renewal". This staff rule applies equally to all fixed-term appointments, whether they are short-term, intermediate-term or long-term contracts, as defined in staff rule 200.2 (f).

However, the Tribunal has consistently held that, under certain circumstances, holders of fixed-term appointments - and appointments under the 200 Series are by definition fixed-term - may have a legitimate expectation of seeing their appointments renewed. The Applicant is of the view that such circumstances exist in his case and maintains that he "had legitimate expectation of contract renewal until 2005". The Administration, on the other hand, argues that "[t]he Applicant had no legitimate expectation of renewal".

III. The Tribunal will consider all the circumstances in order to determine whether the Applicant might have a legitimate expectation of contract renewal.

Some of the reasons adduced by the Applicant in support of his claim may be immediately discarded: he cites his excellent performance; he also recalls that “[d]uring the 14 years he was employed as a Regional Adviser at ECA, [his] contract was routinely and constantly renewed”; lastly, he points out that he had embarked on a two-year programme of work and that his contract was not renewed although he had not completed the programme. In this regard, he points out that he had “just completed the first year of a two-year approved work programme that had been approved and fully funded by the General Assembly” and in which specific outputs were required from him. In the view of the Tribunal, these facts - taken individually or together - are not sufficient to give rise, by their mere existence and without any other element, to an expectation of renewal. The Tribunal reiterates its jurisprudence on these issues, first, the non-pertinence of performance to the renewal of a fixed-term contract noting that, “employment with the Organization ceases on the expiration of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even outstanding performance”. (See Judgement No. 980, *Baldwin* (2000), para. III; and also Judgements No. 427, *Raj* (1988); No. 440, *Shankar* (1989); and No. 907, *Salvia* (1998).) Likewise, its case law is clear regarding the non-relevance of the duration of a fixed-term appointment or the number of times it has been renewed. (See *Baldwin* (*ibid.*); and also Judgements No. 422, *Sawhney* (1988); No. 614, *Hunde* (1993); and No. 839, *Noyen* (1997).)

Finally, as regards the argument that expectation of renewal may arise because the Applicant’s workload extended beyond the expiration date of the contract, the Tribunal has only infrequently considered this issue, however, in *Baldwin* it was not insensitive to this argument. In that Judgement, the Tribunal held that there were “some persuasive arguments” which might lead an employee to expect renewal of his contract, one being the “fact that his workload extended beyond the expiration date of his contract”. However, the Tribunal did not conclude that this argument justified renewal of fixed-term appointment.

IV. Having considered the specific circumstances of the instant case, the Tribunal concludes that the Applicant could not reasonably have had any expectations at the

time that the issue of renewal arose, that is to say during 2002, that his appointment would be renewed. In fact, he had received several letters advising all Regional Advisers - including himself - that their contracts might not be renewed. Moreover, the Applicant himself admits that he was not certain of renewal, since he accuses the Administration of having harassed him as early as 1998 adding that he was even “threatened with non-renewal of his contract on several occasions”. The Tribunal therefore concludes that, given all the facts of the matter, there is no reason to believe that the Applicant could claim to have legitimate expectation of having his appointment renewed.

V. The Tribunal must now examine other possible causes of invalidity of the administrative decision separating the Applicant from the Organization, such as arbitrariness, undue process of law, discrimination or other extraneous motivation. The Tribunal recalls its Judgment No. 1003, *Shasha’a* (2001), where it held:

“[I]n general, an employee serving under a fixed-term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12(b). The Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances the contract terminates automatically and without prior notice, according to staff rule 109.7. (See [*Shankar (ibid.)*]; and Judgement No. 496, *Mr. B.* (1990)).”

But if there are countervailing circumstances, including an abuse of the Administration’s discretion in not extending a fixed-term contract, exception has been found by the Tribunal to the above rule. As the Tribunal stated in Judgement No. 885, *Handelsman* (1998):

“The Respondent’s exercise of his discretionary power in not extending a 200 Series contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors that may flaw his decision”.

Also in *Shasha’a*, the Tribunal decided that “when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts”.

The *onus probandi* falls, of course, on the Applicant, as repeatedly decided by this Tribunal. (See Judgements No. 93, *Cooperman* (1964); No. 336, *Maqueda Sánchez* (1984); No. 465, *Safavi* (1989); and No. 515, *Khan* (1991).

In this particular case, the burden on the Applicant was even weightier, as the JAB had already found that there was no evidence of any such “countervailing circumstances”, to use the language of the Tribunal in *Handelsman*. The Tribunal is satisfied that the Applicant could not prove his case. The administrative process towards a reorganization of ECA was openly conducted: the Applicant was informed on 10 January 2002, that there would be a restructuring of the regional advisory services and, at the meeting of 4 April 2002, the Executive Secretary kept the Regional Advisors apprised of the review process and warned them of the possible rationalization of posts. In September of that year, the Applicant was informed that his contract would not be renewed and he was given three months notice of non-renewal. The 27 December 2002 memorandum of the OiC, Office of Policy Planning and Resource Management, ECA, states that “[t]he review was also characterized by extensive consultations - with relevant ECA Programme Managers as well as with various Departments and services at [United Nations] Headquarters”. Due process was, then, observed.

The Tribunal notes the Applicant’s complaint that the replies provided by the Respondent to the questions put by JAB were not transmitted to him for comment, which violates his right to defend himself. The Tribunal has examined the information in question and finds that it is completely irrelevant to the case. The Tribunal deplores that the JAB did not make this information opportunely known to the Applicant, but decides that the Applicant has not suffered any damage as a consequence of that omission.

VI. The Applicant’s attacks concentrate on the principles, priorities and rationale of the re-organization as a result of which his post, together with those of four other Regional Advisers, was abolished. But whether that re-organization, or the technical principles which guided it, was good or bad, is not a matter for the Tribunal to contemplate. The Applicant may not agree with the criteria according to which the restructuring was made. The Tribunal cannot be the judge of any discrepancy, in the first place because it lacks the technical capacity to decide on such matter, but principally

because it is totally irrelevant. The responsibility for the formulation of the reorganization of ECA falls within the Administration's exclusive domain and it is not for the Tribunal to pronounce itself on that matter: the Tribunal cannot substitute its judgement for that of the Administration. The Tribunal can only examine the record for breaches of due process, for arbitrariness and generally for improper motivation and the Tribunal has been unable to find any of those vices in the restructuring of ECA impugned by the Applicant.

The Tribunal finds in the instant case that not even a *prima facie* case has been established by the Applicant and the justification of the Administration is supported by the facts: there was a real process of restructuring ECA, and the Applicant's post was abolished as a result. Due process appears to have been observed. The Tribunal is satisfied that all parties were kept informed and notified. No discrimination has been proved by the Applicant.

VII. The Tribunal turns now to the Applicant's contention that, as his contract was not renewed due to the effective abolition of his post, he had a right to reasonable consideration for future employment with the Organization. The Tribunal finds, however, that the Applicant had no legal right to reasonable consideration.

Staff rule 109.1 (c) reads, in relevant part, as follows.

- "c) Abolition of posts and reduction of staff
- (i) ... [I]f the necessities of the 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 utilized, 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, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. ..."

The Applicant being a 200 Series staff member, the provisions of staff rule 109.1 (c) do not apply to him. As the Tribunal held in *Seaforth*, (Judgment No. 1163, (2004), para. VIII):

“The Tribunal first notes that Respondent obligations stemming from an ‘abolition of post’ are addressed in the rules of the 100 Series, not the rules of the 200 Series. ... Thus, where there is an abolition of a 100 Series post, the Respondent has an obligation to make a bona fide effort to find staff members another suitable post, assuming that such a post can be found, and with due regard to the relative competence, integrity and length of service of that staff member. There is no comparable rule for 200 Series staff members ... It would be unreasonable and unwieldy for the Respondent to incur obligations similar to those required under 109.1.(c) for a 200 Series post, which, again, is inherently temporary.”

In the present case, the Applicant applied to only one post, for which he was not selected, and presented no evidence of discriminatory treatment against him. There can be no obligation for the Administration to employ the Applicant if there are other, more qualified candidates. He further argues that there were several other vacant posts against which the Respondent could have placed him, however, it is impossible to consider someone for a position if he or she does not apply for the job.

VIII. For the above reasons, the Application is rejected in its entirety.

(Signatures)

Julio Barboza
President

Spyridon Flogaitis
Vice-President

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary

DISSENTING OPINION BY BRIGITTE STERN

I. This dissenting opinion had been drawn up as a draft judgement following the Panel's discussion. At the very end of the session, a majority opinion emerged that was different from the one presented here. This majority opinion adopted, word for word, the part of the draft found in paragraphs I to III of the Judgement, with which I can only agree. However, in the interests of coherence, those paragraphs have not been deleted.

The points of disagreement relate to both applicable law and assessment of the facts.

The majority is of the opinion that discrimination is the only ground for censuring the decision not to renew the contract, whereas I am of the opinion that the due process to which a staff member of the Organization is entitled is broader and requires, in particular, that the reason provided should be true, i.e. based on the facts.

The majority is of the opinion that it was for the Applicant to prove that the reason provided by the Administration — an overall reorganization based on a thorough review of future priorities — was supported by the facts, whereas I am of the opinion that the burden of proof is on the Administration.

The majority is of the opinion that the Tribunal is not authorized to take a decision concerning the way in which the reorganization was conducted, "because it lacks the technical capacity to decide on that matter", whereas I am of the opinion that it is precisely for the Tribunal to verify whether the reorganization process was transparent.

The majority is also of the opinion that, concerning the facts, an actual restructuring exercise took place whereas I have not found the slightest evidence of such a process, as the Administration itself simply stated, in its submissions, that it had to be assumed that one had taken place, since the Applicant had not proved otherwise.

Lastly, the majority is of the opinion that the Applicant had no right to reasonable consideration for another post when his post was abolished, whereas I

believe that holders of posts under the 200 series who have long-term appointments are entitled to the minimum reasonable consideration. These few points of disagreement are explained below.

II. The Applicant, who had a long-term appointment under the 200 series, applicable to staff recruited for technical assistance projects, is contesting the decision not to renew his contract beyond 31 December 2002. He entered the service of the Economic Commission for Africa (ECA) in 1988 and, at the time of the events giving rise to the case before the Tribunal, was based in Addis Ababa, was still employed by the Economic Commission for Africa and held the title of Principal Regional Advisor on Food Security and Sustainable Development, working under the United Nations Regular Programme of Technical Cooperation. It should be noted that there had been a restructuring of ECA in 1996 and that all the posts had been redefined, at that time; the job descriptions of the Regional Advisers had been amended and the incumbents of these posts had been invited to apply for the newly defined posts. The Applicant describes the restructuring exercise as follows:

“During the 1996 exercise in which the Applicant competed with others on an equal basis for the reorganized posts, all existing advisory services areas were reviewed and realigned to the new priorities and new Job Descriptions prepared. All the affected Regional Advisers were given a fair and transparent opportunity to compete for the new posts.”

Following this exercise the Applicant was appointed to a new post, which he occupied until the Executive Secretary of ECA decided, in September 2002, not to renew his contract — which was due to expire at the end of the year — citing a further restructuring and the identification of new priorities.

III. The first question the Tribunal must address in order to determine whether the Administration’s decision not to renew his contract was legitimate is the extent of the Applicant’s rights under his 200 series contract. The Applicant maintains that he had a legitimate expectation of having his contract renewed; Administration disputes this, citing the relevant texts.

The Applicant had a long-term appointment — that is to say, more than 5 years — under the 200 series. I fully agree with the majority’s analysis of the applicable law, to the effect that the Applicant was not, in principle, entitled to renewal of his appointment, on the basis of rule 204.3 (d) of the Staff Rules which states clearly that “A temporary appointment does not carry any expectancy of renewal”. This article applies to short-term, intermediate-term and long-term contracts using the terms of rule 202.2 (f) (1) of the Staff Rules.

However, the Tribunal has also repeatedly indicated that, under certain circumstances, holders of fixed-term appointments which means, by definition, appointments under the 200 series, may have a legitimate expectation of seeing their appointment renewed. The Applicant feels that he is precisely in that situation and he maintains that he “had legitimate expectation of contract renewal until 2005”. The Administration, on the other hand, maintains that “(t)he Applicant had no legitimate expectation of renewal”.

IV. I will therefore consider all the circumstances, in the light of the Tribunal’s case law, in order to determine whether or not the Applicant could claim to have legitimate expectation of contract renewal.

V. Some of the reasons adduced by the Applicant in support of his claim that he had legitimate expectation of seeing his contract renewed cannot be accepted. He cites his excellent performance, which the Administration does not dispute; he also recalls that “(d)uring the 14 years he was employed as a Regional Adviser at ECA the Applicant’s contract was routinely and constantly renewed”; lastly, he points out that he had embarked on a two-year programme of work and that his contract was not renewed although he had not completed the programme, for he had “just completed the first year of a two-year approved work programme that had been approved and fully funded by the General Assembly and in which specific outputs were required from him.” In our view these facts — taken individually or together — are not sufficient to give rise, by their mere existence and without any other element, to an expectation of renewal. I will quickly reiterate here the Tribunal’s well-established case law concerning, first, the non-pertinence of

performance to the renewal of a fixed-term contract noting that, “employment with the Organization ceases on the expiration of a fixed-term appointment and that a legal expectance of renewal would not be created by efficient or even outstanding performance” (Judgement No. 980, *Baldwin* (2000), para. III; cf. also Judgements No. 427, *Raj* (1988); No. 440, *Shankar* (1989); and No. 907, *Salvia* (1998)). Likewise, its case law is clear regarding the non-relevance of the duration of a fixed-term appointment or the number of times it has been renewed to the renewal of such an appointment, as is clear from the following excerpt from the *Baldwin* Judgement: “As to the Applicant’s length of service, the Respondent argues that the Tribunal has held that a series of successive fixed-term appointments in and of itself is not enough to create an exception to staff rule 104.12 (b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any type of appointment (cf. Judgements No. 422, *Sawhney* (1988), No. 614, *Hunde* (1993) and No. 839, *Noyen* (1997) and that this applies to staff rule 204.3 (d) as well” (Judgement No. 980, *Baldwin* (2000), para. IV; cf. also Judgements No. 440, *Shankar* (1989) and No. 578, *Hassani* (1992)). This same interpretation applies to rule 204.3 (d). Finally, as regards the argument that expectation of renewal may arise because the tasks in which the Applicant is engaged extend beyond the expiration date of the contract, the Tribunal has less frequently had to decide on the relevance or non-relevance of this argument, but it should nonetheless be pointed out that in the judgement cited above, the Tribunal was not insensitive to this argument and indicated that there were “some persuasive arguments” which might lead an employee of the Organization to expect that his contract would be renewed, one being the “fact that his workload extended beyond the expiration date of his contract” (*Baldwin* (*ibid.*) para. IV). However, I do not feel, under the circumstances, that that fact, even if it were to be indisputably proved, which I will not judge, could justify saying that the Applicant had a legitimate expectation of renewal of his fixed-term appointment.

VI. This conclusion is borne out by the specific circumstances of the case which show clearly that the Applicant could not reasonably have hoped at the time that the issue of renewal of his appointment arose, that is to say during 2002, that he could count on its being renewed. In fact, he had received several letters which clearly

told all Regional Advisers — of which he was one — that their contracts might not be renewed. Moreover, the Applicant himself admits, perhaps unconsciously, that he was not certain that it would be, since he accuses the Administration of having harassed him starting in 1998 adding that he was even “threatened with non-renewal of his contract on several occasions”. The majority therefore agrees with my analysis of this point, to the effect that, given all the facts of the matter, there is no reason to believe that the Applicant could claim to have legitimate expectation of having his appointment renewed.

VII. However, even when there is no legitimate expectation of renewal of a fixed-term appointment, the Administration is not free to act arbitrarily. The essential principles, which make it possible to ensure that the Administration is functioning properly were recalled in the *Bonder* case (Judgement No. 1052 (2002), para. IV).

“It is the established jurisprudence of the Tribunal 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, in order to prevent a discretionary measure from becoming arbitrary. It is especially important for the Tribunal to ensure the right of staff members to an equitable procedure when discretionary decisions are taken by the Administration, in order not to leave them entirely to the mercy of caprice. The Tribunal has many times affirmed the imperative need for oversight of the discretionary decisions of the Administration, in which it seeks a delicate balance between the need to allow the Secretary-General of the Organization room to exercise judgement and the need to provide an essential protection to the staff members working in the service of the Organization”.

VIII. I will therefore consider the discretionary decision taken by the Executive Secretary of the Economic Commission for Africa not to renew the Applicant’s contract. The Tribunal has consistently held that the Administration does not have to justify not renewing a fixed-term contract; the latter, whether it is under the 100 series or under the 200 series, expires automatically on the date indicated in the contract. However, if the Administration gives reasons for its decision not to renew a contract, the Tribunal considers the veracity of these reasons:

“The Tribunal has consistently held that, in general, an employee serving under a fixed-term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12 (b). The Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances, the contract terminates automatically and without prior notice, according to staff rule 109.7. (See *Shankar (ibid.)* and Judgement No. 496, *Mr. B.* (1990).)

On the other hand, when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).)” (See Judgement No. 1003, *Shasha'a* (2001).)

It is on this point that the majority’s analysis differs from my own. I will therefore examine the justification given for non-renewal of the Applicant’s contract.

IX. Whereas in most cases a fixed-term contract expires automatically without need to give a reason, in the case in point, the non-renewal of the contract was presented as the result of an overall reorganization of ECA based on a thorough review of its priorities for future action. The Administration, in effect, states that the Applicant’s contract was not renewed because, on the one hand, new priorities were identified following an in-depth review of the services of the ECA Regional Advisers and, on the other, because the Applicant’s work was not in line with these new priorities; this is evident from the letter informing the Applicant of the Executive Secretary’s decision:

“As you know, the ECA management has over the past year undertaken a thorough review of the Regional Advisory Services, with a view to reorganizing the programme in the context of the ongoing exercise of aligning the Commission’s normative work with emerging priorities and demands.

As a result of this exercise, it has been decided that the priority of ECA’s Regional Advisory Services will for the foreseeable future be placed on the following four thematic clusters:

- Meeting the Millennium Development Goals, requiring expertise in the areas of Gender, Statistics, Poverty Reduction and Health;

(...)

Given that your skills and experience are no longer commensurate with the capacities required by the Commission to meet the demand of these emerging

priorities, I am writing to inform you that your present contract, which is expiring at the end of December 2002, will not be renewed” (my emphasis).

This reason, that the Applicant could no longer meet the emerging priorities set by the Administration, must be supported by evidence. The reason given for non-renewal must therefore be checked against the facts in the file provided by the Applicant and the Administration. The facts invoked by the Respondent must be true otherwise the decision on which they are based is invalid. As the poet Paul Valéry noted, “*un fait mal observé est plus perfide qu’un mauvais raisonnement*” (“A poorly observed fact is more treacherous than poor reasoning”) (*Tel Quel. Oeuvres II. Bibliothèque de la Pléiade, Paris, NRF, Gallimard, 1960, p. 621*). Thus the facts cited by the Respondent will be looked at. A careful analysis of these facts shows, first of all, that this so-called thorough review never took place and, secondly, that, even if it had taken place, the Applicant’s work would have been perfectly in line with the new priorities. I will explain how I came to these two conclusions.

X. It should be recalled, when reviewing the process which led to the non-renewal of the Applicant’s contract, that the latter asked the Joint Appeals Board to stay the decision but the Joint Appeals Board rejected the request; yet in its report the Joint Appeals Board indicated that there were serious and troubling elements in the file and that the substance of the case should therefore be dealt with in an expedited manner. The matter was referred to the Joint Appeals Board on 20 January 2003 and it issued its report on 2 September 2003. In the course of the proceedings, ECA was asked a number of questions to try to clarify the decision-making process which led to the non-renewal of the contract. One of the questions was as follows: “Please explain the review process by which the determination was made to abolish the specific five of the 14 regional advisors posts”. The reply given was extremely vague. The Respondent said:

“as part of the reform initiatives of the Secretary-General, ECA was requested to reevaluate and submit a report on Technical Cooperation programme to ensure effective efficient focusing of the technical cooperation programme and to avoid duplicacy. The review of the programme took into account the

emerging priorities and the regional and global initiatives as outlined in Mr. Zadi's memorandum of 27/12/02. The amendment to the work programme was submitted under the revision of medium term plan that took place in Johannesburg."

The said memorandum, which is in the file, is an extremely general framework and cannot be considered to be a careful review of the posts with a view to eliminating five of them. It is hard to see these very vague and succinct explanations — the only explanations given by the Respondent — as an effective and transparent reorganization process.

XI. What is more, it is absolutely clear from the rather convoluted explanations given in the counter-memorial from the Administration, that no serious and systematic review of the 14 posts concerned took place prior to the decision being taken to eliminate five of them. The Administration does not even try to refute what the Applicant says about this, namely:

"(n)o job description of any Regional Adviser were changed, modified or amended in any way or form whatsoever either before or after the decision of the Respondent unlike in 1996 when an in-depth review of advisory services was carried out at ECA".

The Administration's hypocrisy is especially apparent when one reads the part of its defence concerning the central issue of an in-depth review guaranteeing a transparent and equitable process for employees of the Organization:

"The Respondent has submitted and the JAB has found, however, that an in-depth review of the Regional Advisory Services of the ECA did, in fact, take place (...). This review concluded that the Applicant's area of work should become a cross-cutting issue (...). The services of a Regional Advisor on the issue were, therefore, no longer required (...). The Respondent never sustained that the Applicant's area or work was not important, but that his post was no longer needed so as to avoid duplication. *The Applicant has submitted no evidence to show that, following the review, his area of work is not being carried out by core staff. In the absence of such evidence, it must be concluded that a review of ECA Regional Advisory Services did, in fact, take place, as reported by ECA, and that the Applicant's area of work was moved to core staff and dealt with as a cross-cutting issue*" (my emphasis).

In other words, what the Respondent is saying is that, as the Applicant did not prove that his area of work was not being undertaken, although in a different way, we must conclude that an in-depth review was, in fact, conducted. This is incredible. The Respondent is trying to put the burden of proof on the other party. It is quite clear that the responsibility for proving that there was an in-depth review — on which the Administration claims to have based its decision — lies with the Administration. It is, to say the least, not enough to convince me that an objective procedure was followed, to affirm that in the absence of any proof to the contrary provided by the Applicant we must assume that such a review did, in fact, take place. As the Applicant rightly points out, “(j)ust saying an in-depth review did take place is not enough”. There should have been an indication of the stages of the in-depth review, the people who conducted it, interviews with the 14 staff members concerned, the priorities established, comparative evaluations of how the different posts matched with these priorities, comparative evaluations of the contributions of the different people concerned to those priorities and so on. None of this was provided to the Tribunal; we could therefore paraphrase what the Respondent said about the Applicant, and note that in reality, “the Respondent has submitted no evidence to show that, following the review, the area of work of the Applicant is being carried out by core staff”. I therefore agree with the Applicant that the way the posts to be eliminated were selected was done as in the game of musical chairs, following “the personal whims and preferences of the Executive Secretary”. In my view, therefore, it is clear that the first part of the explanation provided by the Administration as a basis for its decision not to renew the contract is not supported by the facts.

XII. But that is not all; even assuming that there really were new priorities, although they were not updated following a transparent process, the Respondent has not succeeded in convincing me that the Applicant’s area of work was not in line with these alleged new priorities. As the Applicant points out:

“Let us for the sake of argument take the word of the Respondent that the guiding principle behind his decision on contract renewal of the Applicant was

the need to refocus ECA Advisory Services in a few core areas in line with the priorities of the Millennium Declaration and emerging priorities consistent with the Secretary-General's emphasis on the need to avoid duplication of work and optimize the use of resources in the delivery of advisory services. If this were the case, this was indeed a good decision for which the Respondent should be commended for using it as the basis of trying to arrive at a decision about which of the contracts of the Regional Advisers should be terminated and which should be extended. The Respondent, however, fails to show throughout how this decision was applied to all the Regional Advisers involved (...). The record and the facts show clearly that the area of work of the Applicant is at the heart of the Millennium Declaration as well as the main focus of the expressed area of priorities of the Member States."

Even if some slight changes were made to the work of ECA and its Regional Advisers, it is evident that the Applicant's area of focus was at the heart of the priorities for the future. We need only compare the job description and the Millennium Goals. The Applicant thus points to one of the elements of his job description.

"The Applicant was encumbering a post whose Job Description was to provide advisory services to ECA Member States and their inter-governmental organizations in, and I quote **'formulating and implementing policies relating to the nexus of food security, population dynamics and environmental sustainability'** (the nexus issues); **to advise and assist Member States to build and improve the capacities for analyzing and managing policies necessary to address the nexus issues in their inter-related nature**" (emphasis added by the Applicant).

Furthermore, everyone knows that the Goals include eradication of poverty and hunger (goal No. 1) and ensuring of environmental sustainability (goal No. 7).

XIII. These general goals are translated as follows into goals to be achieved by ECA; the language is *almost word for word* the area of work given to the Applicant.

"(...) the renamed 'Sub-programme 2: Fostering Sustainable Development' of the Medium-Term Plan for the period 2002-2005, that was approved by the Commission/Conference of Ministers and the General Assembly reinforced the importance of addressing the **'nexus linking population growth, agricultural production, and environmental sustainability in an integrated and holistic manner'** by emphasizing that: **The issues of population growth, agricultural**

production, and environmental sustainability are intricately linked. This is particularly true in Africa, where population growth and ecological pressures, in combination with poor agricultural productivity are exacerbating poverty. However, in many African countries, the institutional approach for dealing with the issues of population, agriculture and environment, is still largely sectorally based. A major aim of this sub-programme, *established as part of the reforms at ECA*, is to create and sustain awareness among national policy makers about the interconnections or nexus among the issues of food security, population, environment and human settlements. In turn, it is hoped that this will lead to the design of institutional arrangements and implementation of national policies and programmes that reinforce the linkages” (emphasis added by the Applicant).

In addition, we should point out that these various texts are not just general statements of policy but have been put into budgetary terms. These same priorities appear in both the proposed budget for the biennium 2002-2003 and in that for the biennium 2004-2005, as is clear from the following quotations. The Approved Budget for the Biennium 2002-2003 under the United Nations Regular Programme of Technical Cooperation provides for the very tasks indicated in the Applicant’s job description, namely:

“Advisory services missions in response to requests from Governments on formulation of policies and design of strategies and programmes related to the nexus issues (population, environment and agricultural interactions).”

Likewise, the Programme Budget for ECA for the 2004-2005 Biennium, which was approved by the General Assembly, states quite clearly that the priorities continue to be to:

“Strengthen the capacity of member States to design institutional arrangements and implement national policies and programmes that reinforce the linkages within the nexus of food security, population, environment and human settlements in order to achieve sustainable development.”

XIV. It is evident from these various references that the Applicant is quite right when he says that “(t)he area of focus of the Applicant is at the heart of the stated priorities of the Millennium Declaration, the expressed priorities of the member

States and the approved programme of work of ECA from 2002 to 2005”. In other words the Applicant’s specific tasks continue to be part of the priorities within the context of the reform of ECA, and change of priorities is not a justification for abolishing the Applicant’s post and subsequent non-renewal of his contract. I have therefore concluded that the Applicant was right when he said:

“(t)he claim of the ECA administration that the decision not to renew the Appellant’s contract was necessitated by the need to refocus ECA’s advisory services in a few core areas with the priorities of the Millennium Declaration and the emerging priorities, is not supported by the facts”.

My final conclusion regarding whether the Administration exercised its discretionary power properly is that it did not; the decision not to renew his fixed-term contract definitely violated the Applicant’s right to transparent, just and equitable proceedings.

XV. Given that it was not based on a thorough review of the situation of the 14 people concerned, was the decision, perhaps, prompted by openly discriminatory reasons, which in the majority’s view are the only reasons that could taint the legality of the decision not to renew the contract? The Administration refuted the allegation, saying:

“The ill-motives the Applicant is trying to impute upon the Respondent are completely unsubstantiated. The Applicant alleges that the Executive Secretary of ESA took a dislike to him from the start of his incumbency. This was, allegedly, the result of the Applicant taking the post of Regional Adviser on Food Security from the Executive Secretary’s ‘favourite candidate’, as well as the Applicant’s opposition to a certain economic model (the PEDA model), which the Executive Secretary allegedly favored. It was as a result of this dislike that the Applicant contends his contract was not renewed (...). No evidence to prove this assertion has ever been provided, however, and the Applicant has limited himself to making inferences and unsubstantiated claims.”

While it is clear from the documents in the file that there was tension between the parties — they both acknowledge that fact — that, in itself, does not prove that the Administration was prompted by a clearly discriminatory intent during the

reorganization process. There are tensions in all companies and tensions may have been one element in a range of uncoordinated elements that led to the non-renewal of the Applicant's contract. I feel, however, that the facts point more to negligence in the handling of the case than to a clearly discriminatory intent.

XVI. If, as previously admitted, non-renewal of the contract is in violation of the Applicant's right to just and equitable treatment under the Staff Regulations, the actions subsequent to that non-renewal also deserve to be censured by the Tribunal. A whole series of procedural safeguards intended to protect the Applicant's rights were, in fact, not observed.

XVII. Firstly, it has been established that when a fixed-term contract is not renewed and the person concerned has spent a great many years serving the United Nations, the Administration must take him fairly into consideration with a view to reclassifying him, even when the contract in question is a fixed-term contract under the 200 series. This has been clearly spelled out in *Baldwin*, where it is stated that, according to the Tribunal's case law:

“staff members who have served on fixed-term appointments for an extended period (usually five years or more) are recognized by the Tribunal as having the right to receive every reasonable consideration for further employment. Even though this does not amount to a legal expectancy of continued employment, which would be contrary to the specific terms of the fixed-term appointment, a finding that the Organization failed to give every reasonable consideration for further employment will result in the award of damages which may be substantial” (see *Baldwin (ibid.)*, para. IV).

It is interesting to note that this was a case of non-renewal of a contract without justification, i.e. that the Administration had broad discretionary powers and that the Tribunal nonetheless found that, in view of the circumstances of the case, i.e. the Applicant's extended period of service and the fact that his tasks extended beyond the expiration date of the contract, he could reasonably expect to be considered for renewal.

XVIII. When a fixed-term contract is not renewed because the post is abolished, this rule is modulated somewhat, for it is obvious that the Administration has less flexibility, and when there is a restructuring leading to the abolition of several posts it is a good idea to establish an order of priority for the holders of the different types of contract. Rule 109.1 indicates what is to be done and gives the Administration general directives for handling that type of situation:

“(c) *Abolition of posts and reduction of staff*

(i) ... 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 utilized, 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, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service.”

It is clear from the above that, even though employees on fixed-term contracts are far from being at the top of the list, when a post is abolished, they must nonetheless be given reasonable consideration, having regard to their competence, integrity and length of service. There is no similar provision for contracts under the 200 series. However, as indicated in *Baldwin*, even when fixed-term contracts under the 200 series are involved, staff members with extended periods of service are recognized by the Tribunal as entitled to be given reasonable consideration for further employment. This is not a legitimate expectation of renewal, but simply an expectation of reasonable consideration according to the facts in each case. This obligation to give consideration also applies, in our view, in cases of non-renewal due to the post being abolished, even if the Administration’s obligation in such cases cannot be the same as its obligation towards staff members appointed under the 100 series, who have preference over staff members appointed under the 200 series. The Administration does not dispute this obligation and has told the Applicant that it did not violate this obligation indicating in its defence that “(t)he Applicant was granted reasonable consideration for further employment”. However, it turns out that these are just empty words, for this statement is totally belied by the facts. The Applicant tells the Tribunal that he “was never given any consideration for further employment

(...). The fact is that the Respondent failed to give the Applicant any consideration whatsoever for any post anywhere at anytime which is the Applicant's minimum requirement". He says that "a new post titled 'Regional Adviser on Poverty Strategies' was created and advertised, a post which the Applicant was eminently qualified to fill and for which he applied and did not even receive the simple courtesy of an acknowledgement of his application". The Administration has given no proof that it gave the slightest consideration to the Applicant, for he was not even on the shortlist of candidates for that post. The minimum reasonable consideration has therefore not been established.

XIX. I have also reviewed the proceedings before JAB so as to see whether the rights of the defence were observed. The Applicant said that the Respondent's replies to the questions put by JAB were not transmitted to him for comment, which is contrary to the rights of the defence. He describes the proceedings in JAB as follows:

"The JAB Panel admits that during its proceedings it requested for additional information from the Respondent.

The JAB Panel then proceeded to accept without question and at its face value, the response provided to it by the Respondent. What is worse, the Panel did not even give the Applicant the opportunity to rebut the said additional information even though it knew or should have known that it was the subject of contention, and concluded on the basis of this unrebutted additional information unilaterally supplied by the Respondent, that: (i) the decision to terminate the contract of the Applicant was taken after an in-depth review of ECA's Advisory Services Programme; and (ii) that the process followed by which the determination was made by ECA to abolish the post of the Applicant was transparent. The [Tribunal] is respectfully called upon to find that the manner in which the above information was obtained and used is clearly biased, unfair and unjust in that it violated the rules of procedure of the JAB itself".

It should be noted that the Administration's reply on this point is rather strange and relates to the substance; it concedes that it confined itself to reaffirming its statements rather than substantiating them adding that it was therefore not necessary to give the Applicant a chance to reply. According to its counter-memorial:

“The Applicant complains that the JAB did not offer him the chance to rebut statements from the administration to the effect that an in-depth review of ECA’s Advisory Services Programme took place, and that the process followed to decide which of the Regional Advisors’ contracts would not be renewed was transparent. The Respondent, however, had introduced no new evidence for the Applicant to rebut. The Respondent had simply confirmed to the JAB its stated position.”

In saying that it provided no new evidence meriting comment, the Administration does not refute the fact that the replies sent to JAB were not sent to the Applicant; the latter’s allegations must therefore be considered as having been confirmed. I consider that the fact that Respondent’s replies — irrespective of their importance or relevance — were not sent to the Applicant, constitutes a further example of the way the Administration violated the principle of transparency and the Applicant’s right to due process.

XX. In view of the many procedural violations committed by the Executive Secretary of ECA a decision must be taken on a fitting remedy. The Tribunal has had occasion to point out that, in the most serious cases, the appropriate reparation may be to cancel the administrative decision in question, whereas in other cases it may be only to provide compensation:

“Depending on the extent to which proper procedures have been ignored and on the existence of solid prospects for renewal, the Tribunal may conclude that the procedural irregularities do not fundamentally vitiate the decision and that the applicant is entitled only to a limited compensation for the inadequate treatment of his or her case; or it may conclude that, although the applicant does not have a right of renewal, the procedural irregularities were so serious or so relevant to the decision not to renew that the non-renewal decision should be considered illegal and the staff member entitled either to renewal of his or her contract or to compensation in lieu thereof if the Administration refuses to comply. The latter conclusion applies in principle only in cases where there have been serious and manifest violations of the rights of the staff member and also where the likelihood that the staff member’s contract would be renewed was particularly strong for general and/or specific reasons”. (See *Bonder (ibid.)*, para. VI).

Inasmuch as I have concluded that the Applicant had no legitimate expectation of renewal of his long-term appointment under the 200 series, I believe that compensation should have been provided as adequate reparation for the serious procedural irregularities surrounding and following the non-renewal of his contract.

(Signatures)

Brigitte **Stern**
Member

Geneva, 22 July 2005

Maritza **Struyvenberg**
Executive Secretary