



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1270

Case No. 1353

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas a former staff member of the United Nations filed an Application which was received by the Tribunal on 12 May 2004, requesting the Tribunal, *inter alia*, as follows:

- “a. [To order] maximum compensation for moral and other damages, as established under paragraph 1, article 9 of the Statute;
- b. To declare that the decision of non-renewal of contract did not respect the guarantees of a regular procedure and order reinstatement of a fixed-term contract to the Applicant;
- c. To order hearing of ... witnesses before proceeding to consider the merits of the application ...”

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 September 2004 and twice thereafter until 31 December;

Whereas the Respondent filed his Answer on 20 December 2004;

Whereas the Applicant filed Written Observations on 16 February 2005;

Whereas, on 1 November 2005, the Tribunal decided not to hold oral proceedings in the case;

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 1 January 1999 the [Applicant] was appointed on a two-year fixed-term appointment as Economic Affairs Officer at the P-4 level, in the Unit on Investment and Corporate Strategies of the Division of Production, Productivity and Management at [the Economic Commission for Latin America and the Caribbean (ECLAC)] in Santiago, Chile. Her contract was extended until 31 May 2001, when the [Applicant] separated from service.

Summary of the facts

.. According to the [Applicant], in November 1999, shortly after the completion of her contribution to the Annual Report, she was excluded from most of her duties in the Unit. When she asked the Chief of the Unit for the reasons behind the decision to exclude her, he confirmed orally that her contribution to the Report was of no use and that this would bear consequences on the renewal of her contract.

... In January 2000 the [Applicant] asked for an interview with ... the Chief of the Division to discuss the hostile situation she was facing and to present him with a written report of the activities that she had carried out in 1999. The Chief of the Division informed the [Applicant] that he would not review the ratings placed by the first appraising officers in his Division but he would himself instead assess the performance of the staff members in his Division. ...

... In March 2000, according to the [Applicant], she prepared her work plan for the period 2000-2001, but she was never given an opportunity to discuss it with either of her two supervisors. She remained without an agreed-upon [Performance Appraisal System report (PAS)] work plan as [of] April 2000.

... The [Applicant's] original PAS rating for the period 1999-2000 ... was 'fully meets performance expectations'. According to the [Applicant], in an attempt to alter her report, a page bearing her signature was appended to another performance evaluation, which she had never seen, ... rating [her performance as 'partially] meets performance expectations'. When asked by the [Applicant], [the] Chief of the Division accepted ... responsibility [for] this ... and stated that he felt he did not have to justify his action.

... On 14 September 2000, the [Applicant] submitted a memorandum to the Executive Secretary of ECLAC, in which she requested [that] action ... be taken to investigate this apparent fraudulent procedure and to convene a Joint Disciplinary Committee to consider and recommend on this alleged misconduct. According to the [Applicant], no action was ever taken to respond to this request.

... Also on 14 September 2000, the [Applicant] requested ... [permission] to examine her file in order to make [a] formal claim to ECLAC's Panel on

Discrimination and other Grievances [(the Grievance Panel)]. She was informed by the Chief of the Personnel Section that the Chief of the Division did not intend to renew her contract. The [Applicant] received a letter confirming this fact.

... On 30 October 2000, the [Grievance Panel] transmitted its report ... [The Grievance] Panel found 10 irregularities in her PAS process. [The Grievance] Panel recommended *inter alia* the extension of the [Applicant's] contract for a period of four months (with a new PAS for a period of six months). The Executive Secretary accepted the [Grievance] Panel's recommendation and extended the [Applicant's] contract accordingly until 30 April 2001. The [Applicant] was left, however, under the same supervisor.

...

... On 27 April 2001, although no discussion of work plan had taken place, her supervisor set a rating of 'partially meets performance expectations' and recommended the non-renewal of her contract. That recommendation was mainly based on the grounds of 'lack of integration [into] the Division'. On 30 April 2001, the [Applicant] requested the constitution of a Rebuttal Panel. The [Applicant's] contract was extended for one additional month, until 31 May 2001. ... In its report of 24 May 2002 ... the Rebuttal Panel concluded that the rating given to the [Applicant] by her supervisor was 'fair'. However, in the methodology, the Rebuttal Panel stated that: 'the [Applicant] was not interviewed because she was away from the country and that there were several attempts to interview her by telephone, but without success'.

... On 11 June 2001, the [Grievance Panel] submitted ... a '[second] report regarding the grievance submitted by [the Applicant]'. In this report, the Grievance Panel, *inter alia*, 'reiterated the recommendation made in its first report [of 30 October 2000] regarding the importance of following the appropriate steps in the application of the PAS, and the responsibility that both the direct and the hierarchical supervisors, as well as the Personnel Section have in this regard.'

On 31 May 2001, the Applicant requested the Secretary-General to review the administrative decision not to renew her fixed-term appointment.

On 5 September 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 19 February 2004. Its considerations, conclusion and recommendation read, in part, as follows:

"Considerations

...

26. The Panel ... found several procedural irregularities, which are outlined below:

- a) No action was taken when the Appellant brought to the attention of the Executive Secretary ... the alleged misconduct committed by the [Chief] of the Division. ... The Panel felt that an internal investigation was warranted to establish properly the facts in

this case, since there was *prima facie* evidence proving that the alleged misconduct was committed.

b) With respect to the PAS process, the Respondent recognized that there were serious lapses on the administration of the PAS system and that the PAS rules were not followed. The ... Panel noted the argument of the Respondent that ... the problem was endemic to the Division, due to the management style of the [Chief] The Panel felt that ... [this] was not an excuse to release ECLAC's Administration from its responsibility *vis à vis* the Appellant...

c) In this regard, the Panel also noted document A/56/930 of 23 April 2002, 'Report of the Office of Internal Oversight Services (OIOS) on the inspection of programme management and administrative practices in [ECLAC]'. ...

...

d) ... From the records the Panel found it impossible to find factual basis to support either the contention made by the Appellant or the Respondent regarding [the issue of the Rebuttal Panel's failure to interview the Appellant]. However, the Panel did note that the Rebuttal Panel's report was submitted only on 24 May 2002, one year after it was constituted and after the Appellant's contract ended.

27. The Panel also noted that the Rebuttal Panel in its report ... concluded that the Chief of the Division's evaluation of 'partially meets performance expectations' was justified. ... The Panel found that the existence of procedural flaws, including the flaws in the Rebuttal Panel's proceedings, even if they may be held to vitiate the results of the body's work, in no way indicate that, had the Rebuttal Panel observed the due procedure, the Appellant's contract would have been renewed.

28. The Panel further considered the remaining contentions of the Appellant ... and found no evidence to substantiate them.

Conclusion and recommendation

29. The Panel *unanimously concluded* that there were significant procedural flaws in the conduct of the PAS and the rebuttal process. Although it was impossible to prove whether the Appellant's possibilities of renewal of contract have or have not suffered as a consequence of such errors of procedure, the Administration should be liable and adequate compensation should be given to the Appellant.

30. Accordingly, the Panel *unanimously decided to recommend* that, in view of the fact that the procedural errors committed cannot be corrected otherwise, the Appellant be awarded a sum equivalent to three months' net base salary at the rate in effect on the date of her separation from service."

The Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application, which was received by the Tribunal on 12 May 2004.

On 9 November 2004, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case, and has decided to accept its recommendation for compensation in the amount of three months’ net base salary for the procedural irregularities concerning your PAS and the rebuttal process”.

Whereas the Applicant's principal contentions are:

1. The compensation recommended by the JAB is not adequate considering ECLAC’s “significant procedural flaws” in the non-renewal of the Applicant's fixed-term contract.
2. The totality of circumstances, i.e. the chain of procedural irregularities, violations of due process as well as the misconduct of the Applicant’s supervisors and the hostile environment faced by her constitutes harassment on the part of the Administration of ECLAC.
3. The fact that the Applicant was not singled out within the Division but that irregularities and “abuse” were inflicted on others as well does not lessen the Applicant’s grievance or the harm caused to her.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the legal expectancy of continued employment with the Organization under her fixed-term appointment.
2. The Applicant’s performance did not meet the highest standard of competency expected of staff members.
3. The Applicant has been adequately compensated for the procedural irregularities in the conduct of her PAS and the rebuttal process.
4. There is no evidence that the decision not to renew the Applicant’s fixed-term appointment was improperly motivated or an abuse of discretionary authority, or that she was subjected to isolation, abuse or harassment.

The Tribunal, having deliberated from 1 to 23 November 2005, now pronounces the following Judgement:

- I. In this Application, the Applicant requests the Tribunal as follows: to declare that the non-renewal of her fixed-term appointment violated her rights; to order her

reinstatement; and, to award maximum damages as compensation for the procedural irregularities in her PAS and in the PAS rebuttal process. The Applicant maintains that the three months' net base salary recommended by the JAB and accepted by the Secretary-General is not sufficient compensation for the violation of her rights.

II. The Applicant joined ECLAC on a two-year fixed-term appointment as an Economic Affairs Officer, at the P-4 level, on 1 January 1999. Her contract was extended through 31 May 2001, when she separated from service.

The Applicant's PAS report for the period 1999-2000 initially rated her performance as "fully meets performance expectations". However, after she signed that report, the page bearing her signature was appended to another PAS report, changing her rating to "partially meets performance expectations". The change was not discussed with the Applicant and, when asked about it, the Chief of the Division, who had prepared the Applicant's report, accepted responsibility for the change in the rating, claiming that he did not have to justify his actions.

In September 2000, the Applicant was informed that her contract would not be renewed. The Applicant subsequently submitted to the Grievance Panel a complaint alleging that she had been subjected to harassment and discrimination.

In its first report, dated 30 October 2000, the Grievance Panel listed its findings of 10 procedural irregularities in connection with the Applicant's PAS process, including the following: the failure to carry out a midpoint review; the above-mentioned change in her rating; the fact that this change in her rating was based primarily on events which took place subsequent to the reporting period; the inclusion of this negative document in her file without her knowledge; and, the failure to discuss the Applicant's work plan with her, as of April 2000.

The Grievance Panel also noted "serious lapses in the [Applicant's] supervision" and that, despite her supervisor's claim that "her work was of no use to him", the text prepared by her "was published almost in its entirety".

The Panel concluded that while it could not sustain a claim of gender discrimination, "no clear attempt had been made to integrate [the Applicant] into the working team ... which led to her isolation, hampered her work and adversely affected her performance". The Panel recommended, inter alia, that only the original PAS which the Applicant had signed be included in her file and that the Applicant's appointment be extended through April 2001 to allow for a new PAS to be prepared "with all the appropriate steps being observed". The Applicant's contract was extended

accordingly and, on 27 April 2001, although no discussion of work plan had taken place, the Applicant's supervisor completed her PAS, rating her performance as "partially meets performance expectations". He also recommended that the Applicant's contract not be renewed, primarily on the grounds of her "lack of integration [into] the Division". The Applicant's contract was, however, renewed for one more month, through May 2001, to allow her to rebut this PAS.

On 11 June 2001, the Grievance Panel submitted its final report in the Applicant's case concluding that there was "reasonable ground" not to renew her contract. On 24 May 2002, the Rebuttal Panel, despite not having interviewed the Applicant, issued its report, concluding that the rating given to her was fair.

III. The Applicant requests the Tribunal to order her reinstatement as the decision not to renew her contract was taken in violation of her rights. Staff rule 104.12 (b) (ii) provides that "the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". Staff rule 109.7 (a) 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 Tribunal has consistently upheld these rules, while also holding that an expectancy of renewal "may be created by countervailing circumstances, such as violation of due process, arbitrariness or other extraneous motivation on the part of the Administration" (see Judgement No. 1144, *Miller* (2003)), or if an express promise or firm commitment were made to the staff member. (See Judgements No. 440, *Shankar* (1989) and No. 885, *Handelsman* (1998).)

In the present case, it is clear that the Applicant could not have had an expectancy for the renewal of her contract. The first indication of the intention not to renew her contract would have been in the improper change of her rating by the Chief of the Division, which the Applicant knew of as early as September 2000. The Applicant herself maintains that there was no improvement in her relations with her supervisors even when her contract was extended to allow for a new PAS to be prepared; in fact, she argues that she should not have remained under the same supervisor.

There is no doubt that no promise of an extension was made to the Applicant. Moreover, while the Grievance Panel found numerous procedural irregularities in the process of the Applicant's 1999-2000 PAS, it appears that its recommendation, that only the original PAS for 1999-2000 which rated her performance as "fully meets

performance expectations” be placed in her official status file, was implemented. Her subsequent PAS rated her performance as “partially meets performance expectations” and the Applicant was not successful in her rebuttal of this PAS. Considering these circumstances, it would have been quite unrealistic for the Applicant to have an expectancy for a renewal of her appointment and, accordingly, the Tribunal finds that no such expectancy was created.

IV. Concerning the Applicant’s claims of harassment and discrimination, the Tribunal notes that the Grievance Panel found no indication of gender discrimination and did not make any comment which could indicate a finding of harassment. The Tribunal also notes that, just as the Grievance Panel found lapses in the Applicant’s supervision, so did OIOS which, in addition also expressed “serious doubts” as to the Chief of the Division’s “willingness, preparedness and ability to serve as a senior supervisor and manager”.

The Tribunal notes that the JAB concluded that

“[T]here were significant procedural flaws in the conduct of the PAS and the rebuttal process. Although it was impossible to prove whether the [Applicant’s] possibilities of renewal of contract have or have not suffered as a consequence of such errors of procedure, the Administration should be liable and adequate compensation should be given to the [Applicant].”

The Tribunal concurs with the JAB’s conclusion and, furthermore, finds that in deviating from its own rules, the Administration prejudiced the Applicant. The Tribunal has previously held that “[w]hile the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules.” (Judgement No. 943, *Yung* (1999).) The Tribunal has also held in Judgement No. 1060, *Baddad* (2002), paragraph III, citing ILO Judgement No. 495, *in re Olivares Silva* (1982) that

“[T]he first and greatest safeguard against the operation of prejudice lies in the procedural requirements which every set of staff regulations contains and whose main objective is to exclude improper influence from an administrative decision. ... [P]roof of prejudice is rendered unnecessary when procedural requirements have not been observed.”

In the present case, procedural irregularities which led to the violation of the Applicant’s rights had been found by both the Grievance Panel and the JAB. The Tribunal accepts these findings, as, indeed, did the Respondent. The Tribunal, however, is of the view that the compensation awarded to the Applicant constitutes

inadequate compensation. In reaching this conclusion, the Tribunal considered the serious flaws that existed at several stages of the evaluation of the Applicant's performance and that, while it seems that the Administration had the intention of rectifying prior flaws, flaws just seem to have accumulated. In particular, the Tribunal would point out the serious defects in the preparation of the Applicant's first PAS, especially what seems to be a fraudulent use of her signature by her supervisors and in regard to which, apparently, no action was taken by the Respondent; the irregularities in the preparation of her second PAS, which concluded that she did not meet performance expectations despite not having discussed a work plan with her; and, finally, the Rebuttal Panel which considered this PAS, took more than a year to complete its work and, despite having interviewed several witnesses, never interviewed the Applicant herself.

V. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid additional compensation equivalent to six months' net base salary at the rate in effect on the date of this Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Brigitte Stern
Member

Goh Joon Seng
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary