United Nations AT/DEC/1176

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1176

Case No. 1268: PARRA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas at the request of Alan Parra, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 April 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 26 April 2002, the Applicant filed an Application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 18 July 2002, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal to order:

"1. That the unsigned [Performance Appraisal Report (PAR)] be expunged from his record;

2. [That] the written reprimands issued … be expunged from the [Applicant's] record;

3. … The [Applicant] … respectfully requests the Tribunal to [award him] compensation equivalent to two years' salary and damages in the amount of $10,000."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 19 November 2002 and periodically thereafter until 31 January 2003;

Whereas the Respondent filed his Answer on 24 January 2003;

Whereas, on 29 August 2003, the Applicant filed Written Observations amending his pleas as follows:

> "1. … The Applicant also requests that the Administration be sanctioned for its failure to conduct the investigations into his alleged wrongdoings in a fair and impartial manner, as well as its failure to investigate fairly the charge of sexual harassment and the wrongful misuse of his phone line …
>
> 2. … [T]he Applicant respectfully requests all documents related to the complaint of sexual harassment …"

Whereas the facts in the case are as follows:

The Applicant joined the United Nations High Commissioner for Human Rights (UNHCHR) on a fifteen-day short-term appointment, as a Human Rights Officer at the P-2 level, on 17 December 1993. His contract was extended several times and, effective 5 April 1995, he was promoted to the P-3 level. The Applicant was granted several further extensions of contract, the last one until 31 July 2000, when he separated from service.

The Applicant's evaluation report for the period 17 December 1993 to 15 April 1997 rated his performance as "excellent" and for the period May-December 1998, his performance was evaluated as "frequently exceeding expectations".

Apparently, in July 1999, the Applicant's fiancée, who was a Junior Professional Officer in the same office, brought a sexual harassment complaint against one of her colleagues.

On 23 August 1999, the Applicant wrote to the Senior Administrative Officer, OHCHR, requesting him to conduct an investigation to determine who had made unauthorized phone calls from his phone. According to the Applicant, the calls had probably been made by the same staff member accused of harassing his fiancée.

On 26 November 1999, the Applicant's first reporting officer signed the Applicant's performance appraisal (PAS) for the period May-December 1999, rating the Applicant's performance as "does not meet performance expectations". This PAS was not signed by the Applicant.

On 2 November 1999, one of the Applicant's colleagues filed a complaint against the Applicant, alleging that he had taped an unsigned handwritten note to his computer. The colleague further alleged that this was yet another incident in a series of intimidating and

threatening steps taken by the Applicant. Subsequently, on 4 November, the Security Section conducted an investigation, during which the Applicant admitted that he had written the said note. In his report dated 5 November, the Security Officer who had looked into the matter concluded that "having observed the behavior of both [the Applicant] and [his fiancée], they could at any time lose control of themselves and become violent". The Security Section thus recommended that appropriate action be taken to ensure the safety of the staff members working at the Palais Wilson. That same day, the Applicant was given a written reprimand for his "unacceptable and threatening behavior towards [his] colleagues". The reprimand expressed strong disapproval of the Applicant's conduct, characterizing it as "misconduct for which disciplinary measures may be imposed".

On 9 November 1999, another incident took place, during which the Applicant punched a name-plate in another staff member's office. Consequently, that same day, the Applicant was informed that, in accordance with staff rule 110.2 and paragraph 5 of ST/AI/371, entitled "Revised Disciplinary Measures and Procedures" of 2 August 1991, effective immediately he would be suspended from duty with full pay, for an initial period of one month, pending investigation. The Applicant was also informed that the suspension did not constitute a disciplinary measure and that he should submit his comments and explanations by 22 November.

Also on 9 November 1999, the Applicant was placed on certified sick leave, which extended over several months, until his separation from service.

On 3 December 1999, the Applicant was informed that OHCHR had recommended not to extend his appointment beyond its expiration date, on 31 December.

On 7 December 1999, the Applicant was issued a second written reprimand, and was cautioned that, any recurrence of such behaviour would lead to disciplinary proceedings. However, the suspension from duty would not be extended and the Applicant was to report for duty on 9 December.

On 22 December 1999, the Applicant requested the Secretary-General to review the following administrative decisions: a) not to renew his fixed-term contract; b) to suspend him with full pay for an initial period of one month; and, c) to issue him with a written reprimand. The Applicant also requested permission to submit his appeal directly to the Administrative Tribunal. On 4 January 2000, the Applicant was informed that his request for direct submission had been rejected.

On 19 January 2000, the Applicant submitted an appeal to the Joint Appeals Board (JAB) in Geneva requesting suspension of action in connection with the decision not to renew his fixed-term appointment. On 25 January, the JAB considered the Applicant's request and

concluded that the Applicant would not be injured by implementation of the contested decision. However, the JAB considered that the short notice given to the Applicant regarding the non-renewal of his appointment, would likely result in such injury. Accordingly, the JAB recommended suspension of action until 29 February. On 27 January, the Under-Secretary-General for Management, advised the Applicant that the Secretary-General had agreed with the JAB's conclusion. However, as the Applicant was on sick leave when his appointment was due to expire, his separation could not be effected and, accordingly, the contested decision had not been implemented. The Secretary-General thus decided to take no action on the request.

On 16 March 2000, the Applicant lodged an appeal with the JAB on the merits.

On 13 July 2000, the Applicant submitted his resignation from the Organization. His resignation became effective on 31 July.

The JAB adopted its report on 9 October 2001. Its considerations, conclusions and recommendations read, in part, as follows:

> **"Considerations**
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> …
>
> *Merits*
>
> …
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> 49. Regarding the Appellant's arguments [that] the Organization failed to provide him with adequate objective reasons for the non-renewal of his contract, the Panel considered that, legally, the Organization did not have to provide any reasons since it was stated in the Appellant's contract that it carried no expectancy of renewal. The Panel nevertheless found that the short notice given to the Appellant … was not a reasonable delay. Given the Appellant's long years of services with the Organization, the Panel noted that this was … not in line with the Organization's established practice to inform a staff member at least thirty days before the expiration date of his/her contract.
>
> 50. Moreover, the Panel was concerned about the fact that, according to his latest PAS signed in November 1999 by the appraising officer only, the evaluation of the Appellant's performance had suddenly deteriorated during the period May-December 1999, without any previous warning from his supervisor.
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> 51. … the Appellant [argued] that the decision of non-renewal 'was taken in direct retaliation to his involvement in the sexual harassment case and as unwarranted final disciplinary sanction' … the Panel considered that the Appellant failed to produce concrete evidence in support of his contention. …
>
> 52. … As far as the issuance of a first written reprimand, the suspension from duty with pay for one month pending investigation and the issuance of a second reprimand are concerned, the Panel considered that the procedures followed by the Secretary-General were in accordance with established Staff Rules.
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> …

> 54. … [T]he Panel found … that there was a clear failure from the Organization to carry out an objective investigation.
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> …
>
> 56. … Although the suspension from duty with pay did not constitute a disciplinary measure, the Panel noted that it had been taken in accordance with paragraph 5 of ST/AI/371, which deals with 'revised disciplinary measures and procedures'. The Panel emphasized the fact that disciplinary proceedings had been initiated and then were dropped. The Panel thus reached the conclusion that the Organization rather tried to solve the matter by the non-renewal of the Appellant's contract, which according to the UNAT jurisprudence constitutes a *détournement de procédure.*
>
> **Conclusions and Recommendations**
>
> 57. … the Panel cannot but conclude that the decision not to renew the Appellant's contract was taken as an easy way-out, in lieu of pursuing appropriate disciplinary proceedings. Therefore, the Panel found that the decision of non-renewal, which had been taken on 3 December 1999 while the Appellant was still under suspension from duty, constituted a *détournement de procédure*.
>
> 58. In view of the overall circumstances surrounding the case, the Panel **recommends** to the Secretary-General that the Appellant be granted the amount of $5,000 … as compensation.
>
> …"

On 5 February 2002, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "The Secretary-General considers that, in general, it is not inappropriate for the Administration to discontinue the disciplinary proceedings when the facts of a particular case so warrant and to issue a reprimand for behaviour unbecoming. However, the timeline of the sequential decisions taken in this case was such that it may have given rise to a perception of a *détournement de procédure*. In view of this and the overall circumstances of this case, the Secretary-General has decided to accept the Board's recommendation for compensation."

On 18 July 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The non-renewal of the Applicant's fixed-term contract was wrongful and constituted *détournement de procédure.*

2. The Applicant had a "justified expectation of continued employment" with the Organization.

3. The true motivation, both for the disciplinary action and the non-renewal of the Applicant's contract, was a reprisal for the sexual harassment complaint filed by the Applicant's fiancée and the ensuing allegations of a cover-up brought by the Applicant.

4. The Applicant's rights of due process were violated. The Administration demonstrated prejudice, bias and bad-faith towards him.

5. The JAB wrongfully took into consideration the PAR which the Applicant had not signed.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision in respect of the non-renewal of the Applicant's appointment, which falls within the discretion of the Secretary-General, was not wrongful. The Applicant had no legitimate expectancy of continued employment with the Organization.

2. The Respondent's decision in respect of the non-renewal of the Applicant's appointment did not constitute a *détournement de procédure*, even though the sequence of events may have given rise to such perception.

3. The process initiated against the Applicant in respect of his alleged misconduct met the requirements of due process and did not violate his rights.

4. The decision in respect of the non-renewal of the Applicant's appointment was not based on extraneous factors or improper motivation.

5. The latest PAS included in the Applicant's Official Status file was unsigned because the Applicant was on extended sick leave at the time it was completed.

The Tribunal, having deliberated from 25 June to 23 July 2004, now pronounces the following Judgement:

I. The Applicant began his career with the Organization on a short-term appointment with the UNHCHR on 17 December 1993, which appointment was followed by a series of fixed-term contracts, beginning in June 1995. Until 1999, the Applicant's performance was rated as "excellent" and "frequently exceeding expectations".

In July 1999, the Applicant supported his fiancée, a Junior Professional Officer at UNHCHR, in filing a sexual harassment complaint against one of her colleagues. In August, the Applicant requested his Senior Administrative Officer to investigate the unauthorized use of the Applicant's telephone, stating his suspicion that it was the same colleague who had been accused by his fiancée.

Subsequently, in November 1999, a new era began in the relationship between the Applicant and the Administration. For the first time in his career with the Organization, the Applicant's PAS, covering the period May-December 1999, rated his performance as "does not meet performance expectations". The Tribunal notes that this PAS was not signed by the Applicant, and apparently, he was not even aware of its existence. Also during November 1999, some of the Applicant's colleagues complained about his aggressive behaviour. These complaints led the Respondent to initiate disciplinary proceedings against the Applicant. Ultimately, these proceedings were halted and the Applicant was sent a letter of reprimand, cautioning him about his attitude towards his colleagues and informing him that the reprimand would be placed in his file.

On 3 December 1999, the Applicant was informed that his fixed-term appointment would not be extended beyond its expiration date of 31 December 1999. Nonetheless, since the Applicant was on sick leave, his appointment was extended for several months. On 13 July 2000, prior to the expiration of his last appointment, the Applicant submitted his resignation, explaining that he was doing so in order to receive a repatriation allowance.

On 16 March 2000, the Applicant appealed to the JAB. According to the Applicant, it was only during the JAB proceedings that he discovered the existence of the negative PAS of 26 November 1999.

The JAB concluded that the decision not to renew the Applicant's fixed-term contract was taken as an easy way-out in lieu of pursuing appropriate disciplinary proceedings, thus constituting a *détournement de procédure*, and consequently recommended that the Applicant be compensated in the amount of US$ 5,000. Although the Secretary-General did not accept the JAB's conclusion, he nonetheless accepted the JAB's recommendation, stating that he did so only because "the timeline of the sequential decisions taken … was such that it may have given rise to a perception of a *détournement de procédure*".

II. The Tribunal will first address the Applicant's claim that, notwithstanding the nature of his fixed-term contracts, their continuous renewal over a period of more than six years, coupled with his good performance, had created a legal expectancy of continued employment with the Organization.

It has been the longstanding jurisprudence of the Tribunal that, in keeping with staff rule 104.12(b)(ii), employment with the Organization ceases on the expiration date of fixed-term appointments and that a legal expectancy of renewal is not created by efficient or even by outstanding performance. (See Judgments No. 173, *Papaleontiou* (1973); No. 440,

Shankar (1989); No. 496, *Mr. B.* (1990); and, No. 1052, *Bonder* (2002).) Furthermore, decisions on hiring and retaining staff members fall within the discretion of the Secretary-General, as reaffirmed in Judgement No. 1003, *Shasha'a* (2001): "The Administration, in its discretion, may decide not to renew or extend the [fixed-term] contract without having to justify that decision. Under those circumstances the [fixed-term] contract terminates automatically and without prior notice …"

The Tribunal finds that under the circumstances of the present case, the decision not to renew the Applicant's contract was within the scope of the Respondent's discretion and that no legitimate expectation of renewal had been created by the Administration.

Additionally, as stated above, fixed-term contracts expire upon their stated expiration date, and the Administration is not required to give any notice to this effect. The Tribunal notes the Applicant's claim that, in cases where it has been decided not to extend a fixed-term contract, the Administration had adopted the practice of informing staff members, a month before the expiry date of their fixed-term contracts, of the Administration's intention not to renew them. The Tribunal is of the view that this does not change nor affect the legal standpoint regarding the nature of the fixed-term contract as a contract of a pre-set duration. Moreover, the Tribunal finds that under the circumstances of the present case, this is a non-issue, because on 3 December a letter was sent to the Applicant, informing him of the imminent end of his contract.

III. The Tribunal furthermore agrees with the Secretary-General that there was no *détournement de procédure*, while accepting that the sequence of events may have given rise to a perception of *détournement de procédure*, for which the Applicant had been adequately compensated in accordance with the JAB's recommendation. The Tribunal did not find in the file any evidence substantiating the Applicant's claim of *détournement de procédure*, nor was the Applicant successful in proving the causal link between the various decisions, which is a required element for substantiating such an allegation. In other words, the JAB erred when it concluded that the administrative decision not to renew the Applicant's appointment was, in fact, a veiled punitive measure, intended to avoid disciplinary proceedings. The facts of the case indicate that it is quite possible that the Respondent had decided that the Applicant's behaviour did not warrant disciplinary proceedings, but rather, that a written reprimand would suffice. This decision is within the Respondent's discretionary authority. The Respondent later also decided not to extend the Applicant's fixed-term appointment. While the Tribunal notes the proximity in time of these events, the Tribunal does not find this to be unreasonable and the Applicant's allegation to this effect is therefore rejected.

IV. Having stated the above, the Tribunal finds that in this case, there were two instances in which the Administration failed to maintain the procedural standards expected from the United Nations.

The first instance concerns the reprimand, which the Applicant was given on 5 November 1999. A reprimand is not considered a disciplinary measure within the meaning of staff rule 110.3, as explicitly stated therein. The implication of this rule is that the procedural safeguards contained in the Staff Regulations and Rules in the form of the disciplinary process, which serve to benefit both the Administration and the employees, do not apply to a reprimand.

However, this does not mean that a reprimand does not have legal consequences, which are to the detriment of its addressee, especially when the reprimand is placed and kept in the staff member's file. The reprimand is, by definition, adverse material, and as such, its issuance ought to be carried out while respecting the fundamental principles governing all legal orders of the modern world. Amongst those, of special importance is the principle of due process or natural justice, which implies, inter alia, that before an adverse decision is taken by the Administration, the subject of such a decision has to be afforded the opportunity to be heard (*audi alteram partem*). The Tribunal notes that the letter of reprimand was issued on the same day that the Security Officer had submitted his report. The Tribunal thus finds that such an opportunity was not extended to the Applicant prior to issuing this reprimand, thus violating this fundamental principle.

The second issue concerns the PAS of 26 November 1999, containing a negative evaluation of the Applicant's performance, which had not been signed by the Applicant and the existence of which was not known to him until the JAB proceedings. Once again, a good administration will not tolerate the inclusion of adverse material in an employee's file without him knowing about it and without having a fair opportunity to defend him/herself. In this case, the Applicant was deprived of the possibility of rebutting this PAS.

The Tribunal finds that the Administration's failure to accord the Applicant his rights of due process warrants compensation.

V. In view of the above, the Tribunal:

1. Orders that the letter of reprimand dated 5 November 1999 be considered as void and be removed from the Applicant's Official Status file;
2. Orders that the Applicant's PAS of 26 November 1999 be removed from his Official Status file; and,

3. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Omer Youssif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary