



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1297

Case No. 1379

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane;
Ms. Brigitte Stern;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 March 2004 and periodically thereafter until 15 October;

Whereas, on 7 October 2004, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“3. to order the Respondent to communicate to the Applicant the report of the Office for Internal Oversight Services (OIOS) relating to her ‘*Request for an investigation into the Misappropriation of Funds [of the International Criminal Tribunal for Rwanda (ICTR)]*’ if it exists, or to explain the reasons why the Administration did not conduct such an investigation as recommended by the [Joint Appeals Board (JAB)] ...;

4. to set aside the Secretary-General’s final decision ... dated 18 August 2003, and to draw all legal consequences from such a rescission, i.e. to order, *inter alia*, the payment ... of the equivalent of one year’s net base salary, in damages ...;

5. to order the payment ... of legal costs ...”

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 31 May 2005 and once thereafter until 30 June;

Whereas the Respondent filed his Answer on 30 June 2005;

Whereas, on 15 May 2006, the Applicant filed Written Observations, amending her pleas as follows:

"1. ...

i) [The Applicant requests the Tribunal to] hold oral proceedings ...

...

iii) [The Applicant requests the Tribunal to award compensation] of two years' net base salary at the D-1, step 2 level, with interest, retroactive to [22 April 2000] ...

iv) [R]einstatement to a ... post at the D-1, step 2 level

v) Inclusion in [her] personnel file ... of the two letters of rebuttal ...

vi) Inclusion in [her] personnel file ... of the five letters of recommendation."

Whereas, on 20 July 2006, 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 JAB reads, in part, as follows:

"Employment History

... The [Applicant] joined [ICTR] on 22 April 1999 on a one-year fixed-term appointment at the D-1 level as Deputy Registrar ... [in] Arusha, Tanzania. [In July 1999, the Applicant returned to the United States for surgery and remained there on sick-leave through January 2000]. Effective 23 April 2000, the [Applicant's] contract was extended through 1 June 2000. The [Applicant] was notified on 2 May 2000 of the decision not to further extend her contract.

Summary of the facts

... In a memorandum dated 19 June 1999, the Registrar wrote to the [Applicant] ... [as] a follow-up [to] several discussions they had had before, relating to the performance of her functions. The Registrar expressed his concern for the [Applicant's] overall performance in her capacity of Deputy Registrar, in particular with respect to some specific areas, among other matters outside her area of responsibility or competence, which happened to be 'to the detriment of [her] proper functions with respect to legal and judicial matters'.

... In another memorandum dated 29 June 1999, the ICTR Registrar called upon the [Applicant] to focus her attention 'to the more serious issue of the provision of legal and court management services to the judicial process at both the trial and appeal levels'. The Registrar further stated:

'In this connection, I am pleased to note your intention to visit the [International Criminal Tribunal for the former Yugoslavia (ICTY)] on mission and exchange views with the Deputy Registrar there. It would be a most worthwhile outcome of that mission if you were able to discharge at the ICTR the same legal and judicial support functions as the ICTY Deputy Registrar does at that Tribunal. ...'

... On 19 July 1999, the Registrar, through a memorandum, expressed his 'dismay' at the [Applicant's] initiative to recruit ... a consultant 'without complying with [his] specific instructions on this matter'. In that connection, the Registrar reiterated his concern expressed in his memorandum of 19 June ..., concerning the [Applicant's] non-observance of proper United Nations procedures ...

... On 22 January 2000, the [Applicant], upon her return to [Arusha] after her sick leave, wrote a response to the above-mentioned memoranda. She stated that the content of the said memoranda established a 'confusing pattern of inaccuracies, which must be addressed'. With respect to [the consultant's] recruitment, the [Applicant] explained that the letter of recruitment was mistakenly sent by a messenger who failed to ensure that the Registrar had signed it. According to the [Applicant], the incident was discussed with the Registrar's Special Assistant who promised to report it to the Registrar ...

... Moreover, the [Applicant] expressed her regret that the Registrar had issued these strongly worded memoranda without holding any prior discussion with her. She, nevertheless, expressed her hope that there would be better communication between herself and the Registrar, through regular periodic meetings. The [Applicant] also suggested that her responsibilities and authority be clearly defined. In conclusion, the [Applicant] assured the Registrar of her willingness to work in cooperation with him in order to improve the running of the Tribunal.

... On 2 May 2000, the Registrar verbally informed the [Applicant] that her contract would not be renewed for the current year. On the same day, ... [the] Chief of Personnel, ICTR, informed the [Applicant] that her fixed-term appointment which expired on 22 April 2000 would be further extended until 1 June 2000 only. [He] stated that such extension was for administrative purposes only, in order to allow the [Applicant] to finalize her repatriation arrangements.

[On 20 May 2000, the Applicant wrote an interoffice memorandum to the Registrar, setting out 'the reasons why my contract should be extended through December 2000', and complaining that, as she did not receive 'sufficient feedback from him' regarding her performance, it was difficult for her to know 'specifically what areas of my work needed improvement'.]

... By a letter dated 22 May 2000, the [Applicant] filed a request for suspension of action with the JAB [in New York] ... The [Applicant], on the same day, addressed another letter to the Secretary-General requesting an administrative review of the decision at issue.

[On 26 May 2000, the Personnel Section, ICTR, sent an unsigned Note to the Registrar, entitled 'Documented Incidents of the Applicant's Abuse of Staff and Other Misdeeds in Personnel Matters'. The Note cites specific incidents and concludes that

these ‘incidents illustrate a pattern of behaviour which is unbecoming of a [United Nations’] staff member’; that the Applicant is a destabilizing factor in the Tribunal; that she has ‘lost all credibility and self-respect’ and that ‘her remaining in the Tribunal would not be in the interest of the Organization’. The Applicant refuted the allegations on 18 April 2001.]

... Also on 26 May 2000, the JAB held a hearing on the [Applicant’s] request for suspension of action and issued its report on 30 May ... The [JAB’s] recommendation was as follows: ‘the [Applicant’s] request for suspension of action be granted for a limited time of 45 days so that the parties concerned may have time to gather all the relevant material needed to present their positions’.

... By a letter dated 31 May 2000 ... [the] Under-Secretary-General for Management informed the [Applicant] that he had decided not to accept the recommendation of the JAB because there was no evidence that the implementation of the decision at issue would irreparably harm her rights as a staff member.

... On 17 July 2000, the [Applicant] lodged an appeal [on the merits] with the JAB.”

The JAB adopted its report on 14 July 2003. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

19. ... The Panel in its consideration of the case examined in turn the Appellant’s contentions.

Alleged violations of due process rights

20. The Panel first looked into the Appellant’s allegations of violation of her due process rights as a result of the failure by the Registrar to consult with the President of the Tribunal, prior to making the decision not to renew her [appointment] ... The Panel concurred with the Respondent that the Appellant was not under the supervision of the President of the Tribunal but the Registrar ...

21. The Panel further observed that, article 16 of the Statute of the [ICTR], annexed to the Security Council Resolution S/RES/955 (1994), specifically states that the functions of the Registry were essentially the administration and the servicing of the ICTR and that the staff of the registry was to be appointed by the Secretary-General on the recommendation of the Registrar. Based on the aforesaid, the Panel reached the following conclusions: (i) there was no legal ground to the Appellant’s contention that she was under the supervision of the President; and (ii) the Registrar had no legal obligation to consult with the President before making the decision not to renew the Appellant’s contract. The Panel thus concluded that the Registrar acted within the limit of his authority, without infringing upon the Appellant’s due process rights.

Expectancy of renewal

22. The Panel then examined the Appellant’s contention that she had received from the Registrar the assurances ‘both oral and written’ that her contract would be renewed beyond its expiry on 22 April 2000. ... The Panel observed that the Appellant provided, in support of her argument, an ‘official travel request’ form that was mandatory for staff member on mission to fill out whenever travelling outside the

mission area. The Panel also observed that the Registrar had duly signed the request form, in order to allow the Appellant to undertake her trip to the United States. However, the Panel failed to see any commitment on the part of the Registrar to the effect that the Appellant's contract would be renewed beyond its expiry. ...

23. The Panel after a careful consideration of the facts of the case and the material submitted to it came to the realization that there was no evidence to corroborate the Appellant's allegations that she was given 'reasonable expectation' of continued service with the Tribunal. ...

Improper motivation

24. The Panel felt disturbing the lack of consistency in the Appellant's contentions in support of her appeal. In her initial request for administrative review of May 2000, the Panel observed that the Appellant contended that on one hand, the decision in dispute violated her due process rights and also that on the other hand, she was given assurances by the Registrar that her contract would be further renewed. ... [I]n her observations to the Respondent's reply dated 20 May 2003, the Appellant made the new argument that the contested administrative decision was motivated by some ulterior motives, namely, her coming across some compromising documents, five bank statements belonging to the Registrar. According to the Appellant, such a discovery had prompted the said decision.

25. The Panel questioned the timeliness (or the lack of) of the Appellant's report to the OIOS especially if she had any concern that such a discovery might affect her contract. The Panel indeed noted that the Appellant made a request to the OIOS for an investigation into the possible misappropriation of ICTR funds by the Registrar on 20 May 2003, when she actually came across the Registrar's bank statements in June 1999. The Panel found it difficult to support such an allegation in the absence of any factual evidence. However, the Panel felt that any alleged misappropriation of funds by a United Nations Officer should be reported on a timely manner and be investigated by the OIOS.

Remedies

26. The Panel was of the view that the Appellant did not suffer any impropriety on the part of the Administration, which would warrant any remedy.

Conclusion and Recommendation

27. In light of the foregoing, the Panel *unanimously concluded* that the Appellant failed to make a *prima facie* case that her rights as a staff member had been violated.

28. The Panel *unanimously decided* to make no recommendation in support of this Appeal."

On 18 August 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General agreed with the reasoning and findings of the Board and had, accordingly, decided to accept its unanimous conclusion and to take no further action on her appeal.

On 7 October 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew her fixed-term appointment as Deputy Registrar violated her due process rights.
2. The decision was motivated by prejudice and other extraneous factors.
3. The decision caused the Applicant important moral and financial damage.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment, and the decision not to renew her appointment did not violate her rights.
2. The decision not to renew the Applicant's fixed-term appointment was not arbitrary or capricious and was not vitiated by bias or other extraneous factors.
3. There is no basis for the Applicant's request that the Tribunal order the Respondent to communicate to the Applicant the report of the OIOS relating to her "Request for an Investigation into the Misappropriation of ICTR Funds" if it exists, or to explain the reasons why the Administration did not conduct an enquiry.

The Tribunal, having deliberated from 26 June to 28 July 2006, now pronounces the following Judgement:

I. The Applicant held a one-year fixed-term appointment as Deputy Registrar of ICTR, effective 22 April 1999. She separated from ICTR on 1 June 2000. Her appointment had been extended until that date to enable the necessary administrative formalities to be completed in connection with her separation and to allow for the finalization of repatriation arrangements.

II. The case arises from the circumstances in which the decision was made not to renew the Applicant's appointment beyond 1 June 2000. The Applicant herself had requested that her appointment be extended only for an additional six months, up to December 2000, to enable her to complete certain assignments which she considered important for the work of ICTR. Initially, the Applicant asked for the Tribunal to produce an OIOS report; to rescind the decision not to renew her appointment; and, to pay her compensation equivalent to one year's net base salary "in damages for injury under all heads". Subsequently, she changed her pleas to include a request for reinstatement; to increase compensation to two years' net base salary with interest, retroactive to 22 April 2000; and, to include in the Official Status file a number of documents.

III. The compensation which the Applicant has claimed is in effect for alleged violation of her due process rights. She does not controvert that a fixed-term appointment carries no

expectation of renewal or that such appointments usually come to an end when the term expires. Her claim is rather that the circumstances surrounding the expiry of her contract demonstrate a lack of good faith on the part of a supervisor who was motivated by extraneous reasons to take that decision and that, therefore, her due process rights have been violated. In the JAB proceedings, the Applicant claimed that her supervisor “gave her reasonable expectation that her contract would be renewed after its expiration in April 2000”. The JAB, “after a careful consideration of the facts of the case and the material submitted to it came to the realization that there was no evidence to corroborate the Applicant’s allegations that she was given ‘reasonable expectation’ of continued service” and the Tribunal concurs with this finding.

The jurisprudence of the Tribunal is clear. It is that, normally, even very good performance on the part of a staff member does not carry an expectation that a fixed-term appointment would be extended simply for that reason. In the Applicant’s case, she served as Deputy Registrar for a total of thirteen months during six of which (July 1999 to January 2000) she was obliged to be away from duty on sick leave. In the remaining period and particularly at the early stages of her service, her supervisor placed on record, in a series of written memoranda addressed to her in June and July 1999, fairly substantial concerns about her performance and made reference to a number of discussions which allegedly had taken place between the Applicant and himself with regard to her performance. It would seem that some of the memoranda - dated 29 June and 19 July 1999 - were not seen by the Applicant until she returned to duty from sick-leave, in January 2000. However, at least the first of these memoranda dated 15 June 1999, was seen by the Applicant before she left on sick leave on or about 2 July 1999. Nonetheless, she did not refute its contents until May 2000.

The Tribunal notes that, during the period July 1999 to January 2000 when the Applicant was away on sick leave, she assiduously performed several important tasks relating to her post which have been detailed in her Application. As a senior official and an experienced attorney, the Tribunal would have expected some, even perfunctory, denial of these complaints were they totally unfounded. Given the existence of the complaints by her supervisor concerning her performance, whether correct or otherwise, it seems to the Tribunal highly unlikely that any legal expectation of renewal of her contract would have been held out to her. When in May 2000 the Applicant asked for an extension of her contract to December 2000 to enable her to complete her tasks, she posited her request on the importance of the extension to the work of the Tribunal and not on the basis that assurances had been given to her that her contract would be renewed. However justified her request may have been, it was not agreed to.

IV. It is evident that, for most of the time of the Applicant’s service with ICTR, the relationship with her supervisor was neither stable nor harmonious and that the Applicant encountered difficulties at work. The Applicant felt that a case was being built up against her

continuing in service and she suggests that this was partly, at least, due to a fear the supervisor had that the Applicant was in possession of material which might incriminate him. This makes it all the more unlikely that any assurances of renewal of her contract had been given or that any legal expectation had been created.

As has been repeatedly pointed out in the Tribunal's jurisprudence, the decision process which goes on in the Administration whether to renew a fixed-term appointment or not involves the exercise of discretion and one in which the supervisors and management, in a larger sense, may have to make judgements regarding the performance and suitability of the staff member. This is the prerogative of management. For reasons given above with regard to the reservations on the Applicant's performance, the Tribunal is unable to conclude that the decision against the further renewal of the Applicant's appointment was a capricious one which stands vitiated for that reason.

V. As a separate issue, the Applicant has also claimed that she had a right to be dealt with fairly and that her due process and procedural rights be fully respected in deciding whether or not to renew her contract. In the Tribunal's view, the Applicant's rights in this respect have indeed been violated. The Applicant has claimed that, before a decision whether to renew her appointment or not was made, the Registrar should have consulted with the President of ICTR. The Tribunal does not find it necessary to examine this issue. It is clear that the Applicant had a right to have a performance review made out by the Registrar as her supervisor well before her separation and was entitled to all the protection of the process connected with such an evaluation. Indeed, as early as 16 February 2000, the Chief, Personnel Section, ICTR, reminded the Registrar of these procedures and of his obligation to the staff member.

As far as the Tribunal can see, the Registrar seems to have treated these requirements with cavalier indifference, forcing the Applicant to seek other informal methods of obtaining what she rightly considered was her due. The provisions of ST/AI/1999/14 of 17 November 1999, entitled "Performance Appraisal System [(PAS)]", were clearly not adhered to. As the Tribunal has emphasized in its Judgement No. 1298, rendered at this session, the supervisor has the primary responsibility to ensure that the PAS system is complied with. Nonetheless, it is a responsibility which is shared with the staff member and there is no evidence either that she took the necessary steps in this case to provide, in a timely manner, the draft individual work plan required of her. This may have been due to the extended sick leave period that intervened in a relatively short period of service.

It is to be noted also, that the Registrar's impressions of the Applicant's performance were recorded at a relatively early stage in the staff member's service. It is also to be noted that the Note from the Personnel Section to the Registrar referring to matters adverted to by the Registrar in his memo to the Applicant was only prepared on 26 May 2000 and that in a rather

perfunctory manner without reference to any dates or other pertinent detail. Nor was the staff member provided a timely opportunity to comment on, to clarify or to contradict the facts which are contained therein. These are all matters which should have been encapsulated in the execution of a proper PAS in accordance with the necessary procedures. The Applicant specifically complained about this matter in the letter she addressed to the Registrar on 20 May 2000. The Tribunal must point out that it considers the proper and timely execution of a performance review an important and significant step in staff management relations and one to which the staff members have a right. The Applicant should not have been deprived of these safeguards, and should be compensated.

VI. Whilst the above considerations deal with the pith and substance of the Applicant's case, she has also asked the Tribunal to order production of a document, namely, the OIOS report relating to her request for an investigation into the misappropriation of ICTR funds "if it exists", or to explain the reasons why the Administration did not hold an enquiry as recommended by the JAB. The Tribunal notes that the JAB

"indeed noted that the Appellant made a request to the OIOS for an investigation into the possible misappropriation of ICTR funds by the Registrar on 20 May 2003, when she actually came across the Registrar's bank statements in June 1999. The Panel found it difficult to support such an allegation in the absence of any factual evidence. However, the Panel felt that any alleged misappropriation of funds by a United Nations Officer should be reported on a timely manner and be investigated by the OIOS."

The Tribunal cannot but agree with the JAB. In the Tribunal's view, if the Applicant had access to such information, her failure to act promptly constitutes a serious dereliction of duty on the part of a senior official.

VII. Finally, the Tribunal notes that the Applicant has added a number of pleas in her submissions to the Tribunal that are not receivable by it, since they were never before the JAB. The Statute of the Tribunal states in this regard in article 7, paragraph 1:

"An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal".

Such are her pleas for reinstatement and to insert in her file two letters of rebuttal and five letters of recommendation. These pleas are, accordingly, rejected.

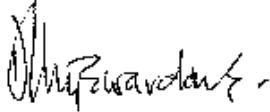
VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in an amount fixed at one month's net base salary at the rate in effect at the date of her separation from service, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

(Signatures)



Spyridon Flogaitis
President



Dayendra Sena Wijewardane
Vice-President



Brigitte Stern
Member

Geneva, 28 July 2006



Maritza Struyvenberg
Executive Secretary