



# Administrative Tribunal

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## ADMINISTRATIVE TRIBUNAL

Judgement No. 1305

Case No. 1389

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 1 November 2004, a staff member of the United Nations Population Fund (hereinafter UNFPA) filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 26 January 2005, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

**“II. Pleas**

*Request for Discovery and Witnesses*

...

2. The Applicant respectfully requests the Tribunal to order the Administration to produce the following information, items, documents, or records ...

3. The Applicant requests an oral hearing ...

*Redress Sought*

4. The damage to the Applicant's professional and personal life incurred as a result of the ... impugned decisions and improper actions by the [Respondent] warrants redress. Having faced harassment and humiliation at the hands of the Administration, the Applicant has suffered serious financial, professional, moral, and psychological harm. Indeed, even her health has suffered.

5. In light of the foregoing, the Applicant requests the following redress:

- Immediate reinstatement to the L-2 post previously held by the Applicant retroactive to February 1, 2001, and an award of compensatory damages; including all payment in full of all lost income and benefits;
- That [named staff members] be enjoined from engaging in harassing behaviour against the Applicant;
- Withdrawal of the 1999/2000 [Performance Appraisal Review (PAR)] review and rating and replacement with one which accurately and fairly reflects the Applicant's performance or, alternatively, a note accurately and objectively explaining their absence;
- Removal of the 2 November 2001 letter of reprimand for non-compliance in submitting her 1999 and 2000 PARs from the Applicant's file;
- Immediate payment of six months' net salary at the Applicant's current salary rate in compensation for the denial of her due process rights by the Administration in allowing a retired non-headquarters based staff member to sit on the Rebuttal Panel, as recommended by the Joint Appeals Board [(JAB)];
- The award of the sum of fifty thousand dollars (USD 50,000) as compensation for the moral injury and damage to the reputation that the Applicant has suffered ...;
- The award of the sum of fifty thousand dollars (USD 50,000) as punitive damages ...;
- The award of twenty-five thousand dollars (USD 25,000) for costs, expenses, expert, and legal fees incurred by the Applicant through the present date;
- Interest at the compounded rate of ten percent per annum on any and all of the above amounts so recommended to be awarded by the Tribunal, from the date of the Applicant's request for administrative review through the date any amounts awarded hereunder are finally and fully paid to the Applicant; and

- Such other relief as the Tribunal deems just, fair and equitable under the foregoing circumstances.”

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 9 July 2005 and twice thereafter until 30 September;

Whereas the Respondent filed his Answer on 30 September 2005;

Whereas the Applicant filed Written Observations on 29 December 2005;

Whereas the Applicant filed an Addendum to her Application and a Correction to her Written Observations on 14 March 2006;

Whereas, on 10 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] was recruited locally in New York ... in April 1980 on a three-month fixed-term appointment (...) as a Clerk-Typist (G-3) assigned to the Programme Division, [UNFPA]. She was granted a probationary appointment in July 1980, and a permanent appointment in May 1982[, and was promoted a number of times]. ... Effective 5 November 1990, she was reassigned to the Procurement Unit, Division for Finance and Personnel Administration (...) as a Procurement Assistant. Effective 1 February 1999, she was temporarily assigned to a 200 Series post as Procurement Adviser (L-2) while retaining her permanent appointment under the 100 Series of the Staff Rules and her G-6 grade. Her temporary grade was discontinued effective 31 January 2002, and she reverted to Procurement Assistant at the G-6 level.  
...

***Summary of the facts***

...  
[On 6 January 1999, the Applicant was informed that she had been selected for the post of Procurement Adviser with an appointment at the L-2 level for an initial period of one year. She was advised that extensions would ‘be subject to continued project funding and satisfactory performance’, and that she would ‘hold a lien on a G-6 post in UNFPA for the duration of [her] assignment’.]

.... Although requested to do so, [the Applicant] did not complete Sections 1, 2 and 3 of the UNFPA [PAR] form for 1999, as required by the Guidelines for Performance Appraisal Review. She did not complete the same sections for the 2000

PAR. After repeated reminders, by e-mail of 10 September 2001 the Deputy Chief, Personnel, UNFPA, gave her a deadline of next day to submit her PAR forms. [The Applicant] submitted her 1999 form to [her supervisor] on 18 September 2001, and the 2000 form on 15 November 2001. Meanwhile, on 2 November 2001, a letter of reprimand was issued to [her] for non-compliance with PAR requirements.

... [The Applicant's supervisor] began Section 4 (Supervisor's Written Appraisal) of the 1999 report with the sentence: 'the staff member has grossly misrepresented both her position and her responsibilities within the unit, and the critical incidents noted'. His opening to Section 4 of the 2000 report reads: '[t]he staff member has again grossly misrepresented the facts surrounding her responsibilities and performance during this year. In general the staff member's performance continues to be much less than satisfactory.' [His] signatures to both reports are undated; his rating in 1999, was 'Needs some improvement', 4 in a 5 point scale in which 5, 'Not satisfactory' is the lowest[;] in 2000, a rating of 'less than satisfactory'.

... [The Applicant] signed both reports on 13 December 2001, and submitted detailed rebuttals. A Rebuttal Panel was convened in March 2002, and submitted its report (according to [the] Respondent) on 16 May ... In its report, it described the context of the case:

'the [Rebuttal] Panel wishes to record several observations about the management environment ... [I]t would appear that UNFPA higher management was aware that the Procurement Unit was beset by more, and more serious, personnel problems than perhaps any other Unit in the Fund. Reports of infighting and demoralization with the Unit circulated widely, yet no effective personnel action was taken by higher management. Apparently, the Chief of the Unit was simply expected to "sort out" problem staff with minimum support from other levels of the Fund.

... [The Applicant] probably did not receive as much of an orientation to her L post or as much coaching as would have been desirable under the circumstances. Nevertheless the [Rebuttal] Panel concluded that [she] did possess adequate knowledge to perform better than she did during the time period in question.'

In its 'Findings', the [Rebuttal] Panel reported:

'the [Rebuttal] Panel unanimously found that there was convincing evidence of under-productivity but probably not to the degree to *alone* justify a rating of "4" or "less than [satisfactory]" ...

... [T]he [Rebuttal] Panel unanimously found that convincing evidence had been presented that [the Applicant] did frequently engage in destructive gossiping, infighting, and resistance to change detrimental to morale and improved performance of the Unit. She most certainly was not the only staff member to do so, but the fact that others did the same does not excuse the lack of professionalism she seems to have displayed. The efforts of the supervisor to discourage such behaviour on her part were clearly ineffective and perhaps at times even fueled the problem further, but once again we did not find any shortcomings of his sufficient excuse for hers.

*Conclusions and Recommendations*

On the basis of the above the [Rebuttal] Panel unanimously finds that the PAR ratings of “4” in 1999 and “less than satisfactory” in 2000, assigned by the supervisor and confirmed by the [Management Review Group (MRG)], were justified.’

... [Meanwhile, on] ... 24 January 2002 ..., [the Applicant had] requested that a decision on her assignment be subject to the outcome of the rebuttal process. The Chief, Personnel Branch, UNFPA, replied on 25 January ... that ‘the MRG reached consensus not to recommend the extension of your present assignment as Procurement Adviser at the L-2 level beyond its present expiration date on 31 January ...’. She added that the Executive Director had endorsed this decision.”

On 22 July 2002, the Applicant requested the Secretary-General to review the administrative decision to uphold her “4” rating on her 1999/2000 PAR and “management’s rescission of [her] L-2 contract based thereon”.

On 25 October 2002, the Applicant lodged an appeal with the JAB in New York. The JAB issued its report on 25 June 2004. Its considerations and recommendations read, in part, as follows:

*“Considerations*

15. The Panel considered ... the contentions of [the] Appellant ... With respect to [her claim that she was subjected to harassment, sexual discrimination and vindictive treatment by her supervisor], the Panel found assertions by [the] Appellant, but no evidence of discrimination or harassment. Similarly, in the case of [her claim that her negative evaluations were in retaliation for her complaints concerning sex discrimination, harassment, and national origin discrimination, as well as her perceived role in a colleague’s case of sexual harassment and invasion of privacy], the Panel agreed that [the] Appellant had provided no proof of her assertions. As for [her contention that she was denied due process by the MRG when it decided to discontinue her L-2 assignment before completion of the rebuttal process], the Panel found no impediment [or] statutory objections to a decision by the MRG to discontinue [her] temporary assignment prior to the completion of the rebuttal process.

...

17. Paragraph 57 of the UNFPA Guidelines for Performance Appraisal Review (...) and Performance Assessment Form (...) stated, in part: ‘[a]ll nominees chosen to serve on rebuttal panels at headquarters must be UNFPA staff members ... In cases involving staff reviewed by MRGs at headquarters, panel nominees must be headquarters-based staff.’ [The] Appellant alleged that [Mr. K.], the Rebuttal Member chosen by the Chairperson of the MRG, was not a UNFPA headquarters staff member, nor, even, a UNFPA staff member when the Rebuttal Panel completed its work. ... The Panel decided to give [the] Respondent another chance to respond to [this] allegation. ...

18. When the Panel resumed its consideration, it had before it an e-mail from [the] Office of Legal and Procurement Support, [United Nations Development Programme (UNDP)]. The relevant portion read:

‘[t]he [Rebuttal] Panel was convened in March 2002 and, according to the current rebuttal guidelines, the panel should present its report [as soon as possible], but within 8 weeks. [Mr. K.] was nominated in February 2002 by the Executive Director to be a member of the panel. He retired in April 2002. Since the work of the panel took longer than expected, [he] was retained as a consultant for 5 days in April 2002 specifically to work with the panel to complete its review of the ... rebuttal and to finalize its report.’

19. The Panel found it suggestive that UNDP/UNFPA had not responded to the allegation that [Mr. K.] was not ‘headquarters-based’, but that further speculation in that point was unnecessary since it was clear that [he] was not a UNFPA staff member at all for a majority of the time of his service in the Rebuttal Panel. The Panel ... concluded that the failure of UNFPA to comply with its own procedures constituted a denial of [the] Appellant’s due process rights.

...

***Recommendation***

21. The Panel unanimously recommends to the Secretary-General that:
- (a) the report of the improperly constituted Rebuttal Panel be expunged from the record;
  - (b) a Rebuttal Panel be constituted in accord with UNFPA’s own procedures to consider [the] Appellant’s rebuttal; and
  - (c) [the] Appellant be paid six months’ net salary at her current rate in compensation for the denial of her due process rights.”

On 17 January 2005, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“[t]he Secretary-General has examined your case in light of the JAB’s report and all the circumstances of the case and finds that he is in partial agreement with the JAB. He accepts the JAB’s recommendation that the Rebuttal Panel report be expunged from the record and that a new Rebuttal Panel be constituted to consider your rebuttal. However, he considers that the JAB recommendation for compensation in the amount of six months salary is excessive, given that the MRG’s decision not to recommend extension of your temporary L-2 assignment was made well before the Rebuttal Panel had delivered its report. The Secretary-General has decided that an appropriate amount of compensation for the violation of your due process rights is one month’s net base salary ...”

On 26 January 2005, the Applicant, having yet to receive the decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 12 September 2005, the new Rebuttal Panel provided a majority report recommending that the Applicant's performance ratings for 1999 and 2000 be maintained. On 3 January 2006, she was informed that the MRG had decided to maintain its original conclusions.

Whereas the Applicant's principal contentions are:

1. The Administration violated its Rules and Regulations by engaging in harassing behaviour against the Applicant.
2. The impugned PAR is tainted by mistakes of fact, erroneous conclusions and omissions of fact and should be quashed.
3. The Administration failed to abide by the Guidelines for Performance Appraisal Review and Performance Assessment Form resulting in a violation of the Applicant's rights of due process, therefore the impugned PAR should be quashed.
4. The Applicant was demoted as a disguised disciplinary measure implemented without applying the safeguards provided for in the Staff Rules, resulting in a denial of her rights of due process.
5. The impugned PAR and subsequent demotion were based on the malice, ill will, prejudice, and personal bias of her immediate supervisor and should be quashed.
6. The Administration failed to compensate the Applicant in the amount recommended by the JAB.

Whereas the Respondent's principal contentions are:

1. The Applicant does not have the right to, or a legal expectancy of, extension of her 200 Series appointment, and the decision of the Administration to reinstate the Applicant to a post at the G-6 level did not violate her rights.
2. The Applicant has not provided adequate evidence for her assertion that the non-extension of her temporary L-2 position and her unsatisfactory 1999/2000 performance appraisals were based on improper motives, such as discrimination or malice.
3. The Applicant's plea to the Tribunal to request the Administration to replace her 1999/2000 Performance Appraisal with a new performance appraisal is premature.

4. The Applicant's plea to request that the Administration remove the letter of reprimand to the Applicant for non-compliance with the performance appraisal procedures is not receivable.

5. The Applicant's request for compensation is excessive and should be denied.

The Tribunal, having deliberated from 10 to 28 July 2006, now pronounces the following Judgement:

I. The Applicant held a permanent appointment under the 100 Series at the G-6 level but from 1 February 1999 until 31 January 2002 she was temporarily assigned to the L-2 level as a Procurement Adviser, UNFPA. Her initial assignment was for a period of one year, with possible extensions subject to "continued project funding and satisfactory performance".

On 2 November 2001, the Applicant, who had failed to complete sections 1, 2 and 3 of her PAR form for 1999 or for 2000 until late 2001, was issued a letter of reprimand for non-compliance with the PAR requirements. In her PARs for 1999 and 2000, which she signed on 13 December 2001, her supervisor rated her as "needs some improvement" and "less than satisfactory", respectively. The Applicant rebutted both reports and requested that the decision regarding her future assignment be subject to the outcome of the Rebuttal Panel, but, on 25 January 2002, she was advised that her assignment to the L-2 position would not be extended beyond its expiration date of 31 January. In its report of 16 May, the Rebuttal Panel found that the Applicant's PAR ratings were justified.

The Applicant subsequently appealed to the JAB. In its report of 25 June 2004, the JAB found "no impediment [or] statutory objections" to UNFPA's decision to discontinue the Applicant's temporary assignment prior to the completion of the rebuttal process. However, the JAB found that as the Rebuttal Panel had been improperly constituted, its report should be expunged; a new panel should be constituted; and, the Applicant should be paid compensation in the amount of six months' net base salary. On 17 January 2005, the Applicant was advised that the Secretary-General had accepted the first two recommendations, but had decided one month's compensation was appropriate for the violation of her rights of due process. Thereafter, on 12 September 2005, the new Rebuttal Panel provided a majority recommendation that the Applicant's performance ratings for 1999 and 2000 should be maintained. On 3 January 2006, she was advised that the MRG convened to consider the Rebuttal Panel's recommendations had decided to maintain her ratings.



II. The Applicant's temporary assignment to the L-2 position was made under a 200 Series appointment. The relevant provisions of staff rule 204.3 provide that such temporary appointments "shall be for a fixed term and shall expire without notice on the date specified in the respective letter of appointment" and "[do] not carry any expectancy of renewal". Moreover, it is well-established in the jurisprudence of this Tribunal that 200 Series posts are inherently temporary and that staff members have no expectation of renewal. (See Judgements No. 885, *Handelsman* (1998) and No. 1163, *Seaforth* (2003).)

In this particular case, however, the Administration included two special conditions for renewal in the Applicant's contract - namely, continuity of financing and satisfactory performance - thus modifying the general conditions prevailing under the 200 Series. The Applicant was placed in a favourable position and had a justified expectation of being renewed as long as the source of funding for the post did not dry up and her performance remained satisfactory. This may be contrasted with the usual position of staff members on fixed-term appointments (or assignments), in respect of which the Tribunal has held that "efficient or even outstanding performance" would not normally give rise to a legal expectancy of renewal. (Judgement No. 980, *Baldwin* (2000).)

III. Under the circumstances, the Applicant's performance evaluations obviously held decisive importance at the moment of renewal: providing her performance was satisfactory, and, of course, that funding continued, she could reasonably have expected that her assignment would continue. This being the situation, the Tribunal must carefully examine her allegations concerning the content and credibility of her PARs and, naturally, her rebuttal to the unfavourable comments of her supervisor and the resulting grades imposed. The nature of the relationship between the Applicant and her supervisor, and the credibility of the latter's comments regarding her behaviour, is, therefore, an essential component of this examination.

Insofar as that relationship is concerned, three things seem clear to the Tribunal: first, the staff member is neither a model of good conduct nor an example of team spirit; second, she managed to establish a relationship of opposition and rivalry with her supervisor, entirely at odds with the behaviour which should characterize a staff member of the United Nations; and, third, her supervisor, rather than staying above the in-fighting ongoing in his Unit, launched himself into the arena and engaged in a duel with the Applicant. As a result, the Tribunal finds that his comments regarding the Applicant are not entirely credible. Frankly, it is under the impression that the Unit was far from being a paradise of good will and cooperation.

IV. In view of these considerations, the Tribunal finds that everybody shares in the responsibility for creating the general disorder apparently prevailing in the Unit and that, even if the Applicant's behaviour left much to be desired, the Administration is responsible for some gross procedural defects towards her.

The Tribunal considers that it would have been reasonable for the Administration to have waited for the report of the Rebuttal Panel before deciding not to renew the Applicant's assignment, as the report would have clarified the circumstances of her performance. This, as was stated above, was decisive for her continuation in the L-2 position. For the Administration to have rebuttal procedures in place, but to nullify the role of the Rebuttal Panel by taking its decision prior to the convocation of the Panel, is unacceptable. As the Tribunal held in Judgement No. 826, *Beliyeva* (1997),

“[h]aving undertaken a consideration of the Applicant's situation, it was incumbent upon the Respondent to make his determination in accordance with fair procedures. Because the evaluation of the Applicant's performance was a factor, it is unacceptable that the decision as to her future was taken before the rebuttal procedure was finalized.”

In the instant case, whilst the Applicant's actions with respect to her PARs and her contributory role in their delay do not excuse the Administration from not having completed the Rebuttal Panel's proceedings prior to making its decision, the Tribunal can and will factor them into its consideration of damages.

Finally, it is obvious that the appointment of one of the members of the Rebuttal Panel did not meet the procedural requirements imposed by the internal rules of the Organization, which was highly irregular and violated the Applicant's rights of due process. As the Secretary-General compensated her with one month's salary and agreed to repeat the rebuttal exercise, however, the Tribunal considers the Applicant to have had sufficient satisfaction under this heading.

V. The Tribunal is aware of the fact that the Applicant is also attempting to protest her letter of reprimand of 2 November 2001 in these proceedings. As the Respondent rightly points out, the issue is not receivable, *ratione materiae*. In Judgement No. 1106, *Iqbal* (2003), the Tribunal “reiterate[d] the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization”. If the Applicant in the instant case wished to contest the decision to issue her a letter of reprimand, she should have complied with the procedural rules by requesting administrative review in a timely fashion, in accordance with staff rule 111.2 (a):

“[a] staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing”. (See generally, Judgements No. 571, *Noble* (1992) and No. 1235 (2005).)

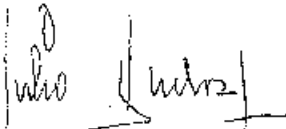
VI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of three months' net base salary at the rate in effect at the date of Judgement, in addition to the one month's salary she already received, 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.

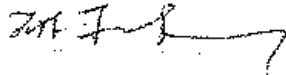
(Signatures)



**Jacqueline R. Scott**  
First Vice-President, presiding



**Julio Barboza**  
Member



**Goh Joon Seng**  
Member

Geneva, 28 July 2006



**Maritza Struyvenberg**  
Executive Secretary