



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1366

Case No. 1444

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Mr. Goh Joon Seng; Sir Bob Hepple;

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 30 May 2005 and twice thereafter until 31 August;

Whereas, on 29 August 2005, the Applicant filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 5 October 2005, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, *inter alia*:

- “(a) [TO ORDER] that the decision taken by the Secretary-General ... be rescinded.
- (b) TO DECLARE null, void, and of no effect the decision of the [United Nations Mission in Kosovo (UNMIK)] International Administrator of the Department of Education not to renew the contract of the [Applicant].
- (c) TO DIRECT the Office of Human Resources Management ([OHRM]) and/or UNMIK to reinstate the [Applicant] in the position she had at the time of separation, at the same level with all benefits ...
- (d) TO DIRECT that such reinstatement automatically restore the [Applicant] in all her rights and entitlements as a staff member including particularly contributions to the pension fund retroactively to the date of separation.
- (e) TO DIRECT OHRM/UNMIK to renew the contract of the [Applicant] with the Secretariat of the United Nations and/or with UNMIK during a period of two years.

(f) TO ORDER the Respondent to search and remove from the files in UNMIK and at Headquarters all detrimental documents regarding the [Applicant], including the irregular [Field Operations Performance Appraisal (FOPA)], that it may have filed and/or kept without previously having submitted them to the [Applicant] in violation of administrative instruction[s ST/AI/292 of 14 July 1982 and ST/AI/240/Rev.2 of 28 November 1984] ...

(g) TO ORDER the Respondent to file in all [the Applicant's] files the documents favorable to her which have been removed from her files or should have been put in them and have not been ...

(h) TO ORDER, ... in lieu of specific performance, that the [Applicant] be compensated the maximum amount of compensation allowed, ... and that moreover the [Applicant] be reinstated at the grade and level she would normally have achieved on the date of the decision had her contract been duly renewed for a period of two years.

(i) TO ORDER that a new FOPA should be prepared from August 1999 to June 2000 and that the [Applicant] be given the opportunity effectively to rebut her FOPA.

(j) TO ORDER the Secretary-General to pay the [Applicant] two years' net base salary for the undue delay caused by the Respondent in the hearing of the case by the [Joint Appeals Board [(JAB)]."

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 8 April 2006 and once thereafter until 8 May;

Whereas the Respondent filed his Answer on 5 May 2006;

Whereas the Applicant filed Written Observations on 15 June 2006;

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 the [United Nations Environment Programme (UNEP) in Nairobi as a P-4 Writer in Information and Public Affairs] on 13 April 1992, on a fixed-term appointment. She separated from UNEP on 30 June 1995 and, following a break in service, she ... [served] with the International Criminal Tribunal for Rwanda (...), until ... 30 September 1997 ... Effective 27 August 1999, the [Applicant] was reappointed on an appointment of limited duration (ALD) as an Information Officer (P-4) in ... UNMIK. The appointment was subsequently extended through 30 June 2001, at which time the [Applicant] separated from service.

Summary of the facts

... According to the [Applicant], on 28 August 2000, her supervisor ... the International Administrator for the University of Pristina, signed a recommendation for an extension of her contract until 31 December 2001.

... [Also according to the Applicant], on 6 February 2001, she was confronted by a United Nations Volunteer (UNV) working for the University of Pristina ... who blocked the main entrance of the University Rectorate where their offices were located. She waited a few seconds and when [the UNV] did not move she ‘brushed past him’, walked in and closed the door behind her. The [Applicant] complained to [an] UNMIK Police Officer ... who reported the incident ... to his Station Commander. [The Police Officer] in his report stated that no official complaint was made in this matter.

... On 7 February 2001, the [Applicant was advised by her supervisor] ... that he had received a complaint against her. ...

... On 8 February 2001, the [Applicant] wrote a formal complaint against [the UNV] to the International Administrator reporting the incident of 6 February ...

... On 12 February 2001, the Chief of Staff sent an e-mail to [the Chief of the Trust Fund Unit] confirming that he had taken note of the complaint of the [Applicant] against [the UNV] and that the UNMIK Civilian Personnel Unit would handle the case in accordance with the relevant rules and procedures and that it was premature to assess that [she] 'had not been afforded due process.' According to the [Applicant,] her complaints were never investigated.

... By a form 'Request for extension/appointment international staff member', dated 6 May 2001, which rated the [Applicant]'s performance 'partly satisfactory', the Chief Civilian Personnel Officer (CCPO) recommended no further extension of the [Applicant]'s contract. ...

... On 30 May 2001, the International Administrator issued the [Applicant's FOPA] for the period 1 July 2000 through 30 June 2001 and summoned the [Applicant] to discuss the contents of the FOPA with him. On 6 June, ... the International Administrator issued the same FOPA and rated the [Applicant] 'partly satisfactory'. The [Applicant] rebutted this FOPA.

... On 11 June 2001, [the Applicant's supervisor] requested [the] Administrative Officer from UNMIK to conduct a preliminary review of the case.

... On 28 June 2001, the [CCPO] wrote an e-mail in reply to a query made by the [Applicant] informing her *inter alia* that: 'With regard to your questions as to the status of investigations requested in February, please note that no investigations have been conducted to my knowledge'.

...

... On 27 November 2001, the FOPA Rebuttal Panel reported to the Acting Chief Administrative Officer (CAO). Referring to the incident of 6 February ... involving the [Applicant] and [the UNV] the Rebuttal Panel stated that: '... These staff members, including [the Applicant] exhibited behaviour unbecoming to the United Nations staff members'. With respect to the performance rating, the Rebuttal Panel recommended that the [Applicant] be given an overall rating of 'fully satisfactory'.

... Also on 27 November 2001, the Acting CAO wrote a memorandum to [the Applicant's supervisor] in which he accepted the conclusions of the Rebuttal Panel. He added: 'I propose to bring the investigation of [the Applicant's] complaints to an end by not proceeding further with the investigation of related issues she has raised'.

... By a memorandum dated 7 December 2001, the Acting CAO informed the [Applicant], *inter alia*, that: 'I wish also to inform you that I do not intend taking any further action concerning the complaints leveled by you ... or ... against you as the Panel has dealt sufficiently with all the incidents that occurred. I do not believe it will serve any useful purpose to prolong this matter.'

... ”

On 3 January 2002, the Applicant requested the Secretary-General to review of the following issues: a) the non-extension of her contract; b) the denial of due process; and, c) failure to investigate the above-referenced complaints.

On 14 May 2002, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 13 December 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

30. ... The Panel was of the view that the decision not to renew the Appellant’s contract was not a disguised disciplinary action and was taken within the discretionary power of the Secretary-General.

31. In determining whether a fixed-term appointment should be extended, a record of performance is an important factor. The Panel noted that the non-extension of the Appellant’s contract was based on her unsatisfactory performance with UNMIK. ...

32. The Panel further noted from the records of this case that the Appellant was first assigned to Mitrovica. Due to a tense situation prevailing in the mission area aggravated by the fact that the Appellant had a ‘pro Serb’ reputation and at the request of the Regional Administrator, the Appellant was removed from her post as Regional Information Officer in Mitrovica. She was then transferred to Pec. At that time, by a memorandum dated 21 April 2000 from the Spokeswoman and Director of Information to the Officer-in-Charge of the Security Service, the Spokeswoman pointed out that: ‘It was made clear to [the Appellant] that the transfer to Pec was intended to give her a fresh start in a region that was relatively stable and free of inter-ethnic problems. Unfortunately, her reputation in the press has followed her to Pec and [the Appellant] continues to be publicly perceived as an ‘enemy of the Albanians’. As a consequence, the Regional Administrator there has asked that she be removed.’

33. The Panel also noted that in June 2000, the Officer-in-Charge, Public Information, recommended that the Appellant’s contract not be renewed beyond its then expiration date. However, at that time, the Appellant was extended and reassigned to the Department of Education and Science. The Panel thus noted that the Appellant was sufficiently warned that she had to improve her interpersonal skills and that UNMIK provided her ample opportunity to do so by transferring her and accommodating the Appellant to posts suitable with her qualifications and experience. The performance was an important factor in the decision not to extend the Appellant’s contract.

34. The Panel further observed that the incident which occurred on 6 February 2001 only reflected that the Appellant’s difficulties or problems in the area of interpersonal skills continued. The record of this case showed several letters of complaint against the Appellant submitted by staff members of the Department of Education and Science.

35. Regarding the contention of the Appellant that she was denied due process and that adverse material was placed in her file without her knowledge, the Panel noted that the Appellant did not rebut her first FOPA for the period 1999-2000. ... The Panel was of the view that UNMIK provided her ample opportunity to defend herself respecting her rights as a staff member, including her due process rights. ...

...

37. [In connection with the issue of the investigation, the] Panel noted that in August 2001 both the Appellant and the other two staff members involved ... were given the opportunity to comment on the allegations against them. ... [T]he Panel agreed that the Appellant’s due process rights were respected. ... While looking at the overall facts of the case, the Panel was of the view that the Administration of UNMIK acted in good faith and within its discretionary power when it decided not to renew the Appellant’s contract and close the matter.

38. As a final consideration, the Panel observed that the Appellant did not include any substantiating documentation in support of her claim that she suffered harassment and repeated threats of violence. The

Panel also reviewed the Appellant's Official Status file and did not find in it any adverse material filed without the knowledge of the Appellant.

Conclusion and recommendation

39. In light of the foregoing, the Panel *unanimously concluded* that the Appellant had failed to demonstrate that the Respondent has committed a breach of her terms of employment or that her rights as a staff member had been violated. The Panel also concluded that the Appellant did not suffer any irreparable harm as there was adequate evidence proving that the Organization assisted the Appellant and gave her ample opportunity to improve her interpersonal skills. The decision taken not to renew the Appellant's contract was not flawed by extraneous factors and was taken within the legitimate exercise of the discretionary power of the Secretary-General.

40. Accordingly, the Panel *unanimously decided* to make no recommendation in support of this appeal."

On 28 January 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on her appeal.

On 5 October 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The non-renewal of her appointment was motivated by arbitrariness, prejudice or other extraneous considerations.
2. The Respondent removed favourable documents from her file, and inserted documents detrimental to her.
3. She was the victim of a "vindictive campaign of lies and slander".
4. She was denied due process.

Whereas the Respondent's principal contentions are:

1. The non-renewal of the Applicant's appointment was a valid exercise of the Secretary-General's discretionary authority; the decision followed a proper evaluation of the Applicant's work performance and was not motivated by arbitrariness, prejudice or other extraneous considerations.
2. The decision not to renew the Applicant's contract was not a disciplinary measure.
3. Applicant has furnished no proof of adverse material allegedly placed in her file without her knowledge, or of favourable material removed or omitted.
4. The Applicant was accorded due process before the JAB.

The Tribunal, having deliberated from 31 October to 21 November 2007, now pronounces the following Judgement:

I. The Applicant was reappointed after a break in service on an ALD as an Information Officer (P-4) in UNMIK, on 27 August 1999. Following extension of appointment, according to the Applicant, on 28 August 2000, her supervisor, the International Administrator for the University of Pristina, signed a recommendation for an extension of her contract until 31 December 2001. However, her last letter of appointment stated in paragraph 3: “[t]his [ALD] starts on the effective date of appointment shown above and will expire without notice on 30 June 2001”.

On 6 February 2001, an incident occurred between the Applicant and a UNV working for the University of Pristina. Both complained and, apparently, the UNMIK Civilian Personnel Unit agreed to handle the case in accordance with the relevant rules and procedures. However, according to the Applicant, her complaints were never investigated.

By a form “Request for extension/appointment international staff member”, dated 6 May 2001, which rated the Applicant’s performance “partly satisfactory”, the CCPO recommended no further extension of the Applicant’s contract, i.e., beyond 30 June. This recommendation was endorsed by the Office of the Deputy Special Representative of the Secretary-General on 22 May. On 30 May and, following review, on 6 June, the Applicant’s supervisor issued her FOPA for the period 1 July 2000 through 30 June 2001, rating her “partly satisfactory”. The Applicant rebutted this FOPA.

On 27 November 2001, the FOPA Rebuttal Panel, having obtained comments from both the Applicant and the UNV regarding the 6 February incident, concluded that both “exhibited behaviour unbecoming to ... United Nations staff members”. With respect to the performance rating, the Rebuttal Panel recommended that the Applicant be given an overall rating of “fully satisfactory”. Having received the report of the FOPA Rebuttal Panel, the Acting CAO accepted its conclusions and proposed to “bring the investigation of the [Applicant’s] complaints to an end by not proceeding further with the investigation of related issues she has raised”.

On 3 January 2002, the Applicant wrote to the Secretary-General asking for administrative review. She lodged an appeal with the JAB on 14 May. In its report dated 13 December 2004, the JAB concluded that the Applicant had failed to demonstrate a breach of her terms of employment or a violation of her rights; that she did not suffer any irreparable harm as she was given ample opportunity to improve her interpersonal skills; and, that the decision taken not to renew her contract was not flawed by extraneous factors. Thus, it made no recommendation in support of this appeal. The Secretary-General accepted the JAB’s findings and conclusions on 28 January 2005.

II. The Tribunal takes note of the five pleas advanced by the Applicant, and will consider them *seriatim*.

III. On the first plea regarding the decision not to renew her contract, the Tribunal notes that the Applicant was employed on fixed-term contracts, and that her last two appointments were ALDs. All fixed-term contracts are for a limited duration only and hence they do not give rise to a right of renewal. (See No. 440, *Shankar* (1989).) The same applies to ALDs. The Administration has no duty to give reasons for non-renewal or extension of such

appointment. (See Judgement No. 1191, *Aertgeerts* (2004).) However, an expectancy of renewal may arise if the staff member is led to so expect. The Tribunal recalls in this regard Judgement No. 1173, *Guerrero* (2004):

“The Tribunal notes that the Respondent did not offer an explanation for the fact that the Applicant was granted 1,000 kilograms for unaccompanied baggage and that in accordance with staff rule 107.21 (i), such entitlement is indeed granted only to staff members appointed or assigned for one year or longer.

The Tribunal considers that the totality of the circumstances in this case, as described above, could reasonably have led the Applicant to expect continued employment with UNEP.”

In the instant case, however, there is no suggestion that the Administration had, by words or conduct, led the Applicant to so expect. On the contrary, her ALD specifically stipulated: “This [ALD] starts on the effective date ... and will expire without notice on 30 June 2001”.

IV. Where the circumstances give rise to an expectancy of renewal, then the decision not to renew must not be vitiated by lack of due process, arbitrariness or other extraneous motives on the part of the Administration. (See Judgement No. 1144, *Miller* (2003).) In the Tribunal’s view, even if a legal expectancy of renewal had arisen herein, the non-renewal was not initiated by extraneous and improper motives but in accordance with due process. In that respect, on 30 May 2001, the Applicant’s supervisor issued a FOPA for the Applicant after the necessary discussion with her. He rated her performance as “partly satisfactory”.

The Applicant rebutted the FOPA. The Rebuttal Panel changed the rating to “fully satisfactory”. However, the Rebuttal Panel concluded that both exhibited behaviour unbecoming to United Nations staff.

The JAB also refers to the Applicant’s poor interpersonal skills as well as her lack of neutrality relevant to her professional standing. While with UNMIK at Mitrovica, an area deeply embroiled in conflict between Serbs and Albanians, she developed a “pro-Serb” reputation. This led to her being re-assigned to Pec, but her reputation somehow followed her and she continued to be perceived as an “enemy of the Albanians”. As a consequence, the Regional Administration requested that she be removed. According to the JAB, UNMIK gave the Applicant sufficient warning that she had to improve her interpersonal skills and provided her with ample opportunity to do so by transferring her and accommodating her with posts suited to her qualifications and experience. The Applicant’s performance was an important factor in the decision not to extend her contract.

The Tribunal finds that the Secretary-General is entitled to take the Applicant’s conduct into account. Although the Tribunal cannot and will not substitute its own judgement for that of the Secretary-General in this respect, it entirely agrees that his decision not to renew the Applicant’s ALD was taken in the best interest of UNMIK and not taken as a disciplinary measure.

V. With regard to the second plea, namely that the Applicant was not given a FOPA while working for the UNMIK Department of Public Information “and therefore could not rebut it”, the Tribunal observes that the JAB established that a FOPA was prepared for the Applicant covering the period 27 August 1999 to 30 June 2000 in

which her overall performance was rated “partly satisfactory”, but that the Applicant never challenged these ratings. The JAB points out that the Applicant was given several opportunities to rebut her first FOPA and to develop better interpersonal skills. Moreover, she was given ample opportunity to defend her rights, including her due process rights. The Tribunal, therefore, finds that the FOPA stands as the rated record of the Applicant’s work performance.

VI. The third plea requests the Applicant’s reinstatement and UNMIK to “search and remove from [her] files in UNMIK and at Headquarters all detrimental documents”, including the relevant FOPA that may have been inserted without previously having been submitted for rebuttal. The Tribunal notes that the Applicant makes this request in general terms, without specifying any particular detrimental documents. Had she inspected her Official Status file and found therein adverse material that had been inserted without her knowledge, she could have made the appropriate application. As it is, the Tribunal notes that the JAB reviewed the file and found “no adverse material [which had been] filed without the knowledge of the Applicant”, and it is fully satisfied with the JAB’s finding in this respect.

For similar reasons of lack of specificity, the Applicant’s request for placement in her Official Status file of documents favourable to her which had been removed therefrom without her knowledge cannot be entertained. The Tribunal views her omnibus requests as vexatious.

VII. In pleas four and five, the Applicant makes various claims for compensation for violations of due process, harassment and delays. In the Tribunals’ view, the JAB thoroughly reviewed the issues and the Tribunal fully concurs with its recommendations. The Applicant’s allegation that the JAB denied her due process is without basis. It recalls in this connection Judgement No. 1278 (2006):

“VI. The *onus probandi* regarding discrimination, arbitrariness, improper motivation or undue process of law falls on the Applicant. This has been the consistent jurisprudence of the Tribunal, as previously stated in Judgement No. 834, *Kumar* (1997): ‘the burden of proof in matters where prejudice or discrimination is alleged rests upon the Applicant’. Similarly, in Judgement No. 874, *Abbas* (1998), the Tribunal stated that ‘[t]he burden is on the Applicant to present convincing evidence when alleging that the decision ... is tainted by prejudice or improper motivation.’ The Tribunal recently reaffirmed this position in Judgement No. 1103, *Dilleyta* (2003): ‘[i]t has been the consistent jurisprudence of the Tribunal that, where an Applicant alleges bias or other improper motivation or extraneous factors vis-à-vis a contested decision, that he carry the burden of proof in relation thereto’.”

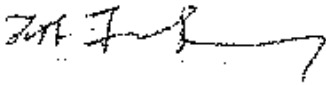
In the present case, while the Applicant suggests that some improper motivation was behind the contested decision, she did not bring any proof in support of this claim. The Applicant has thus not discharged her burden of proving such legal deficiencies in the Respondent’s decision and this claim must also fail.

VIII. In light of the foregoing, the Application is rejected in its entirety.

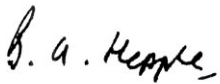
(Signatures)



Spyridon **Flogaitis**
President



Goh Joon Seng
Member



Bob **Hepple**
Member

New York, 21 November 2007



Maritza **Struyvenberg**
Executive Secretary