



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1371

Case No. 1449

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas at the request of a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 30 November 2005 and once thereafter until 15 December;

Whereas, on 2 December 2005, the Applicant filed an Application requesting the Tribunal, *inter alia*:

“7. With respect to competence and procedure, ...

...

(c) *to decide* to hold oral proceedings ...;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Administrator not to renew the Applicant's contract and to separate her from service as of 31 January 2004;

(b) *to find and rule* that the Joint Appeals Board [(JAB)], in light of its findings, erred as a matter of justice and equity in failing to recommend the Applicant's reinstatement in service and to recommend the award of appropriate and adequate

compensation for the consequential harm done to the Applicant including lost employment, monetary losses, effect on her professional reputation and mental anguish as well as for violation of her rights to due process under the Staff Rules & Regulations;

- (c) *to find and rule* that the decision of the Administrator was procedurally flawed and tainted by bias and prejudice thereby constituting injustice and abuse of authority;
- (d) to order that the Applicant be reinstated in service with effect from 1 February 2004;
- (e) to award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- (f) to fix pursuant article 9, paragraph 1 of the Statutes and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay, in view of the special circumstances of the case;
- (g) to award the Applicant as cost, the sum of \$10,000.00 in legal fees and \$500.00 in expenses and disbursements."

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 12 May 2006 and once thereafter until 12 June;

Whereas the Respondent filed his Answer on 12 June 2006;

Whereas the Applicant filed Written Observations on 26 January 2007;

Whereas, on 29 October 2007, 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 initially recruited by UNDP on a two-year [fixed-term appointment], effective 1 March 2001, as Director (D-2), Special Unit for Technical Co-operation among Developing Countries (TCDC). Her appointment was extended for six months, effective 1 March 2003, and for two more months, effective 1 September ... As from 1 November ..., she was placed on special leave with [full] pay [(SLWFP)] and her contract was extended until 31 January 2004, when she separated from the service.

***Summary of the facts***

... [A Results and Competency Assessment (RCA)] was partially completed for [the Applicant's] service from 1 July - 31 December 2001. Her self-assessment and the competency scorecard for managers is completed as is the overall evaluation ('fully meets expectations'), but it is signed neither by her direct supervisor, [the] Assistant

Administrator, nor by [the Applicant]. ... [T]here is no copy in her [Official Status] file. Counsel for [the Applicant] states that she did not receive a copy until October 2002.

... On 23 August 2002, [the] Administrator, UNDP, in his capacity as Chairperson of the Career Review Group (CRG) signed section K of the above-mentioned RCA. It read:

‘ ...

The Senior CRG supports the ratings of [the Applicant].

However, recognizing that [the Applicant] joined UNDP only in July 2001, the Senior CRG felt that there is an urgency for [the Applicant] to show greater ability in elaborating and implementing a strategic vision for South-South cooperation to be mainstreamed in UNDP. ...

The senior CRG also believes [the Applicant] should have made greater efforts to reach out and get to know and partner with other units in the house, especially the practice areas, in order for TCDC to fully realize its vast potential. Opportunities were missed and follow-up insufficient. [The Applicant] is encouraged to widen her perspective of the TCDC mandate.

...’

... On 21 January 2003 [the Administrator, UNDP, sent the Applicant] the following e-mail:

‘ ...

As we agreed your contract will now be extended for 6 months. Towards the end of this period and after TCDC High-Level meeting, we will review together your achievements against the ... 5 areas which we discussed ...

...’

... In a memo of 22 January 2003 ..., [the Applicant] replied to the implicit criticism of her performance ...

... On 17 April 2003, [the Administrator, UNDP,] wrote ... to [the Applicant] on the results of the 2002 Global Staff Survey (...), remarking, ‘I am sure you are as disappointed as I am with the results and would agree there is much scope for improvement’. Replying on 2 May ..., [the Applicant] gave her perspective on the results and concluded ‘I am confident that the steps already taken and those envisaged will address the concerns’.

... An RCA was completed and signed by [the Assistant Administrator] for the period 1 February 2002 to 31 January 2003 ... It states that performance-related discussions were held on 14 January 2003, and gives [the Applicant] an overall rating of ‘fully met expectations’, although it includes some unfavourable ratings and remarks. It is unsigned by [the Applicant] and undated by [the Assistant Administrator]; there is no copy on [the Applicant’s Official Status] file. Counsel for [the Applicant] states that [the Applicant] was given her copy in August 2003.

... On 12 September 2003, [the Assistant Administrator] sent the following e-mail ... to [the Applicant]:

‘ ...

As we agreed, the period to consider in the submission of the RCA is 2002 plus the first six months of 2003. I therefore expect you to update the document accordingly.

...

In light of the above and because your presence at headquarters will be required during the next days relating to this very important matter, I have decided to formally cancel the authorization that I previously gave you to undertake a mission ...’

... As requested, [the Applicant] provided an expanded Part B of the RCA to cover the period 1 February 2002 to 16 September 2003 .... [The Assistant Administrator’s] comments and evaluation (overall ‘fully met expectations’) are essentially the same as on the earlier 12-month RCA. The RCA contains comments from [the Applicant], but is neither dated nor signed; there is no copy on ... file.

... The CRG considered the RCA on 17 September 2003, and decided not to recommend a further extension of [the Applicant]’s contract. On 7 October ..., [the Assistant Administrator sent the Applicant] the following e-mail ...:

‘ ...

As a follow up to the Senior CRG’s decision not to extend your contract beyond its current expiration date of 31 October 2003, it has been decided to appoint [the] Director of Operations Support Group, as Officer in Charge of the Special Unit on Technical Cooperation among Developing Countries, effective 1 November ...

...’

... On 22 October 2003, [the Applicant] wrote to [the Administrator, UNDP], noting that the discussion with her supervisor, which, according to UNDP/2003/ADM/19 [of 14 February 2003], should have taken place within 10 days of the CRG report, did not take place. She also contested the CRG ratings and recommendation. The same day, she submitted copies of her rebuttal to the Office of Human Resources [(OHR)] and to the Chairman of the Rebuttal Panel ...

...

... [The] Officer-in-Charge, OHR, wrote [to the Applicant] on 29 October 2003 ... referring to her letter to [the Administrator, UNDP,] and to OHR:

‘ ...

In order for you to retain your staff member status during the rebuttal process, your appointment will be extended for a period of up to three months, in order to allow sufficient time for the exercise to be concluded.

During that period, you will be placed on [SLWFP]. ...’

... [The Applicant] addressed a request for administrative review to the Administrator on 4 December 2003. The reply of 9 December ... from [the] Assistant Administrator and Director, Bureau of Management, said, in part:

‘ ...

The decision to extend your appointment with UNDP for three further months supersedes the previous notification that your contract would expire by 31 October ..., and therefore your request to review the 7 October ... decision has no *raison d’être*.

When the Panel of Rebuttal submits its report to the Administrator, the latter will make a decision as to your situation. ...’

... On 30 January 2004, two letters were addressed to [the Applicant]; one from [the Administrator, UNDP,] read:

‘In my capacity as the Chair of the CRG, ...

... I acknowledge that it is indeed not appropriate that a RCA covers eighteen months instead of twelve months, as is prescribed by the RCA guidelines. ...

The mere fact that you were granted and agreed to a six-month extension to give you an opportunity to improve your performance - a measure you did not challenge at that time - is a clear indication that you had only partially met the expectations. This is what the 2002 RCA would have indicated. However, for your benefit, we chose not to put the results of our discussions in the 2002 RCA, and therefore abstained from finalizing the RCA.

This departure from the RCA procedure is unfortunate, and in order to comply with the recommendations of the RCA Rebuttal Panel of reference - who does not make any comments on your performance - the RCA will be revised in order to reflect the evaluation of your performance in 2002 only.

The comments for 2002 will remain the same since they explain why you were asked to demonstrate significant improvement in areas specified by the end of the next review period (in your case, six months).

The Panel and yourself found that the rating “fully met expectations” was not consistent with the CRG comments and recommendation. However, this rating had no other purpose than to preserve your professional reputation and future career.

Given the Rebuttal Panel’s recommendation for consistency, the rating “fully met expectations” granted to you for the year to (sic) 2002 needs to be replaced by “partially met expectations”. ...

....’

The other [letter], from [the Officer-in-Charge, OHR,] said:

‘I regret to inform you that the Administrator has decided that your appointment will not be renewed beyond 31 January 2004.

...’

... [The Applicant] addressed a request for administrative review to the Administrator ... on 13 February 2004. On 27 February ..., she received a faxed copy of ‘the revised RCA for 2002’, ... referred to in [the Administrator’s] letter quoted above. ...”

On 12 April 2004, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 16 June 2005. Its considerations and recommendation read, in part, as follows:

***“Considerations***

...

25 [The] Appellant, having alleged prejudice and the introduction of improper motives in the consideration of the extension to her [appointment], bore the onus of proof. The Panel concluded that she had failed to convince, and dismissed the allegations.

...

27. The remainder of [her] contentions relate to due process and defects in procedure. [The] Respondent ‘does not deny that procedural errors were committed in the management of the Appellant’s RCA for 2002’ ..., but [asserts] that she ‘was fully afforded her due process rights.’ In fact the entire RCA procedure, beginning with her RCA for 2001, was rife with procedural errors.

28. [The] Appellant has submitted copies of three RCAs. None of them is included in her [Official Status] file and none is offered by Respondent. The Panel has, therefore, judged their state of completion on the basis of those submitted by [the] Appellant.

...

32. Having noted that proper procedures were ignored, the Panel found no evidence to find ... ‘the existence of solid prospects for renewal’. It was clear to the Panel that [the Assistant Administrator] and [the Administrator] had made known their reservations about [the] Appellant’s performance, even if they had failed to follow correct procedures. The Panel concluded therefore that ‘the procedural irregularities do not fundamentally vitiate the decision’ not to extend [her appointment], and that she ‘is entitled only to a limited compensation for the inadequate treatment of ... her case.’ ...

***Recommendation***

33. The Panel recommends to the Secretary-General that [the] Appellant be paid compensation in the amount of one month net base pay at the time of her separation.

34. The Panel makes no other recommendation with respect to this appeal.”

On 25 January 2006, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“The Secretary-General ... accepts the JAB’s conclusion that the decision not to extend your fixed-term appointment was properly made and entailed no violation of your rights. The Secretary-General, however, while accepting the obligation incumbent upon the Organization to comply with its own procedures, regrets that he cannot accept the JAB’s recommendation to pay you compensation ... [N]o right of yours was violated in the evaluation process in a manner that had an effect on the decision not to extend your contract and, indeed, you were made aware of the deficiencies in your performance and were given full opportunity to improve it. While ‘exemplary’ or ‘punitive’ damages may, exceptionally, be awarded, the circumstances in which such an award may be made clearly do not exist in your case. The Secretary-General has therefore decided to take no further action on your appeal.”

On 2 December 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The decision of the Administrator was procedurally flawed and tainted by bias and prejudice, thereby constituting an injustice and abuse of authority.
2. The Applicant’s rights to due process were violated.

Whereas the Respondent’s principal contentions are:

1. The Applicant had no legal expectancy of renewal, and the decision of the Respondent not to renew her appointment constituted an appropriate use of his discretion; it was not vitiated by prejudice or other improper motive.
2. The Applicant was fully afforded her due process rights.
3. The Applicant’s pleas for monetary compensation are without merit.

The Tribunal, having deliberated from 29 October to 21 November 2007, now pronounces the following Judgement:

I. The Applicant joined UNDP as a Director (D-2) of the Special Unit for TCDC under a two-year fixed-term contract on 1 March 2001. She only took up her appointment on 1 July 2001, however. The Applicant was recruited following a competitive selection process open to both external and internal candidates. She came to her post with 25 years of experience in the private and public sectors, including prior service as Minister of Energy of Côte d’Ivoire, and having held various posts in the United Nations and the World Bank. Following extensions of six, two and three months, respectively, the Applicant was informed on 30 January 2004, the day before her last extension expired, that her contract would not be renewed. She is challenging this decision and the circumstances that led to the non-renewal of her fixed-term contract.

II. The Applicant's initial RCA (RCA 1) covering the six-month period 1 July - 31 December 2001, with a rating "produced results and displayed a range of competencies that fully met expectations" was neither signed by her nor by her direct supervisor and was not placed in her Official Status file. In August 2002, the UNDP Administrator signed one of the sections of the RCA, while making a number of criticisms and urging the Applicant to improve her performance. On 14 January 2003, the Applicant was informed by the Administration that her fixed-term contract, scheduled to expire at the end of February, would be renewed for only six months and that she would have to improve upon her performance in five specific areas.

III. Her second RCA (RCA 2) for the period 1 February 2002 - 31 January 2003 was also rated as "fully met expectations" and was signed by her immediate supervisor but was not signed by the Applicant, was not dated and was not placed in her Official Status file. Although the overall rating was "fully met expectations", it contained some critical comments on certain areas of the Applicant's performance albeit also reflecting some improvement. The overall picture of the evaluation, both in terms of the specific comments and the overall assessment, was positive. The Applicant got 7 ratings of "needs improvement", basically with respect to interpersonal relations, compared to 14 positive ratings, including eight "fully satisfactory", four "exceeds expectations" and two "outstanding". In the opinion of the Tribunal, the final comments entered by her immediate supervisor reflect a positive evaluation:

"The staff member has deployed vast energy in trying to implement the mandate of the TCDC Unit, after a period of adjustment. This has resulted in the launching of new programmes which have given good visibility to UNDP. Also remarkable is the result achieved in the area of partnerships with external actors, including the natural constituency of TCDC, the G-77. It is regrettable that sometimes, a clear link between these activities and the programmatic work of UNDP is not visible. This touches on a broader issue of the interaction between the Unit and other units in the Organization. Although the TCDC Unit is not to blame solely, it is its responsibility to cultivate better ties with the rest of UNDP. The staff member has acknowledged the issue and is working on it. Another area that needs development is the substantive contribution of the Unit to the practice debate. The South-South angle will undoubtedly be a strong valuable addition to the strengthening of the knowledge culture of the Organization and the staff member should be more visible in that debate. Last but not least, the management of people needs ... stronger attention from the staff member."

The Applicant's contract was renewed for a further period of two months until 31 October 2003 in order to permit the completion of RCA 2.

IV. During that period, the Applicant was asked to provide an account of her performance in 2003 so that she could be evaluated. The Applicant drafted a memorandum detailing her tasks during the last six months which she transmitted to the Administrator on 3 September 2003. The latter met with her on 5 September and congratulated her on her work while expressing some concerns as to her interaction with certain Heads of Bureaux. The Applicant responded that two of the Bureau Heads had never responded to her requests for a meeting. The Applicant provided, in a letter dated 9 September addressed to the



Administrator, an account of all the issues raised during that meeting, noting, inter alia “Your words of appreciation of my work and achievements were very comforting. Please be assured I will continue to invest myself in my work.” However, instead of preparing a third RCA for 2003, the Administration suddenly decided on 12 September to add the first six months of 2003 to the evaluation for 2002. It requested the Applicant finalize that new RCA by 15 September. This third RCA (in fact RCA 2 bis) covered the period 1 February 2002 - 16 September 2003: although the Applicant had submitted substantial additions for the last six months, this RCA 2 bis did not take them into account at all and reproduced exactly the same ratings as for RCA 2; the final comment remained unchanged, leading to the same rating “fully met expectations”, but the RCA was neither dated, signed nor placed in the Applicant’s file. The Applicant vigorously challenged that evaluation, contending that her work during the last six months had not been taken into account at all and requested a review of her evaluation. She was informed that such a review would be conducted at the 17 September CRG meeting. The Applicant requested that the new review should be conducted at a later meeting of the CRG to give her time to prepare her case. Her request was rejected and her RCA 2 bis was therefore reviewed on 17 September by the CRG, only five days after she had been asked to add an account of her last six months of work. The CRG endorsed the rating of “fully met expectations” while recommending that her contract should not be renewed.

V. On 7 October 2003, the Applicant was informed by e-mail that her contract would not be extended beyond 31 October. On 22 October, the Applicant once again challenged the evaluation and the entire procedure: she noted that she had not had the time to comment on the new version, RCA 2 bis, which was prepared on 16 September, before its submission to the CRG on 17 September; that the discussion that, in accordance with the circular UNDP/2003/ADM/19, should have been held with the staff member within 10 days of the publication of the CRG report, did not take place; and, that the 18-month evaluation period was arbitrary. She therefore challenged the RCA 2 bis by filing an application for review with OHR and the Rebuttal Panel. In order to give the Rebuttal Panel enough time to complete the rebuttal process, the Applicant’s contract was renewed for the last time for three months - until 31 January 2004 - during which she was not assigned any duties but was placed on SLWFP. It should be noted that a new Director was appointed on 1 November 2003, before the Applicant’s rebuttal procedure was completed.

VI. The Rebuttal Panel submitted its report on 15 January 2004 and expressed concern at the inconsistency between the rating “3”, “fully met expectations”, and the recommendation not to renew the Applicant’s contract. It stressed several inconsistencies, such as:

“The CRG endorses the rating by the Immediate Supervisor ‘fully met expectations’ but concludes ‘the increasing loss of credibility ... within UNDP call for a different leadership for TCDC’. This does not match the rating ‘Exceeded expectations’ given by Immediate Supervisor on the Results Scorecard with regard to ‘improved working relationships with G-77, Bureaux, Clients, Constituents and other partners’.”

The conclusions and recommendations of the report of the Rebuttal Panel were as follows:

“ The Panel notes the weaknesses in the management of the RCA process, as well as several instances of non-compliance with the RCA guidelines and procedures.

The Panel notes a major inconsistency between the scorecard, the supervisor’s and the CRG’s write ups, the rating of ‘3’ and the recommendation that the [staff member] seek alternative employment.

The Panel recommends that the CRG review its comments to ensure a more balanced evaluation of the [staff member’s] performance consistent with the rating of ‘3’ ‘fully met expectations’ (sic) that clearly provides a rationale for its recommendation ... ‘The staff member should seek alternative employment opportunities with a view to separation from UNDP in accordance with applicable Staff Rules’ ...”

VII. On 30 January 2004, the day before the expiration of the three-month extension of the Applicant’s contract, the Administrator, UNDP, wrote her a letter acknowledging that it had been inappropriate to utilise an 18-month RCA period and explaining that in order to comply with the Rebuttal Panel’s recommendation he had decided to downgrade her overall rating:

“The Panel and yourself found that the rating ‘fully met expectations’ was not consistent with the CRG comments and recommendation. However, this rating had no other purpose than to preserve your professional reputation and future career.

Given the Rebuttal Panel’s recommendation for consistency, the rating ‘fully met expectations’ granted to you for the year to 2002 needs to be replaced by ‘partially met expectations’.”

VIII. On 27 February 2004, the Applicant received a revised version of RCA 2 bis (RCA 2 ter), that she challenged before the JAB. The JAB issued its report on 16 June 2005. While recognizing that many procedural errors had been committed in the handling of the Applicant’s RCA, the JAB also stressed that the Applicant did not have any legal expectation of renewal of her fixed-term contract and recommended only the payment of one month’s salary to the Applicant as compensation for the violation of due process in the handling of her evaluation. While the Secretary-General also acknowledged that procedural errors were committed, he informed the Applicant by letter dated 25 January 2006 - nine months after the JAB report - that it was his understanding that the JAB had found that “the decision not to extend [her] appointment was a proper exercise of administrative discretion” since “the procedural errors did not fundamentally vitiate the decision not to extend [her] contract” and therefore refused to award her compensation of a month’s salary recommended by the JAB as she had suffered no prejudice. That is the decision being appealed before the Tribunal.

IX. The Tribunal first recalls its traditional approach, whereby even if the Applicant did not, in principle, have any right to renewal of her fixed-term contract under staff rule 104.12 (b) (ii), it ought to consider whether the prospects for renewal were greater because of certain circumstances specific to the case and whether procedural irregularities were committed during the procedure that culminated in non-

renewal and, if so, whether those irregularities are sufficiently serious to be deemed to have vitiated the non-renewal decision, in which case that decision should be considered null and void, or whether they simply give rise to a right to compensation for procedural irregularities. In this connection, the Tribunal recalls its reasoning in Judgement No. 1052, *Bonder* (2002), para. VI:

“Depending on the extent to which proper procedures have been ignored and on the existence of solid prospects for renewal, the Tribunal may conclude that the procedural irregularities do not fundamentally vitiate the decision and that the Applicant is entitled only to a limited compensation for the inadequate treatment of his or her case; or it may conclude that, although the Applicant does not have a right of renewal, the procedural irregularities were so serious or so relevant to the decision not to renew that the non-renewal decision should be considered illegal and the staff member entitled either to renewal of his or her contract or to compensation in lieu thereof if the Administration refuses to comply. The latter conclusion applies in principle only in cases where there have been serious and manifest violations of the rights of the staff member and also where the likelihood that the staff member’s contract would be renewed was particularly strong for general and/or specific reasons.”

The Tribunal will therefore consider, firstly, whether there were any “solid prospects for renewal” that the Applicant could invoke and, secondly, how the Administration managed the evaluation that led it to not renew the Applicant’s contract.

X. The Applicant alleges that she had strong, legitimate expectations that her fixed-term contract would be renewed. She says that she “came to the post as an experienced professional in her field with an excellent track record, and gave up other opportunities on the clear understanding that she would make a career with UNDP” and that “her legitimate expectation for continued employment can be adduced from the circumstances surrounding her appointment as well as the record of service and the high regard in which she was held by her counterparts”. The Applicant does not explain what “circumstances surrounding her appointment” might have given her a legitimate expectation of renewal, however, and the Tribunal cannot accept such a vague allegation. Moreover, its established jurisprudence shows that even excellent performance does not confer a right to renewal of a fixed-term contract. (See Judgements No. 1237 (2005) and No. 1264 (2005).) In any event, in the Tribunal’s view, there is nothing in the file to suggest that the Applicant received any indications from the Administration that might have led her to believe that there were solid prospects for renewal of her contract. It is true that the Respondent acknowledged that “had the Applicant’s performance been fully satisfactory, it is highly probable that her contract would have been extended for two further years, as is the usual practice within UNDP”, showing that the prospects for renewal were, as the Administration itself acknowledged, closely linked to performance. The Applicant cannot lay claim to an undisputed track record, however. Quite the opposite: as early as August 2002, i.e. just over half way through her contract, the Administration’s reservations about her performance were conveyed to the Applicant. Moreover, in January 2003, she was informed very explicitly that her contract would be renewed for only six months and also received the implicit message that any further renewal would depend on the progress made in five areas to which her attention was drawn. The Tribunal therefore

concludes that there is no particular circumstance that would warrant a finding that the Applicant had solid prospects for renewal of her fixed-term contract.

XI. Notwithstanding the above, that leaves the question of whether the Applicant's rights to due process in the evaluation process that culminated in the non-renewal of her contract were respected. The Applicant invokes both procedural irregularities and the existence of improper motives based on bias and discrimination.

XII. Turning first to the question of whether due process was observed during the procedure for renewal of the Applicant's fixed-term contract, the Tribunal has no hesitation in saying that it was not, given the gross and manifest irregularities and violations that were committed. The Administration had already acknowledged this fact in its statement to the JAB, in which it "does not deny that procedural errors were committed in the management of the Appellant's RCA for 2002". The JAB came to the same conclusion when it stated in its report: "In fact the entire RCA procedure, beginning with her RCA for 2001, was rife with procedural errors". One has only to reread the description in paragraphs II to V above of the stages of the Applicant's evaluation process to realize that there were numerous procedural irregularities. In particular, one can cite the sudden haste in early September 2003 that led to the Applicant's RCA, covering an abnormally long period of time, being completed in a matter of days, which obviously left no opportunity for it to be considered impartially or for the Applicant to respond to it. The Tribunal has criticized such an approach repeatedly, for example in Judgement No. 1026, *Sturdza* (2001), paragraph IV, where it noted:

"the lack of timeliness in [performance evaluation], inter alia, deprived the Applicant of the possibility of responding, not only in rebuttals but, most essentially, in her work performance, to any legitimate criticism of her performance, and that those deficiencies constituted a lack of fairness in procedures leading up to the Applicant's separation".

XIII. Moreover, no specific evaluation was made of the five areas in which the Applicant had been asked to make improvements, a fact that she underlines in her 4 December 2004 letter to the UNDP Administrator, requesting administrative review of the decision not to renew her contract:

"we agreed in January 2003 on a six-month extension of my contract based upon five criteria you enumerated for assessing my performance. The overall assessment of my work that includes the RCA for 18 months failed to take into account the criteria you had communicated to me, as well as my recent achievements in these areas. I therefore find myself presented with an unfair evaluation of my performance in light of the goals that were mutually agreed upon."

XIV. Furthermore, it is apparent that when the Rebuttal Panel recommended to the Administration that it review its comments to make them compatible with the rating "fully met expectations", the Administration solved the problem of inconsistency between its comments and its rating by doing the exact opposite, that is, by changing the rating to "partially met expectations" rather than changing its comments

as suggested by the Rebuttal Panel. In other words, the evaluation made by her direct supervisor and that made by the UNDP Administrator were irreconcilable and the Administrator unilaterally “reconciled” them retroactively by changing the rating “fully met expectations” given by the direct supervisor and confirmed by the CRG to “partially met expectations”.

XV. The Tribunal is particularly concerned at the Administration’s ambiguous attitude, more precisely, the fact that the Administration rated the Applicant relatively positively while treating her absolutely negatively. As the Applicant emphasizes, “throughout the process, the Applicant’s direct supervisor maintained that her performance had met expectations”, and yet her contract was not renewed. In this regard, the Tribunal agrees with the Applicant when she says, in her 22 October 2003 letter rebutting her evaluation and the non-renewal of her contract, that: “If the senior management decides to separate for reasons other than professional ones, it is certainly their prerogative. But, if the separation is based on professional reasons, *some consistency will be required between the rating and the decision*”. (Emphasis added.) United Nations staff members are entitled to transparency and honesty in the evaluations made by the Administration; otherwise the entire system put in place by the Organization becomes meaningless. The Tribunal therefore concludes that the Administration seriously violated the Applicant’s rights to a fair and equitable procedure and believes that she was justified in asserting that “the treatment afforded her by UNDP does not meet the basic requirements of good faith and fair dealing that are an inherent part of the contractual relationship and which are required of a good employer”. Moreover, the Tribunal feels bound to express its disapproval at the Administration’s avowed manipulation of the rating system: the explanation given by the Respondent that “this rating [of ‘fully met expectations’] had no other purpose than to preserve your professional reputation and future career” represents a distortion of the evaluation system and reflects a degree of disregard for the truth that the Tribunal frankly finds deeply disturbing. Not only were the staff member’s rights violated, but the purpose of the entire philosophy of the evaluation system put in place by the United Nations as an employer was subverted. Potential future employers, whether another United Nations agency or an outside entity, must be able to rely in good faith on any evaluations made under the Organization’s formal evaluation system that candidates for employment with them may wish to submit to them. The Tribunal recalls in this connection its Judgement No. 1058, *Ch’ng* (2002), in which it stated “[t]he Tribunal feels that the Organization has to respect and follow its procedures in keeping with what the world expects of the United Nations (see Judgement No. 1022, *Araim* (2001))”.

XVI. The Tribunal also wishes to refer to what it sees as perhaps the most serious aspect of the violation of the due process to which the Applicant was entitled. The facts show that while her contract was indeed renewed for three months on 31 October 2003, ostensibly to permit completion of the rebuttal procedure with respect to her evaluation, this renewal was purely *pro forma*, since a new Director was appointed on 1 November. The Respondent invokes the final, three-month extension of the Applicant’s contract to support his claim that her rights to an equitable procedure were respected:

“The Applicant’s contract was extended precisely to respect her due process rights and give her the opportunity to rebut the earlier decision not to extend her contract. Therefore, the three-month renewal of her contract, which gave the Applicant adequate time to rebut the decision of the Respondent ... permitted the Administration to await the recommendations of the Rebuttal Panel before making any further decisions on the Applicant’s contract.”

The statement that the Administration was awaiting the outcome of the Rebuttal Panel before deciding on the Applicant’s contract is somewhat inconsistent with the facts, which show that the contract extension was not really an extension - or, at least, was only a purely formal one - since the post occupied by the Applicant had been filled and the Applicant herself was not occupying any post, having been placed on SLWFP. These facts, which are not contested, show that the Administration had no intention of taking the Rebuttal Panel’s findings into account. They also explain why, when instructed by the Rebuttal Panel - which, it must be reiterated, had confirmed the rating “3”, “fully met expectations” - to make the comments consistent with the ratings, the Administration, with no other way out since it had already replaced the Applicant in her post, had no “choice” but to change the rating retroactively in order to justify the fact that it had not renewed the Applicant’s contract and had already replaced her.

XVII. In view of the foregoing, the Tribunal concludes that the Administration did not treat the Applicant in a manner befitting her status as an international civil servant, treatment to which she is entitled under the Staff Regulations and Rules. When the Applicant learned that her appointment would not be renewed, the rebuttal process relating to her 2002 RCA had not been completed and no RCA had been prepared for 2003, since the assessment for that period had been arbitrarily and for reasons of form alone incorporated into the 2002 RCA, without any significant amendment to the latter. Furthermore, when her appointment was extended for the last time, the die had already been cast and she no longer had any real opportunity to contest the non-renewal of her appointment on the basis of her performance, since her successor had already been appointed. Consequently, the process culminating in the non-renewal of the Applicant’s fixed-term appointment was vitiated by errors and irregularities, and by a clear lack of good faith on the part of the Administration.

XVIII. The Tribunal then considered the Applicant’s allegation that a number of factors point to the existence of improper motives for the Administration’s actions. Even when the decision at issue is a discretionary one, as is the case with the non-renewal of a fixed-term appointment, the Tribunal consistently verifies that the Administration’s decisions are not improperly motivated, as it has made clear from its earliest rulings: “Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision”. (Judgement No. 50, *Brown*, (1953) para. 3. See also Judgements No. 142, *Bhattachararyya* (1971); No. 309, *De Shields* (1983); No. 319, *Jekhine* (1983); and, No. 345, *Najjar* (1985).)

The Tribunal also recalls that the burden of proof rests with the individual alleging improper motives. (See, for example, Judgements No. 93, *Cooperman* (1965); No. 336, *Maqueda Sánchez* (1984); No. 448, *Large* (1989); No. 465, *Safavi* (1989); No. 515, *Khan* (1991); and, No. 1122, *Lopes Braga* (2003).)

XIX. The Applicant first contends that she was discriminated against on the basis of her gender, highlighting the following point:

“The rush to separate her from service is all the more difficult to understand in light of UNDP’s ostensible commitment to increase the proportion of women, especially those from developing countries, in higher level posts. The influence of gender discrimination appears to be present in that the Applicant’s critics, mostly, if not entirely, male, seem to have singled her out for her failure to become part of their ‘team’, which is a veiled criticism for a perceived challenge to their authority”.

The Tribunal notes that the Applicant herself states that such discrimination “appears to be present”, without categorically confirming its existence; the Tribunal takes the view that the file does not contain adequate proof to support this very general accusation against the Administration. (See, for general reference, Judgement No. 1112, *Suresh* (2003).)

XX. Second, the Applicant refers to events that occurred after her departure which, in retrospect, allegedly demonstrate the existence of bias against her. In particular, she states that, shortly after she submitted her appeal to the JAB, the UNDP Office of Audit and Performance Review initiated an investigation into a project - the Third Africa-Asia Business Forum - that she had launched during her tenure. The Applicant interprets this sequence of events as “an indication of the ongoing animus of the UNDP managers against her”. The Tribunal does not view the launching of an investigation as evidence of bad faith against a staff member. Audit divisions are mandated to ensure the transparency of the operations of the United Nations and it should be noted that, following the additional information provided by the Applicant on the project being investigated, the investigation was not pursued. In the Tribunal’s view, a verification procedure essential to the proper functioning of the Organization cannot in any way be construed as evidence of ill-will towards the staff member concerned.

XXI. Third, the Applicant maintains that “she was the victim of some unstated animus on the part of the Administrator’s close circle of advisors”, and states, in particular, that the CRG was composed in such a way as to ensure that it could not be objective in its assessment of her. According to the Applicant, “[k]ey members of the CRG who reviewed my RCA are colleagues who refused to work with me from the day I was recruited. They never granted me an audience in spite of numerous requests and systematically refused to interact with me. How could they possibly be objective in assessing my work?” The Tribunal notes that the Rebuttal Panel pointed out that there was no precedent for establishing a special CRG, and that the CRG was therefore the only body empowered to review the decision. The Tribunal has also taken due note of the

fact that the Administrator, not the CRG, lowered the Applicant's rating and that, in fact, the CRG confirmed the rating of "fully met expectations", although it is clear that the Applicant was hoping that the rating would be improved. In the absence of a review body other than the existing CRG and of specific instances of a hostile attitude towards the Applicant, the Tribunal is not convinced that the Administration's decision was improperly motivated.

XXII. In conclusion, the Tribunal, after having carefully considered all the Applicant's allegations, does not take the view that she has provided evidence that the Administration's decision not to review her fixed-term appointment was based on improper or discriminatory motives, but rather holds that the process of her performance evaluation was vitiated by procedural errors and irregularities and by a clear lack of good faith on the part of the Administration.

XXIII. It is therefore appropriate to consider the compensation that should be awarded to the Applicant for these serious violations of her rights. The Respondent maintains that compensation is not necessary because the Applicant was not entitled to have her appointment renewed. The Respondent "admits that irregularities occurred in the process of completing the Applicant's RCAs, but submits that these irregularities did not affect the decision not to renew the Applicant's appointment, a conclusion also reached by the JAB". The Applicant, on the other hand, holds that, in any event, and even if the Tribunal finds that such irregularities do not warrant the rescission of the decision not to renew her appointment, the violation of her rights to due process is itself sufficient to entitle her to compensation.

XXIV. First and foremost, the Tribunal is of the opinion that, despite the serious procedural irregularities, the lack of a legitimate and serious expectation of renewal precludes the conclusion that the Applicant was entitled to have her appointment renewed and thus to be reinstated. The Tribunal shares, however, the Applicant's view of the need for compensation for the violation of her procedural rights. When similarly gross irregularities have occurred, it has not been necessary for the Applicant to provide any evidence of prejudice other than that arising from the violation of his or her right to equal treatment, as the Tribunal has frequently pointed out:

"The Tribunal finds that the Respondent's procedural failures constitute a violation of the Applicant's right to due process, for which this Tribunal will award compensation to the Applicant. In addition, because of such procedural irregularities, the Applicant is not required to provide any evidence of prejudice to make his case, and the Tribunal must impute prejudice where otherwise it would find none. The Tribunal finds that the Applicant is entitled to compensation on the basis of imputed prejudice." (Judgement No. 1134, *Gomes* (2003), para. VII.)

According to the Applicant,

"[b]y virtue of UNDP's failure to honour its obligations of good faith and fair dealing that are inherent in the Staff Rules and Regulations and by refusing to afford the Applicant fair



consideration for continued employment, the Applicant's career has been cut short and her reputation in the international community has been harmed. The Applicant is seeking to restore her professional reputation and to be compensated for the needless stress and anxiety she and her family have undergone as well as for the damage to her career and reputation occasioned by UNDP's prejudicial actions."

XXV. As it explained in its Judgement No. 1237, the Tribunal will determine adequate compensation in light of the case as a whole:

"... The Tribunal need hardly make the point that the adequacy of compensation must be judged in the light of all the circumstances of each case. ...

... Whilst good or even outstanding performance does not automatically lead to any conclusion that a fixed-term appointment would be extended and creates by itself no entitlement to such an extension, where inadequate performance is the reason for the decision and the process of evaluation is as seriously flawed as in this case, an implication arises that, had a correct evaluation been made, then the Applicant's appointment may or would have been extended. Certainly, the Tribunal finds no difficulty in taking this into consideration for the purposes of assessing compensation payable for denial of due process and, in this context, the fact that the Applicant had only served one year is irrelevant in the particular circumstances of this case. He unfairly lost an 'opportunity to increase his length of service'." (Judgement No. 1237 (2005), paras. VIII and IX.)

Under the circumstances, the month's salary recommended by the JAB - which the Secretary-General refused to pay - seems largely inadequate to the Tribunal, which takes the view that nine months' salary is fair compensation for the cumulative serious violations committed and the clear lack of good faith on the part of the Administration in its management of the Applicant's case.

XXVI. In view of the foregoing, the Tribunal:

1. Declares that the assessment process involving the Applicant was conducted in circumstances that seriously violated her right to due process;
2. Orders the Respondent to pay the Applicant compensation in the amount of nine months' net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
3. Rejects all other pleas.

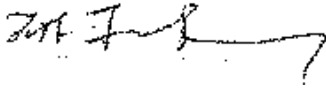
*(Signatures)*



**Dayendra Sena Wijewardane**  
Vice-President

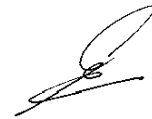


**Brigitte Stern**  
Member



**Goh Joon Seng**  
Member

New York, 21 November 2007



**Maritza Struyvenberg**  
Executive Secretary