United Nations

AT/DEC/1382

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1382

Case No. 1454

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, Vice-President; Ms. Brigitte Stern;

Whereas at the request of a former staff member of the United Nations Environment Programme (hereinafter referred to as UNEP), the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 December 2005;

Whereas, on 28 December 2005, the Applicant filed an Application containing pleas which read, in part, as follows:

"II: ***PLEAS***

10. The Administrative Tribunal … is respectfully requested to find …:

(a) that the case is receivable …

(b) that the corresponding termination indemnity be granted to the Applicant as a result of non-renewal of her contract due to the abolition of her post, leaving the Applicant without a job after twenty years of devoted service in the Organization. She was the most senior in UNEP, Mexico Office.

(c) that in order to dispel confusion on what the Applicant seeks from the Administrative Tribunal, it should be noted that the Applicant is not claiming the abolition of her post, but the deprivation of justice in view of the violation of her rights.

(d) that [staff rule] 109.1 (b) which states that 'A termination within the meaning of the Staff Regulations is a separation from service initiated by the Secretary-General,

other than retirement at the age of sixty or more or summary dismissal for serious misconduct'; and [staff rule] 109.1 (c) (i) '… due regard shall be had in all cases to relative competence, to integrity and to length of service …' be taken into consideration.

(e) that [staff rule] 104.12 (b) (iii) which states that

> 'upon completion of five years of continuous service on fixed term appointments, a staff member who has fully met the criteria of staff regulation 4.2, and who is under the age of fifty-three years, will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization'

be also considered due to previous proposal of UNEP to consider the Applicant for a permanent appointment.

(f) that due importance be given to UNEP's Memorandum … of 31 May 1999, from [the Deputy Executive Director] addressed to All UNEP Staff … , where he states that:

> 'In a continuous effort to harmonize and rationalize approaches to Human Resources Management, the Executive Director has approve the following changes in terms of policy on initial appointment, extensions and reinstatements/reappointments with immediate effect: … The appointments of the staff members who fully meet the performance expectations … may be extended, subject to the requirements of the Programme: Two years after the initial appointments and four years after the first extension. … As a general practice, *in cases on non-extension, a notice period of three months should be given to staff members whose appointments have been reviewed by the AP bodies.*'

(g) that [staff rule] 104.14 (ii) 'the Appointment Board shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the Secretariat and the staff members in other international organizations', be also taken into account.

(h) that upon having to reduce posts because of its own needs, the Organization [must] not ignore staff['s] acquired rights.

…

11. Having found the case receivable, the members of the Administrative Tribunal are respectfully requested to find [for the Applicant] on the merits:

...

12. ... [To order]

(a) that the Applicant be paid an amount equivalent to the termination indemnity of twelve months' net base salary after 20 years of fully satisfactory service in [UNEP]."

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 13 June 2006, and once thereafter until 13 July;

Whereas the Respondent filed his Answer on 13 July 2006;

Whereas the Applicant filed Written Observations on 30 September 2006 and, on 14 April 2008, submitted an additional communication;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"***Employment History***

[The Applicant first] entered the services of [UNEP, in the Regional Office for Latin America and the Caribbean (ROLAC),] in August 1981 as a Bilingual Stenographer at the G-5 level on a short-term contract ... [After serving under several short-term contracts, from February 1983 onwards she served under fixed-term contracts.]

In October 1986, she was promoted to Senior Bilingual Stenographer at the G-6 level. In September 1992, her functional title changed to Conference Services Assistant. … In January 2000, her functional title changed to Meetings Services Assistant …

Her last fixed-term contract expired on 31 May 2002.

Summary of the facts

[The Applicant's] appeal is directed at payment of termination indemnity.

[In 1989,] UNEP Headquarters had indicated that it would be possible to convert certain fixed-term appointments for staff in the General Service category into probationary appointments subject to certain conditions. [The Applicant, who fulfilled the conditions, was recommended for conversion.] …

…

By cable of 3 January 1990, UNEP Headquarters [indicated] that no conversion to probationary appointment was possible at that time for [the Applicant] due to a change in the rules governing such conversion.

In 2001, i.e. eleven years later, the Executive Director, UNEP, reviewed the functional structure and administrative set-up of the ROLAC Office and compared it to other regional offices. After the review, the Executive Director, UNEP, instructed that five General Service positions in ROLAC be abolished to bring the office in line with other UNEP regional offices.

By letter dated 16 November 2001, [the Human Resources Management Services (HRMS), United Nations Office at Nairobi (UNON)], informed [the Applicant] of the above decision by the Executive Director, UNEP. HRMS, UNON, further informed [the Applicant] that the reduction of the General Service posts was necessitated by the fact that only 80% of the funds allocated for the ROLAC Office for the year 2002 would be released and that the reduction of staff had to be implemented without delay. This letter read in part as follows: 'In view of the foregoing, we regret to advise that your post will be abolished effective close of business 31 December 2001.'

The letter of 16 November 2001 from HRMS, UNON, also served [the Applicant] with one month's notice of [abolition] of her post on 31 December ... She was notified at the same time of the Executive Director's decision to provide her with an additional five months' notice period on condition that she [sign] an agreement not to appeal against the administrative decision to

abolish her post. She signed this agreement on 13 December ... As a result, her contract [was extended until 31 May 2002, and she was placed on special leave with pay until that date].

On 6 May 2002, [the Applicant] wrote a letter to HRMS, UNON, seeking termination indemnity as per staff rule 104.12 (b) (iii). Her reason for claiming termination indemnity [was] based on the argument that she had served the Organization for twenty years and therefore had a reasonable expectation for continuous employment in the Organization.

By e-mail of 13 May 2002, HRMS, UNON, informed [the Applicant] that she could not be granted termination indemnity because her fixed-term contract was not [being] terminated but[, rather,] was not [being] renewed upon its expiration.

By memorandum dated 28 June 2002, [the Applicant] submitted a request for administrative review to the Secretary-General."

On 25 September 2002, the Applicant lodged an appeal with the JAB in Nairobi. The JAB adopted its report on 5 April 2005. Its considerations and recommendation read, in part, as follows:

"***Considerations***

The Panel examined the receivability of the appeal *ratione temporis* and noted that the contested administrative decision in which the Appellant was informed about the abolition of her post and the intention of the Administration not to extend her fixed-term contract was issued on 16 November 2001. Consequently, and in accordance with staff rule 111.1 (a), the Appellant should have submitted her request for administrative review by 16 January 2002 and her subsequent appeal by 16 March 2002. Instead, she submitted her appeal in September 2002 and consequently her appeal is time-barred.

…

Although the Respondent's respective objection regarding receivability *ratione temporis* would have warranted some kind of explanation from the Appellant, she did not submit any such explanation and thus the JAB was not in a position to consider a waiver of the time limits in accordance with staff rule 111.2 (f). Therefore, this appeal must be rejected as untimely.

The appeal is also not receivable *ratione materiae*. The Appellant was offered, by letter of 16 November 2001, to have her contract extended until 31 May 2002 in deviation to the normal practice of receiving one months' notice on the occasion of non-extension of a fixed-term contract. In exchange, the Administration expected her to forfeit her right to contest the administrative decision. These terms are clearly spelled out in the offer and were later accepted by the Appellant. The Appellant has tried to circumvent the consequences that flow from this agreement by arguing that this agreement was limited to contesting the decision not to extend her contract but that it does not cover her claim for termination indemnity.

Firstly, the Appellant can not argue in favour of this limitation in the application of the agreement because she was never entitled to termination indemnity under staff regulation 9.3 and Annex III to the Staff Regulations in the first place. Termination of a contract is generally understood as the premature ending of a contract before its normal expiration either due to health reasons, lack of funding, unsatisfactory performance, misconduct or any other reason that would justify the employer not to let the contract run its normal course until the end of the fixed-term into which it has been entered. This is not the case here, as the Appellant's contract was allowed to run until the end of its term and was merely not renewed. It is therefore nonsensical to argue that somehow the Appellant believed the no-contest agreement could cover a possible claim for termination indemnity.

Secondly, termination indemnity, where applicable, is a secondary claim resulting from the primary reason of termination. Where all claims arising out of a termination become the subject of a no-contest agreement, it is self-evident that all secondary claims that arise out of the termination are automatically covered by that agreement. For this reason too, the Appellant's argument can not stand. In light of the foregoing considerations and conclusions, the Panel concluded that this appeal is not receivable.

Recommendation

In the light of the foregoing considerations and conclusions, the Panel recommends to the Secretary-General that this appeal be rejected as time-barred."

On 26 July 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 its unanimous recommendation and to take no further action on her appeal.

On 28 December 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. She deserved to be considered for another post, but was never offered reinstatement or a change of functions or title.

2. She appealed the lack of payment of a termination indemnity, not the decision to abolish her post.

Whereas the Respondent's principal contentions are:

1. The appeal was time-barred.

2. The Applicant waived her right to contest the administrative decision.

The Tribunal, having deliberated from 24 April to 2 May 2008, now pronounces the following Judgement:

I. The Applicant initially filed her case with the Tribunal on 28 December 2005.

II. Before considering the Applicant's current request, the Tribunal will first briefly review the proceedings prior to its submission. In August 1981, the Applicant began working for the ROLAC Office, UNEP, in Mexico on a series of short-term contracts. From 13 August 1982 to 30 May 2002, i.e., for almost 20 years, she was employed on an ongoing basis on a series of fixed-term appointments. On 16 November 2001, the Applicant was informed that, as a result of a general restructuring of the office, her post would be abolished on 31 December but that, on an exceptional basis, her contract would be extended for five months, from 1 January to 31 May 2002, on the sole condition that she sign an agreement stating that she would not appeal against the decision to abolish her post. The Applicant signed the official letter

notifying her of the abolition of her post and stipulating that she would not appeal against that decision, on 13 December 2001.

On 6 May 2002, the Applicant addressed a letter to HRMS, UNON, requesting a termination indemnity, to which she believed she was entitled under staff regulation 9.3, staff rules 109.1 (b) and 109.4, and annex II to the Staff Regulations and Rules. On 13 May, the Applicant received an e-mail from HRMS, UNON, stating that she was not entitled to the payment of a termination indemnity because "UNEP did not terminate [her] contract before it was due to expire - which is what tri[gg]ers the indemnity payment". Subsequently, on 28 June, the Applicant requested a review of the decision of 13 May not to award her a termination indemnity, stipulating that:

> "[She had] served the Organization for twenty years. In accordance to staff rule 104.12, after five years of continuous service [she] had a reasonable expectation of continuous employment in the Organization. The non-continuation of [her] appointment [was] a direct consequence of the abolition of [her] post. Under normal circumstances [her] contract would have been extended.
>
> … [She was] a woman of 48 years of age, divorced, with two children still attending college. The termination of [her] contract preclude[d] any possibility of further supporting [her] children and ensuring a proper education for them. In addition, the fact that [she was] neither entitled to a pension benefit nor [could she] anymore afford a health insurance for [her]self and [her] family [was] indeed a hard blow."

On 2 July, the Applicant received confirmation that her letter had been received. The Secretary-General did not, however, respond to her request for a review within the two-month time limit that began on that date. Accordingly, the Applicant submitted an appeal to the JAB on 25 September.

III. The JAB adopted its report on 5 April 2005 and, in its summary of the facts of the case, the Board rightly pointed out that "[t]he Appellant's appeal is directed at payment of termination indemnity". However, the Board found that the appeal was not receivable on two grounds. First, since the Applicant's appeal was time-barred, it was not receivable, *ratione temporis*, and, secondly, the appeal was not receivable, *ratione materiae*. It is appropriate at this juncture to give a brief overview of the two arguments put forward by the Board in support of its findings.

IV. First, the JAB stated that the Applicant's appeal was not receivable, *ratione temporis*, because the Board was of the opinion that the decision in respect of which the Applicant was requesting a review was the decision of 16 November 2001, notifying her of the abolition of her post. In the Board's view, the Applicant should, therefore, have submitted her request for a review by 16 January 2002 and her subsequent appeal to the JAB should have been filed by 16 March. The Board, therefore, considered her appeal submitted on 25 September to be time-barred.

V. Secondly, the JAB found that the Applicant's appeal was not receivable, *ratione materiae*, because, on 13 December 2001, the Applicant had signed an agreement waiving her right to contest the

abolition of her post. The JAB rejected the clear distinction drawn by the Applicant between the decision of 16 November abolishing her post, which she was not contesting, and the decision of 13 May 2002 denying her claim for a termination indemnity. Indeed, the Board stated that "[t]he Appellant has tried to circumvent the consequences that flow from [the non-contest] agreement by arguing that [the] agreement was limited to contesting the decision not to extend her contract but that it does not cover her claim for termination indemnity". The Board refused to accept the Applicant's argument, contending, on the contrary, that the two issues were indistinguishable and concluding, therefore, that the claim for termination indemnity was not receivable, *ratione materiae*, because the Applicant had signed the no-contest agreement on 13 December:

> "Termination indemnity, where applicable, is a secondary claim resulting from the primary reason of termination. Where all claims arising out of a termination become the subject of a no-contest agreement, it is self-evident that all secondary claims that arise out of the termination are automatically covered by that agreement."

VI. The Applicant submitted a request for a copy of the JAB's report on 28 April 2005 and received an e-mail containing the report on 11 May. In a letter dated 15 July, the Secretary-General informed the Applicant that he had accepted the findings set out in the Board's report and that he had decided to take no further action on her appeal. Subsequently, on 28 December, the Applicant filed an appeal with the Tribunal, after having obtained from the President of the Tribunal an extension of the time limit for filing her application until 31 December.

VII. As stipulated in the Application, the Applicant's request is founded on two grounds:

> "[T]hat the … termination indemnity be granted to the Applicant as a result of non-renewal of her contract due to the abolition of her post, leaving the Applicant without a job after twenty years of devoted service in the Organization. She was the most senior in UNEP Mexico Office[;]
>
> [T]hat in order to dispel confusion on what the Applicant seeks from the Administrative Tribunal, it should be noted that the Applicant is not claiming the abolition of her post, but the deprivation of justice in view of the violation of her rights."

In support of her Application, the Applicant first maintains that she was entitled to a termination indemnity after 20 years' service with the United Nations. Secondly, she requests a termination indemnity equivalent to 12 months' net base salary.

VIII. For his part, the Respondent revisits the two grounds for non-receivability referred to by the JAB. On the one hand, he takes the view that the Applicant's appeal before the Board was time-barred, asserting that the Applicant "attempts to circumvent the time-limits by contending that the contested decision is the decision of 13 May 2002 … denying her request of 6 May … for a termination indemnity". The Respondent maintains that the new date cannot be accepted. The Respondent also maintains that the appeal

was not receivable, *ratione materiae*, because the Applicant signed an agreement waiving her right to contest the abolition of her post and thus forfeited her right to appeal. Lastly, on the substance of the appeal, the Respondent points out that

> "[i]n any event, even if the Tribunal were to accept the Applicant's premise, the Respondent would note, as did the JAB and the Under-Secretary-General for Management, that the Applicant was 'never entitled to termination indemnity under Staff Regulations, because [her] contract was not terminated but rather expired and was not renewed' ...".

IX. In the Tribunal's view, the JAB was mistaken in its failure to distinguish between the two decisions at issue, namely the first decision of 16 November 2001, announcing the abolition of the Applicant's post, and the second decision of 13 May 2002, stipulating that the Applicant was not entitled to a termination indemnity. The Board's mistake impacts upon both grounds of non-receivability.

X. First, unlike the JAB, the Tribunal is of the opinion that the Applicant's appeal was not time-barred if the correct distinction is made between the two aforementioned decisions and if it is indeed the letter of 13 May 2002 denying the Applicant a termination indemnity that she contested before the JAB. She requested a review of the administrative decision on 28 June 2002, within the two-month time limit, and also submitted her appeal dated 25 September 2002 within the prescribed time limits.

XI. Secondly, the Tribunal will consider the scope of the no-contest agreement. The Tribunal wishes to register its concern about such a practice, which may, depending on the circumstances, be regarded as duress of such magnitude as to render the no-contest agreement null and void and, consequently, to preclude its consideration by the Tribunal. Thus, for instance, in paragraph III of its Judgement No. 910, *Soares* (1998), the Tribunal questioned "whether the Applicant signed the 'Letter of No Contest' under duress, thereby rendering it invalid". The Tribunal could pose the same question in the present case: in view of the specific facts of the case, could the Applicant really have "chosen" not to sign the no-contest agreement, given that she was a General Service staff member at the G-6 level and that, six weeks before the Christmas holidays, she was told that she would no longer have the job that she had held for almost 20 years? That being said, the Tribunal notes that the Applicant is not contesting the abolition of her post and that she is not, therefore, taking issue with the agreement insofar as it amounts to a waiver of her right to contest that abolition.

XII. In any event, whether or not the agreement is deemed valid, it does not have the scope attributed to it by the JAB and the Respondent. Indeed, the Tribunal takes the view that the no-contest agreement of 13 December 2001 clearly dealt *only with the decision to abolish the post* occupied by the Applicant, as the agreement itself stipulated:

> "This letter serves as one month's notice of abolishment of your post on 31 December 2001. In this connection, the Executive Director has agreed, on an exceptional basis, to provide you with an additional notice period of five months. Therefore, your contract will be extended to 31 May 2002, and you may proceed on leave with full pay effective 1 January 2002 until 31 May 2002. The granting of this additional notice will be dependent on *your agreement not to appeal against the administrative decision on the abolition of posts*." (Emphasis added.)

Furthermore, the Applicant signed that agreement, stipulating: "I accept the terms and conditions of the above, and agree that *I will not appeal against the administrative decision on the abolition of posts*". (Emphasis added.) Accordingly, the Tribunal shares the Applicant's view that she did not waive her right to appeal against the decision of 13 May 2002 denying her a termination indemnity.

The distinction between the substance of a decision and its implementation is not unknown in the jurisprudence of the Tribunal. In another case involving a no-contest agreement, the Tribunal expressly limited the scope of the agreement on the basis of such a distinction:

> "The question of interest on the sums owed to the Applicant by the Administration under the agreement is different … It concerns not the substance of the agreement, but its application. Therefore, it does not fall within the scope of the no-contest agreement made by the Applicant." (See Judgement No. 955, *Al-Jassani* (2000), para. V.)

Similarly, in the present case a distinction should be drawn between the substance of the decision, i.e., the abolition of the post, and its application, i.e., the non-payment of a termination indemnity.

XIII. The Tribunal thus concludes that the JAB should have found the Applicant's appeal receivable, because it was neither non-receivable *ratione temporis* nor non-receivable *ratione materiae*. The Tribunal finds, therefore, that the Applicant's appeal was receivable.

XIV. When it recognizes that the JAB was wrong to find an appeal non-receivable, the Tribunal can either remand the case to the Board or, if it feels that it has sufficient information to do so, it can proceed to a ruling. As the Tribunal previously explained in paragraph IV of its Judgement No. 1171, *Mungai* (2004):

> "When the Tribunal takes a decision such as this, it is faced with two options: either it may remand the case for consideration on the merits, or it may proceed itself on the substantive appeal. The Tribunal notes that the provisions of article 7 (1) of the Statute of the Tribunal provide as follows:
>
> > 'An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal.'
>
> In the instant case, as the matter has been before the joint body and given that the facts of the case are not in dispute, the Tribunal sees little value in remanding the case to the JAB and thus further extending the length of time this case has already taken in the pursuit of administrative justice".

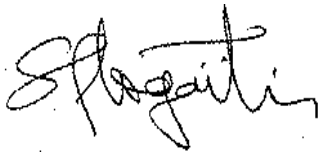
XV. In the present case, the Tribunal takes the view that remanding the case to the JAB would serve little purpose. In that regard, this case differs from the case addressed in Judgement No. 1385, also issued at the present session, in which the Tribunal decided to remand the case to the Joint Appeals Board because "both the Applicant and the Respondent asked the Tribunal to make such an order in the event that it determined the case was receivable". The Tribunal notes that such a request was not made in the present case. On the contrary, the Tribunal wishes to point out that, in his Answer, the Respondent expressed the following views: "[Should] the Tribunal rule that the appeal is receivable, the Respondent requests the Tribunal to grant the Respondent reasonable time to submit an Answer on the merits". This request shows that the Administration is not opposed to the direct consideration of the case by the Tribunal.

XVI. In view of the foregoing, the Tribunal:

1. Declares that the Applicant's appeal before the JAB was receivable and that the Board was mistaken in its finding that the appeal was not receivable *ratione temporis* or *ratione materiae*; and,

2. In order to guarantee *due process*, orders the two parties to submit their arguments on the merits of the case by 1 June 2008 at the latest.

(Signatures)



Spyridon **Flogaitis**
President

Jacqueline R. **Scott**
Vice-President

Brigitte **Stern**
Member

New York, 2 May 2008

Maritza **Struyvenberg**
Executive Secretary