United Nations AT/DEC/1389

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1389

Case No. 1454 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Ms. Brigitte Stern; Mr. Agustín Gordillo;

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, the receivability of which was addressed by the Tribunal in Judgement No. 1382 (2008);

Whereas the facts additional to the facts set forth in Judgement No. 1382 are as follows:

On 2 May 2008, the Tribunal rendered Judgement No. 1382, in which it "[d]eclare[d] that the Applicant's appeal before the [Joint Appeals Board (JAB)] was receivable and that the Board was mistaken in its finding that the appeal was not receivable *ratione temporis* or *ratione materiae*". The Tribunal determined that "remanding the case to the JAB would serve little purpose", and noted that the Respondent had asked to be granted "reasonable time to submit an Answer on the merits" in the event that the Tribunal rule that the case was receivable. Accordingly, the Tribunal ordered both parties to submit their arguments on the merits of the case by 1 June 2008. The Applicant submitted information to the Tribunal on 26 May. The Respondent submitted his arguments on the merits of the case on 27 May, and the Applicant commented thereon on 16 June.

Whereas the Applicant's principal contentions are:

1. She deserved to be considered for another suitable 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.

3. Other staff members in similar situations were paid termination indemnity.

Whereas the Respondent's principal contentions are:

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

2. As her contract was not terminated, the Applicant is not entitled to termination indemnity.

The Tribunal, having deliberated from 25 June to 25 July 2008, now pronounces the following Judgement:

I. Before considering the arguments on the merits, the Tribunal recalls that it recognized its competence to consider the present Application in an earlier judgement of 2 May 2008 (Judgement No. 1382). It is appropriate briefly to recapitulate what was decided, in order to determine the scope of the Tribunal's competence in this case. The Tribunal decided that the JAB had wrongly declared itself incompetent, *ratione temporis* and *ratione materiae*, as it considered that the appeal was contesting the abolition of the Applicant's post. The Tribunal noted that the Applicant had clearly stated that she was contesting not the abolition of her post but the violation of her rights. This is apparent from the very wording of her Application: "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" (reproduced in paragraph VII of Judgement No. 1382). The Tribunal thus followed the principle that a distinction should be made between the substance of a decision and its application. It decided that it was necessary more precisely, in the present case, to draw a distinction 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" (Judgement No. 1382, para. XII). The Tribunal will therefore consider the entire Application but will rule only on the *alleged violations connected with the circumstances surrounding the implementation of the abolition decision* that may affect the Applicant's entitlement to financial compensation at the time of her separation.

II. The Tribunal will start by recalling the substance of the Application. In order to clarify the nature of the rights which she considers to have been violated, the Applicant refers to several rules which she believes are applicable to her. Reference will be made here to the principal ones.

Firstly, the Applicant invokes staff rule 109.1 (b), which states: "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 years or more or summary dismissal for serious misconduct". Secondly, the Applicant invokes staff rule 109.1 (c) (i), which states:

> "…if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service ".

Thirdly, the Applicant invokes rule 104.12 (b) (iii), which provides that:

> "upon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff resolution 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."

Fourthly, the Applicant refers to the UNEP memorandum of 31 May 1999 from the Deputy Executive Director addressed to all UNEP staff, which states:

> "In a continuous effort to harmonise and rationalise our approaches to Human Resources Management, the Executive Director has approved the following changes in terms of policy on initial appointment, extensions and reinstatement/ reappointment with immediate effect. ... 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 [appointment and promotion] bodies."

III. The Tribunal first notes that certain of the above-mentioned rules deal with the consequence of the abolition of a post while others deal with the management of fixed-term contracts. All the complexity of this case lies here, as the Tribunal will develop in the course of its Judgement.

IV. On the basis of these rules, the Applicant puts forward a series of arguments to illustrate the violation of her rights culminating in what she considers to be a "deprivation of justice". Moreover, the Tribunal recalls that the rights that the Applicant considers to have been violated are all rights relating to possible payment of compensation at the end of her service. It is appropriate to emphasize that, in essence, what the Applicant wants is not to be separated from the service of the United Nations after twenty years of service without some financial compensation. The Tribunal emphasizes, in this regard, that in her Application, the Applicant is not claiming a termination indemnity *stricto sensu* but, to quote her exact words, "*an amount equivalent to the termination indemnity* of twelve months[']net-base salary after 20 years of fully satisfactory service". (Tribunal's emphasis.) The Tribunal will therefore consider the

allegations relating to the award of financial compensation for the violation of her rights in the implementation of the post's abolition, at the time of her separation.

V. Taking due account of the fact that the Tribunal recognized its competence to review the consequences of the implementation of the decision of abolition of the post and of the fact that the Applicant alleges a deprivation of justice, the Tribunal will now consider the way the Applicant was treated by the Administration, at the time of her separation.

VI. It is well-established in the Tribunal's case law that the normal expiration of a fixed-term contract which occurs independently of the abolition of a post, does not give rise to termination indemnity. According to the Staff Regulations and Rules, the Applicant cannot claim a right to a termination indemnity. Indeed, staff rule 109.7 is perfectly clear and provides that:

> "(a) A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.
>
> (b) Separation as a result of the expiration of any such appointment *shall not be regarded as a termination* within the meaning of the Staff Regulations and Staff Rules." (Tribunal's emphasis.)

VII. The application of this rule is not contested. In this sense, the Tribunal agrees with the Respondent's claim in his answer: "[t]he Respondent respectfully submits that, pursuant to the Staff Regulations and Rules, the Applicant is not entitled to a termination indemnity…." This position is also in accordance with the analysis made by the JAB, in its report of 5 April 2005, according to which the Applicant:

> "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".

VIII. The Tribunal nevertheless believes that it must emphasize the unfairness of situations such as that of the Applicant, in which a staff member who has served the Administration for many years receives no compensation at the end of his or her service. Staff rule 109.7 seems inappropriate in view of the career path of certain staff members of the Organization. Other administrative tribunals have taken this same view. For example, in Judgement No. 24, *Jorge O. Amora*, (1997), para. 27, the Administrative Tribunal of the Asian Development Bank stated that

> "…recourse to successive short-term or temporary contractual appointments to jobs which are essentially of a permanent nature is not fair employment practice, particularly if such appointments can be shown to have been made only to deny employees security of tenure or other conditions and benefits of service. Such appointments are permissible only if they have a clear functional justification and rationale in the exigencies of management and the nature of the job in question, and are subject to limitations based on norms of good administration."

Similarly, with regard to appointments which place staff members in a precarious position, the Administrative Tribunal of the International Labour Organization reiterated this sentiment and recognized its monitoring role. In Judgement No. 701, *Bustos* (1985), it stated the following:

> "The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties - or at any rate the party which is in a position to formulate the document - do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties - or at any rate the stronger of them - do not wish to face ...."

In Judgement No. 693, *Nuñez* (1995), the United Nations Administrative Tribunal itself stated that it

> "…recommends that further consideration be given to the possibility of adopting a more definitive schedule for determining what is to be the ultimate status, in all its aspects, of supernumeraries in order to address the problems of uncertainty and insecurity created by lengthy service under successive short-term appointments".

According to the Tribunal, while it may appear logical not to grant termination indemnity to persons employed only for a few years, such a rule hardly appears justified for persons who have spent their entire working lives in the service of the Organization.

IX. That being said, it should be recalled, as the Tribunal has already stated, that it "…is neither a political organ that can take staff-management decisions, nor an adjudicating organ with the power to redress unsatisfactory situations on the basis of a sense of equity". (See Judgement No. 1311 (2006), para. X.) In any case, the above opinions are expressed in respect of very specific situations and in no way call into question use of fixed-term appointments in general. In this case, the Tribunal can therefore only apply the rule, however unsatisfactory it may turn out to be in certain situations, such as that of the Applicant. Nevertheless, it draws the attention of the Administration to a rule which appears to be obsolete, the strict enforcement of which may, in some cases, have unfair consequences in respect of the practice that has developed - at least as this file would tend to point out - within the United Nations of using continuous, sequential fixed-term contracts throughout a career.

X. It further appears that the Administration is well aware that it is not good policy to build an international civil servant's career on the basis of a number of fixed-term appointments. Staff rule 104.12

(b) (iii) testifies to this, in that it tends to favour the conversion of certain fixed-term appointments to permanent appointments after five years. In addition, in 1999, although under the Staff Rules no notice was required of expiration of a fixed-term contract, the UNEP Administration decided to develop a practice that was more respectful of its staff, by giving them - like staff members with permanent contracts - three months' notice. Nonetheless, these evolutions of the practice do not change the rule that no compensation is owed upon the expiration of a fixed-term contract.

XI. Having come to the conclusion that, according to staff rule 109.7, the Applicant has no right to a termination indemnity, the Tribunal will, however, determine if the implementation of the decision to abolish her post was done in such a way as to constitute a violation of the Applicant's rights.

XII. Firstly, the Tribunal notes that making the date of abolition of the post, which confers entitlement to an indemnity if it interrupts a contract, coincide with the expiration of the Applicant's fixed-term appointment, which does not confer entitlement to an indemnity, in the present case, creates at least the appearance of a lack of good faith and also makes it all the more difficult to determine the Applicant's rights. Indeed, in making coincide the date of the abolition of the post with the date of the expiration of the contract, the Administration precluded the Applicant from the possibility of obtaining a termination indemnity, since it characterised her situation as simply the normal expiration of a fixed-term contract.

XIII. Secondly, the Tribunal must recall that the Administration is bound by certain fundamental obligations towards all staff members, whether or not they have a permanent appointment. (See Judgement No. 981, *Masri*, (2000).) It is thus beyond question that the Administration must observe the principle of good faith in managing its staff. It must act in good faith in negotiations; it must act in good faith when it terminates a staff member; it must act in good faith in the placement of staff members against appropriate posts, etc. This principle of good faith is particularly important upon abolition of post.

XIV. On this point, the Tribunal must note the Administration's total disregard of its obligations under staff rule 109.1 (c) (i), which stipulates that, when a post is abolished, the Administration must make efforts to place the staff member concerned on a new post, provided of course that there are posts available that match his or her profile, having due regard "…in all cases to relative competence, to integrity and to length of service". Here, the Tribunal must recall that when it is questionable whether a staff member has been given every reasonable consideration, the burden of proof of having done so is on the Administration. (See, for example, Judgements No. 362, *Williamson* (1986) and No. 447, *Abbas* (1989).) Yet, it appears that the Administration made absolutely no attempt to place the Applicant in another post. In particular, the Administration has not contested what the Applicant said: "Although [she] was the most senior staff member and had collaborated as Secretary for eleven of her twenty years of service, she was not granted

the opportunity to be considered for any other post, in spite of the fact that her evaluations had been very good and excellent ones".

XV. Finally and thirdly, the Tribunal notes that as the UNEP Administration considered the situation of the Applicant as an expiration of her fixed-term contract as far as the financial consequences were concerned, UNEP should have followed the procedural rules provided for in the case of such expiration in its Memorandum of 31 May 1999. Indeed, the practice of giving three months' notice to UNEP staff members as set out in this Memorandum modifies, to a certain extent, the general rule of lack of notice under staff rule 109.7 (a). This practice, at UNEP's initiative, gives better protection to international civil servants and should have applied to the Applicant. By not applying it in her case, UNEP did not observe the principle of equality of treatment due to all staff members. (See for example Judgements No. 612, *Nogales* (1993) and, No. 1011, *Iddi* (2001).)

XVI. The Respondent states that the Applicant could not benefit from this practice because, under her no-contest agreement, she was given six months' notice and a five-month contract extension. The Tribunal cannot accept that reasoning. The additional months were solely in return for the waiver of the Applicant's right to contest the abolition of her post. The contract extension can in no way be considered as constituting three months' notice. The Tribunal therefore concludes that the Administration violated the Applicant's right to benefit from the 1999 memorandum instituting a new practice, developed by UNEP itself, on which staff members should be able to rely in order to receive three months' notice or, if not, to be suitably compensated.

XVII. In light of the foregoing, the Tribunal considers that the behaviour of the Administration towards the Applicant, in implementing the decision to abolish her post, failed to comply with the obligations of good faith and due diligence owed by the Organization to its staff and with the principle of equal treatment of all staff members in similar situations. In conclusion, the Tribunal decides that financial compensation should be granted to the Applicant under the circumstances of this case for violation of her rights at the time of the implementation, by the UNEP Administration, of the decision to abolish her post upon the expiration of her fixed-term appointment.

XVIII. For the above reasons, the Tribunal:

1. Declares that the decision to abolish the Applicant's post was implemented in a way that violated her right to fair and equitable treatment;

2. Orders the Respondent to pay the Applicant an amount equivalent to 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)

Jacqueline R. **Scott**
Vice-President

Brigitte **Stern**
Member

Agustín **Gordillo**
Member

Geneva, 25 July 2008

Maritza **Struyvenberg**
Executive Secretary