



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1392

Case No. 1457

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Goh Joon Seng; Sir Bob
Hepple;

Whereas, on 20 October 2005, a former staff member of the United Nations, filed an application
that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 January 2006, the Applicant, after making the necessary corrections, filed an
Application requesting the Tribunal, inter alia:

“[To]:

- A. Order a rescission of the decision not to renew [the Applicant’s] fixed-term appointment ... and [his] re-employment in the United Nations;
- B. Order ... production of birth certificates and information about pre-war (1991) places of residence of four male language assistants who were transferred from [Prnjavor International Police Task Force (IPTF)] Station to Banjaluka[, United Nations Mission in Bosnia Herzegovina, (UNMIBH) Regional Headquarters (RHQ),] ... since [the Applicant] had requested [a] transfer ...
- C. Order ... production of ... information how many male local staff members were employed in Banjaluka UNMIBH RHQ and Banjaluka IPTF Station since 1 January 1996 [of whom] at least one grandparent was a native Bosnian Croat and who were pre-war (1991) residents of Banjaluka Municipality and when [they] were ... employed;
- D. Order ... production of ... information about all the male local staff members who have got a mission assignments from Banjaluka UNMIBH RHQ accompanied with their birth

certificates, information about pre-war (1991) place of residence and information if they had [United Nations] Language Proficiency Certificates and when [they] were ... sent to mission assignments;

...

- E. [Order] compensation ... in the [amount] of [US\$ 30,000];
- F. [Order] compensation in the event that the Respondent decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 10, paragraph 1, of the Statute of the Tribunal in the amount of three years' [net base] salary; [and,]
- G. [Order payment of costs 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 23 June 2006, and once thereafter until 24 July;

Whereas the Respondent filed his Answer on 20 July 2006;

Whereas the Applicant filed additional documents on 20 October 2006;

Whereas the Respondent filed a communication on 3 November 2006;

Whereas the Applicant filed additional documents on 31 August 2007 and 14 February 2008;

Whereas, on 27 June 2008, 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 Joint Appeals Board (JAB) reads, in part, as follows:

“Employment History

... The [Applicant] is a former staff member who served as a Language Assistant at the GL-4 level, with UNMIBH. He entered the service on 1 October 1998 under an appointment of limited duration (ALD). Over the next three years his appointment was extended. The [Applicant] separated from service on 11 October 2002.

Summary of Facts

... The [Applicant] was appointed to UNMIBH for assignment to ... IPTF station Prnjavor, effective 1 October 1998, at the GL-4 level. In June 2002, a liquidation plan for the closures of IPTF stations was forwarded to the Personnel Section/UNMIBH, for action. According to the Respondent, in July 2002 IPTF station Prnjavor closed and the [Applicant] was re-assigned to IPTF station Prijedor, which subsequently was also closed down.

... By memorandum dated 13 September 2002 ... UNMIBH informed the [Applicant], *inter alia*, as follows:

‘In connection with the end of Mission mandate effective 31 December 2002, a reduction of the Mission's personnel strength, which started on 1 July ..., will go on and unfortunately posts will be progressively abolished.

To this end, and in consultation with UNMIBH programme managers, a review has been carried out focusing on functions and posts to be reduced. I regret to inform you that

your post has been identified in the review as one to be abolished. Accordingly, and after having reviewed other placement possibilities with UNMIBH for which you would be qualified, I am sorry to inform you that your appointment with UNMIBH will not be extended beyond 11 October...’

...”

On 11 November 2002, the Applicant requested administrative review of the decision not to renew his ALD.

On 4 February 2003, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 14 July 2005. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

...

18. The Panel observed that the Appellant’s main argument was that the decision not to renew his ALD was motivated by prejudice. He adduced that other Language Assistants with less experience than him and with no United Nations Language Proficiency Certificate were extended while his ALD was not. The Panel noted from the evidence submitted by the Respondent that comparative review grids were developed. The Appellant indeed was reassigned from IPTF station in Prnjavor to another IPTF station located in Prijedor. The Appellant claims that he should have been reassigned to IPTF station in Banja Luka as were the first and third language Assistants from the comparative review grid. It should be noted that, according to the regional Closing Station Plan, IPTF station in Prijedor was scheduled to close on 5 November 2002, IPTF station in Banja Luka was scheduled to close on 30 November 2002. Thus, there was a minimal period (25 days difference) between the scheduled closing of the two IPTF stations.

19. ... The Panel concluded that ... the Appellant was fully and fairly considered by a Joint Review Panel which was established to recommend on the extension ... of the Language Assistants’ appointments.

20. The Panel noted that the Appellant made other requests to the JAB such as to obtain birth certificates and information about pre-war (1991) places of residence of four male language assistants who were transferred from Prnjavor IPTF to Banjaluka UNMIBH. In connection with these requests, the Panel found that they were not related to the present case and were beyond the scope of the mandate of the Panel to make them.

21. In the present case, the Panel finally found neither the creation of any expectancy nor any abuse of discretion or failure to follow the proper procedure in UNMIBH Administration’s decision not to renew the Appellant ALD when it expired. The Panel noted that the Appellant was informed well in advance that his contract would not be extended beyond 11 October 2002.

Conclusions and Recommendations

22. In light of the foregoing, The Panel *unanimously concluded* that the Appellant failed to demonstrate that the Respondent committed a breach of his terms of employment or that his rights as a staff member had been violated. It saw no evidence of bias or extraneous factors that would have vitiated the contested decision.

23. Accordingly, the Panel *unanimously decides* to make no recommendation in support of this appeal.”

On 28 July 2005, the Officer-in-Charge, Department of Management, transmitted a copy of the report to the Applicant and informed him that the Secretary-General accepted the JAB's findings and conclusion and had accordingly decided to take no further action on his appeal.

On 19 January 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew his contract violated his rights as a staff member, and was motivated by bias, prejudice and extraneous factors.
2. His contract was not renewed due to ethnic discrimination.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right to, nor the legal expectancy of, continued employment with the Organization and the non-renewal of his appointment did not violate his rights.
2. The contested decision and actions were not vitiated by prejudice, discrimination or other extraneous factors. The Applicant's allegations of discrimination based on ethnicity are unfounded.
3. The Applicant's request for the award of costs is without merit.
4. The Applicant's other pleas are without merit.

The Tribunal, having deliberated from 27 June to 25 July 2008, now pronounces the following Judgement:

I. The Applicant brings this appeal to the Tribunal following the expiration of his contract of service, which, he alleges, was not renewed because of ethnic discrimination. He asks the Tribunal to rescind the decision not to renew his ALD and order that he be reinstated or order compensation in lieu thereof. He also seeks costs and moral damages, and, finally, he asks that the Tribunal order the Respondent to produce, inter alia, copies of the birth certificates and information about the pre-war place of residence of other local male staff members, "who have got a mission assignment from Banjaluka UNMIBH RHQ".

II. The Applicant entered the service of the Organization on 1 October 1998, as a Language Assistant at the GL-4 level with UNMIBH, pursuant to an ALD. Prior to the service in question, the Applicant had been a staff member, for three years, from 1 July 1992 to 31 July 1995 under a similar ALD. In June 2002, a liquidation plan for the closures of IPTF stations was forwarded to the Personnel Section of UNMIBH. The closures became effective at the end of the UNMIBH mission mandate, 31 December. In an effort to retain as many staff members as possible, staff members were urged to apply for other internally advertised posts so that they might be reassigned, if qualified. The Applicant did not apply for any posts at all.

III. As a result of the liquidation plan, each station was assigned a closure date. Initially, the Applicant, who was, at the time the liquidation plan was issued, serving at the IPTF Prnjavor station, asked to be transferred to the Banjaluka station, because, apparently, he was from Banjaluka. Instead, according to the determinations of the review committee established especially to make decisions about the redeployment, where possible, for the UNMIBH staff members, the Applicant was transferred to the Prijedor station. Subsequently, however, the Prijedor station was scheduled to be closed on 5 November 2002 due to operational reasons, and the Applicant was notified that he would not be transferred to another duty station and that his contract would not be renewed. The Applicant's contract, spanning approximately 4 years, expired on 11 October 2002.

IV. The Applicant alleges that his contract should have been renewed, as other less qualified staff members had their contracts renewed and their service with UNMIBH continued beyond the time when his contract expired. He further alleges that preference was given to those staff members who were returning staff members, but that he was not accorded that preference, even though he was indeed a returning staff member. The Applicant alleges that the Organization failed to renew his contract because of his ethnic background. More specifically, he alleges that the State Security Service of Serbia improperly influenced UNMIBH Staff Administration's personnel management decisions in order to penalize those staff members who had "at least one grandparent [who] was a Bosnian Croat" (i.e., him). The Applicant goes as far as to charge the Respondent with "facilitating the [alleged] ethnic cleansing in Banjaluka City through his employment policies".

V. The Respondent denies all wrongdoing in this matter. First, the Respondent notes that the Applicant had no right to, nor a legal expectancy of, continued employment with the Organization. Second, the Respondent asserts that the decision not to renew the Applicant's contract was due solely to the need to downsize, and then dismantle, the operations of UNMIBH in connection with the end of UNMIBH's mission mandate, effective 31 December 2002. The Respondent claims that the selection process for determining renewal/extension of contracts was transparent and fair and pursuant to the Organization's rules and regulations governing such process. Thus, the Respondent denies any action or inaction based on bias, prejudice or improper motive and vehemently objects to the Applicant's allegations of ethnic cleansing by the Organization. Finally, the Respondent notes that the Applicant's requests for costs, moral damages and production of documentation relating to the male staff members are without merit.

VI. The Tribunal turns first to the question of whether the decision not to renew the Applicant's contract was legally sound. The Tribunal recalls the great latitude given to the Secretary-General in matters of personnel. As stated in Judgement No. 834, *Kumar* (1997) para. IV:

“The Tribunal is sympathetic to the fact that the Applicant sincerely believes himself deserving of this post. ... Nonetheless, the Tribunal may not substitute its judgement for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors ...”

and, in Judgement No. 1163, *Seaforth* (2003) para. X, the Tribunal held that, “[o]nly where the Respondent’s discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination ... is such discretion subject to limitation.”

Where there are allegations of such prejudice and improper motive, however, the burden of proving such an allegation rests on the Applicant. This is clearly set out in Judgement No. 1122, *Lopes Braga* (2003), where the Tribunal held that: “[w]ith respect to whether a discretionary decision, such as the decision not to promote the Applicant, has been tainted by prejudice, discrimination or improper motive the burden of proving such prejudice or improper motive is on the Applicant”. (See also Judgement No. 1245 (2005).)

VII. In the instant case, the Tribunal agrees with the contentions of the Respondent relating to renewal and concludes that the Applicant had no right to, or legal expectancy of, renewal of his contract. First, the Applicant was employed with the Organization pursuant to an ALD, which indicated the temporariness of the arrangement. Second, the language of staff rule 304.4 (a) specifically states that such temporary appointments “carry no expectancy of renewal or conversion to any other type of appointment”. In addition, staff rule 309.5 provides that such temporary appointments “expire automatically and without prior notice on the expiration date specified in the letter of appointment”. The Tribunal further notes that the language of the Applicant’s contract itself specifically and expressly addressed the fact that there was no expectancy of either renewal or conversion under an ALD. It states: “This appointment is non-career in nature. It carries no expectancy of renewal or of conversion to any other type of appointment in the United Nations, and does not entitle the holder to consideration for any position other than the one for which this contract was issued.”

Moreover, as the Respondent argued, and as the JAB recalled, the Applicant expressly agreed to the terms of the ALD, including the non-expectancy of renewal or conversion, by affixing his signature to the following statement:

“I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and the 300 Series Staff Rules. I have been made acquainted with these Regulations and Rules, a copy of which has been transmitted to me with this letter of appointment.”

Second, in the case of a fixed-term contract, and especially one of expressly limited duration such as the ALD pursuant to which the Applicant was employed, a legal expectancy of renewal would not be created even by efficient or outstanding performance. (See Judgments No. 700, *Benthin* (1995); No. 795, *El-Sharkawi* (1996); No. 980, *Baldwin* (2000); and, No. 1247 (2005).) In the instant case, the Applicant

provides no evidence, either direct or circumstantial, of any firm or other commitment to renew his contract, and the Respondent affirmatively asserts that none was made. In light of the above, the Tribunal finds that the Applicant did not have either a right to, or legal expectancy of, the renewal of his contract.

VIII. The Tribunal next turns to the issue raised by the Applicant, that the Respondent based his decision not to renew his contract on the Applicant's ethnicity. The Tribunal finds absolutely no evidence that ethnicity was a factor in the Respondent's decision. As the Respondent asserts, and as the record corroborates, the Respondent decided not to renew the Applicant's contract because the UNMIBH was being first, downsized, and second, dismantled, pursuant to a liquidation plan dated June 2002 for the closures of the IPTF stations. Although the Applicant requested a transfer to the Banjaluka station, that request was not granted, for reasons having nothing to do with the Applicant's ethnicity. In determining which staff members would be transferred, and to where, and which would not be transferred, the Respondent engaged in a transparent and fair review and selection process. The Tribunal notes that the downsizing exercise was done subject to guidelines that had been discussed with members of the local Field Service Support Union, the local staff representatives, the IPTF Administration and the Civilian Administration. In addition, comparative grids were prepared, comparing each staff member according to several criteria, including, but not limited to, the level of seniority, the staff member's performance appraisals and whether they had acquired the Language Proficiency for English, each factor receiving a certain percentage of weight in the decision. Furthermore, the review committee also considered additional factors, such as whether any complaints had been made about the staff member, whether the staff member was a returning staff member and the nature, if any, of the staff member's family situation. In relative terms, based on the score the Applicant received in the review process, the Tribunal is convinced that the Applicant was not discriminated against as a result of his ethnicity or otherwise; in fact, there is not even a scintilla of evidence that this was the case. Thus, this claim must fail.

IX. The Tribunal does note, however, that in the evaluation process, which awarded points for various factors, the Applicant was not given credit for his status as a returning staff member. Apparently, the mission had no record on file that the Applicant was a returning staff member. Without the credit, approximately 23 staff members scored higher than the Applicant. If credit had been given for being a returnee, only 18 staff members would have scored higher. The Tribunal notes that, at this point, after the fact, it is impossible to determine whether that additional credit and the resulting five places in the order of points would have improved the Applicant's chances of being transferred again and of having his contract renewed until the end of the mission mandate. It is quite possible, though, that the absence of such returnee credit in the case of the Applicant could have affected the Applicant in a negative way. As the assessment of the Applicant's returnee status was within the sole dominion of the Respondent - the Applicant having no knowledge that such status was a factor in the Respondent's decision-making until after the fact - the burden of proving that the lack of such credit had no, or limited, effect on the Applicant falls on the

Respondent. The record makes clear that the Respondent erred in this regard, because it apparently had no record of the Applicant's previous service, and the Respondent does not deny his mistake. Thus, the Tribunal finds in favour of the Applicant in this regard and awards him compensation.

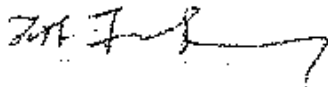
X. In view of the foregoing, the Tribunal:

1. Orders that the Respondent pay to the Applicant a sum equal to the net base salary he would have received from 11 October to 31 December 2002 as compensation, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

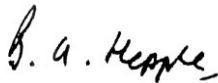
(Signatures)



Jacqueline R. **Scott**
Vice-President

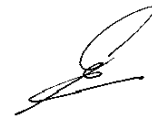


Goh Joon Seng
Member



Bob **Hepple**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary