



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1398

Case No. 1465

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas, on 17 January 2006, a former staff member of the United Nations Population Fund (hereinafter referred to as UNFPA), filed an Application requesting the Tribunal, inter alia, to find:

“9. ...

(a) that the procedures for the [performance appraisal review (PAR)] process were not followed properly and thus occasioned a lack of due process.

(b) that the result of this flawed process was that the Applicant was unjustly separated ...

(c) the Organization reneged on its promise to assist in suitable alternative placement breaching the well regarded ‘Principle of Good Faith in Dealing with Staff’.

10. ... [and] to order that:

(a) the Applicant be retroactively reinstated.

(b) his record be fairly and adequately cleared of any unsubstantiated, adverse allegations and due credit be given for his performance and [that] the adjustment communicated through [the] 1 November 2005 UNFPA letter is unfair and inadequate.

(c) ... he be compensated 2 years of salary and benefit package for the denial of due process and emotional stress/harassment. The full 6 months extension recommended by the PAR Rebuttal Panel be started on 20 February 2003 when the Rebuttal Panel submitted its report.”

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 31 July 2006, and once thereafter until 31 August;

Whereas the Respondent filed his Answer on 25 August 2006;

Whereas the Applicant filed Written Observations on 26 October 2006;

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] entered the service of UNFPA on a fixed-term contract on 30 July 1996. From August 1996 to January 2001, he served as UNFPA Representative for Yemen, and served thereafter as UNFPA Representative in Sri Lanka and in Maldives as Country Director until 31 March 2003.

Summary of Facts

... On 28 August 2002, a Senior Management Review Group (MRG) meeting was convened to review [the Applicant's] performance. According to that report, [his] performance had been called into question following discussions with the Executive Director with senior management and further to the deliberations of a MRG meeting in May 2002. At issue, apparently, was [his] PAR for 2001, which was favorable to [the Applicant]. That meeting called for no action to be taken on the contents of [the Applicant's] PAR until an assessment was carried out with respect to a number of issues. This led to what the Report calls a fact finding mission to Sri Lanka ... The assessment concluded that [the Applicant] 'was not meeting the standards of a UNFPA Representative' with regard to 'managerial competence and judgement' and 'technical competence'.

... On 11 October 2002, [the] Executive Director, UNFPA, wrote [to the Applicant] to inform him that:

'As conveyed to you in your 2001 [PAR], the Senior MRG concluded that you do not meet the professional requirements of a Representative in a UNFPA office ... The Senior MRG also took into consideration your past performance appraisals over the last six years, which indicate a continuing pattern of deficient performance, as evidenced by the MRG comments in your 1999 and 2000 PARs, especially the two unsatisfactory appraisal reports during your tenure in Yemen.

... Based on your sub-standard performance appraisal history, you have failed to meet those expectations despite repeated warnings to improve your performance.

... Against this background, I regret to inform you that you are hereby relieved of your functions as UNFPA Representative effective immediately and will be placed on special leave with full pay (SLWFP) ...'

... On 20 November 2002, [the Applicant] wrote to [the Executive Director, UNFPA], to request that she reconsider her decision and [also that she grant him] additional time for a job search. He urged her to continue extending his contract, without placing him on SLWFP, 'until a mutually agreed suitable post is found', and 'until the process of rebuttal, ombudsman and other legal administrative recourses to protect my rights ... are completed'.

... On 22 November 2002, [the Applicant] submitted a formal rebuttal.

... On 4 December 2002, [the Executive Director, UNFPA], wrote to [the Applicant] to inform him that it was not possible to re-instate him, and that he was being relieved of his duties as of that day. ...

...

... According to [the] Respondent's submission, a three-person Rebuttal Panel (RP) was convened on 20 December 2002.

... By letter dated 2 January 2003 to [the Applicant], [the Officer-in-Charge, UNFPA], upheld the decision not to reinstate him.

...

... [On 20 February 2003, the RP recommended that the MRG consider giving the Applicant a six-month extension.] The RP also recommended that the MRG Final Comments on the 2001 PAR be reformulated and adjusted 'so that it comes out less susceptible to misinterpretation and misunderstanding in the minds of the staff member and ... independent observers and to make it possible without prejudice, for the separating staff member to pursue other options outside of UNFPA'.

... Also on 20 February 2003, [the Executive Director, UNFPA,] sent [the Applicant] the RP's recommendations, and the subsequent Senior MRG decision to uphold his performance ratings. ..."

On 19 April 2003, the Applicant requested administrative review of this decision. On 18 March 2004, he lodged an appeal with the JAB in New York. The JAB adopted its report on 2 May 2005. Its considerations, conclusions and recommendation read, in part, as follows:

"Considerations

...

30. The Panel first examined at length [the] Appellant's claims that the decision not to renew his contract was tainted by bias and racism at various points in the PAR process. ... Upon reviewing the file in this case and the particular instances of improper motive challenged in the appeal, the Panel finds that Appellant failed to adduce sufficient evidence that the decision was motivated by prejudice or other improper motivation on the part of the Respondent.

31. [The] Appellant claims that UNFPA failed to follow the proper procedures in the 2001 PAR process. He contends that, despite 'highly satisfactory' PAR over the years, the MRG, relying on biased hearsay arguments, failed to respect his supervisor's 2001 fair performance assessment. The Panel notes that, prior to 2001, UNFPA administered Appellant's PAR process annually. For each year, no evidence arises that Respondent failed to follow its procedures. Contrary to [the] Appellant's assertions, these PARs clearly demonstrated UNFPA's concerns regarding his performance and identified specific areas requiring improvement. ...

32. In terms of the MRG's disagreement with the supervisor's assessment in [the] Appellant's 2001 PAR, the Panel expresses its concern as regards the basis for the MRG's action in differing with the supervisor. The reasons given in the PAR for contradicting what otherwise appeared to be a fairly solid evaluation seemed rather perfunctory. Nevertheless, the Panel notes that the RP had the issue before it and in this regard interviewed the supervisor, who indicated that

the PAR was an evaluation of programme delivery rather than a review on performance lapses in management related issues. Moreover, in terms of due process, under UNFPA Guidelines, the MRG clearly has responsibility for administering all issues of effective human resource management, an obligation which carries the authority to review and approve narrative appraisals and performance ratings by supervisors to ensure consistency and fairness and to review issues of contractual status of staff and separation. In addition, where a PAR reflects persistent and fully-documented lapses in performance, the MRG may recommend separation. Thus the MRG was authorized and, under the circumstances, obliged to step in and initiate the Special MRG assessment. The Panel therefore could not conclude that a lapse of due process occurred in this regard.

33. [The] Appellant also claims that the RP's conclusions found lapses of due process which the MRG subsequently ignored. It is necessary to point out, however, that, contrary to [the] Appellant's characterization of its conclusions, the RP found only that 'some aspects of due process were not accorded to the staff member including his abrupt removal from office and vacating a valid contract in the process, absent allegations of fraud, corruption or other odious acts that would require extraordinary action to preserve evidence.' ...

34. With regard to his rebuttal process, [the] Appellant claims that the RP's assessment was flawed ... The record shows that the RP took into account a number of sources that would appear to be directly relevant to the performance issues in question. The Panel therefore found [the] Appellant had not proven the RP assessment was flawed.

...

36. Finally, [the] Appellant contends that UNFPA had unfairly extended his contract by only five months rather than 'a customary extension of 1 or 2 years'. In this vein, he claims that his separation was premeditated, demonstrated by the fact that the letters of 11 October and 4 December 2003 clearly show that UNFPA did not wait for the finalization of the rebuttal process, which was intended to offer clarification and dialogue, thus rendering the exercise useless. Contrary to these assertions, the record shows that the RP issued its report on 20 February 2003 and its recommendation to extend [the] Appellant's appointment on SLWFP until 31 March 2003 was accepted. The Panel also disagrees that the fact that his contract was not extended to one or two years violated his terms of appointment, insofar as [the] Appellant offers no evidence to show a custom within UNFPA or within the United Nations system carving an exception into the rule on fixed-term contracts outlined above. Likewise, [the] Appellant's complaint regarding Respondent's lack of assistance in his job search must also fail for lack of any statutory basis creating an obligation on the part of UNFPA to find employment for a staff person on a fixed-term appointment.

37. In terms of [the] Appellant's other claim regarding the RP's recommendations, the Panel agrees that the 2001 PAR should be re-formulated and adjusted 'so that it comes out less susceptible to misinterpretation and misunderstanding in the minds of the staff member and independent observers and to make it possible without prejudice, for the separating staff member to pursue other options outside of UNFPA'. The Panel considers that, while as stated above the decision to make the modifications lies within the discretion of the MRG, the lack of any reasons to maintain the comments contravened the procedures articulated within the Guidelines, despite the RP's apparently thorough review of the matter. In the absence of any indication in Respondent's reply to the appeal why the recommendation should not be implemented, the Panel considers it appropriate to adjust the PAR accordingly.

Conclusions and Recommendations

38. In light of the foregoing, the Panel *unanimously concludes* that [the] Appellant adduced insufficient evidence of improper motivation in taking the decision not to extend his contract. With regard to [his] challenges to the procedural issue in the case, the Panel *unanimously*

concludes that Respondent afforded [the] Appellant's contract due consideration under the required procedures. However, it *unanimously agreed* with the RP's recommendation as to the modification of certain comments in the 2001 PAR, and therefore *recommends* that the comments be adjusted as per that recommendation."

On 23 June 2005, the JAB sent the Applicant a copy of the report. On 22 September, the Under-Secretary-General for Management informed him that the Secretary-General had decided to accept the JAB's findings and conclusions, as well as its recommendation with respect to the adjustment of his 2001 PAR. Accordingly, on 1 November, the Director of Human Resources, UNFPA, provided the Applicant with a modified section 10 (i) of his 2001 PAR. The Applicant responded on 15 November, proposing alternate modifications.

On 17 January 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The procedures for the PAR process were not followed properly.
2. His rights of due process were violated.
3. His separation from service was unjust.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is not receivable. No exceptional circumstances have been cited that would warrant a waiver of the time-limits.
2. The Applicant had no legal expectancy of contract renewal.
3. The Respondent's decision was not marred by extraneous factors.
4. The Respondent provided adequate employment assistance.

The Tribunal, having deliberated from 3 to 25 July 2008, now pronounces the following Judgement:

I. The preliminary issue in this case is whether the Application is time-barred. Article 7.4 of the Statute of the Tribunal provides that an application is not receivable unless it is filed within ninety days from the date of communication of the JAB's opinion containing recommendations unfavourable to the Applicant. In the event of the JAB's opinion being favourable to the Applicant, an application must be filed within ninety days after the Secretary-General has failed to take action or failed to carry out the recommendation "within 30 days following the communication of the opinion". In this case, the JAB report of 2 May 2005, containing recommendations unfavourable to the Applicant and rejecting his pleas on the merits, was communicated to the Applicant by the Secretary of the JAB on 23 June 2005.

II. The JAB report also made a recommendation which may be construed as favourable to the Applicant, namely that the MRG's comments, which formed an integral part of the Applicant's 2001 PAR,

should be adjusted in accordance with the recommendation of the UNFPA RP. In its report of 3 February 2003, the RP recommended that the MRG comments should be “adjusted” and “reformulated”, “so that it comes out less susceptible to misinterpretation and misunderstanding in the minds of the staff member and of independent observers and to make it possible, without prejudice, for the separating staff member to pursue other options outside UNFPA”. The JAB observed that UNFPA had not implemented the RP’s recommendation. It noted that while any such adjustment generally lay within the discretion of the Administration, the latter had not presented any reason why the 2001 PAR comments should not be adjusted. Therefore, the JAB recommended that the RP’s recommendation to “adjust” and “reformulate” the text should be implemented.

III. On 22 September 2005, the Under-Secretary-General for Management informed the Applicant that the Secretary-General accepted the JAB’s findings and conclusions and had decided to accept its recommendation to adjust his 2001 PAR. The Applicant was advised that this was “the final decision on the appeal” under staff rule 111.2 (p) and that any recourse in respect of it should be addressed to the Administrative Tribunal. On 1 November, the Director of Human Resources, UNFPA, sent the Applicant a revised version of section 10 (i) of his 2001 PAR, purporting to carry out the recommendation. On 15 November, the Applicant wrote to the Executive Director of UNFPA, proposing a different wording of this revision.

IV. Having apparently received no favourable response to his letter of 15 November 2005, the Applicant filed his Application with the Tribunal on 17 January 2006. It is to be noted that, in practice, the Tribunal accepts the date of dispatch of an application as the date of “filing”. In the present case, the Application was filed nearly six months after communication to the Applicant of the JAB report containing unfavourable recommendations and, thus, it is clearly time-barred pursuant to the provisions of article 7.4. Even if the recommendation relating to the adjustment of the 2001 PAR is treated as one “favourable” to the Applicant, the time began to run in respect of this recommendation, at the latest, on 22 September 2005, although it could be argued that it began earlier, namely 30 days after 2 May, the date of the JAB report. Thus, even adopting the most generous interpretation of article 7.4, the Tribunal notes that the Applicant was nearly one month out of time in respect of this “favourable” recommendation.

V. The Tribunal has discretion under article 7.5 to suspend the provisions regarding time limits. It observes that the Applicant did not request suspension, or extension, of the time limits. The Tribunal has, however, considered whether there were any extraordinary circumstances which would justify waiver of the time limits. The Tribunal has repeatedly stated the importance it attaches to complying with the time limits which “are of [the] utmost importance for ensuring the well functioning of the Organization” (Judgement No.1106, *Iqbal* (2003)), and “will not waive or suspend such time limits unless there are

extraordinary circumstances including ‘serious reasons which prevented the Applicant from acting’”. (Judgement No.1335, (2007), citing Judgement No. 359, *Gbikpi* (1985).)

The only explanation put forward by the Applicant for his lateness was cited in his cover letter of 17 January 2006, which stated that “the political and security situation in Nepal [where the Applicant lives] has been quite difficult, including curfews and agitations, and we are facing difficulties in communications and mail deliveries”. Since the Applicant concedes that the JAB report was communicated to him on 23 June 2005 and the Secretary-General’s letter on 22 September, and gives no details of the dates on which these were actually received, and because the date of “filing” has been interpreted favourably to him as the date on the Application, he has not shown that communication, mail delivery and other problems significantly prevented him from filing his Application in time. The Tribunal notes that the Application was made only after the Applicant had received the revised wording of the 2001 PAR, however he failed to take any steps at that time to request extension of the time limits in his case. The Tribunal considers that the Applicant held a senior post in the Organization and should have been well aware of the need to comply with procedures, including time limits.

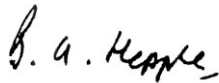
VI. In any event, the Tribunal has to point out that any dispute about the revised wording of the 2001 PAR is not appealable to this Tribunal. The JAB made it clear that the decision to make the modifications lies within the discretion of the MRG. So far as the Tribunal may judge, it appears that the wording proposed by UNFPA on 1 November carries out the recommendation made by the JAB, and it has not been shown that the MRG’s discretion was in any way wrongly exercised.

VII. Accordingly, the Tribunal finds that the Application is not receivable, *ratione temporis*.

(Signatures)



Spyridon Flogaitis
President

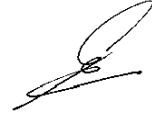


Bob Hepple
Member



Agustín **Gordillo**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary