



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1399

Case No. 1466

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 10 September 2005, a former staff member of the United Nations, filed an Application requesting the Tribunal:

“11. ... to *find*:

(a). That the [Joint Appeals Board (JAB)] did not exhaustively look into the Applicant’s case.

...

(e). The JAB did not consider the fact that the Registrar ... had settled and signified the intent of [the International Criminal Tribunal for Rwanda (ICTR)] to extend the Applicant’s fixed term contract.

...

(k). That the JAB did not look into the abuse of office and the official status of [the Chief of Administration] who unlawfully overturned the Registrar’s Decision to reassign and renew the Applicant’s contract.

...

(m). That the JAB did not find that the decision of the first reporting Officer [the Chief of Administration] was illegal in that he used a wrong Short Term Report form that denied the input of the second reporting officer (... the Registrar) in a bid to manipulate the process and act with impunity.

...

- (p). That the JAB recommendation for compensation of 7 months net salary for violation of the Applicant's due process was inadequate.
- (q). That the JAB should have found that by special circumstances the Applicant had reasonable, legitimate, and legal expectation that his contract will be renewed.
- (r). That the JAB should have found that due to the mal-administration of [the Chief of Administration] ..., the Applicant's separation was vitiated by extraneous factors, serious procedural irregularities, prejudice, lack of good faith, tack of due process, arbitrariness, abuse of authority, and abuse of official status.

...

12. [and] to order:

- (a). That the Applicant be reinstated to his post or be reassigned to another post commensurate to his post at the time of separation without loss of benefits and seniority.
- (b). That the Applicant be paid his full salaries from 16 May 2001 to the date of finalization of this case.
- (c). That the Applicant be paid compensation commensurate to the psychological, social and emotional injuries sustained.
- (d). That the contested Short Term Report of 12<sup>th</sup> February 2001 be withdrawn from the Applicant's personnel file.
- (e). That the ICTR administration should prepare [Performance Evaluation Reports (PERs)] to cover the periods of services in the ICTR.

OR in the alternative;

- (f). That the payment of compensation of 6 years' net salary should be made to the Applicant.
- (g). That the Respondent should issue the Applicant a certificate of service for the period served in ICTR."

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 22 August;

Whereas the Respondent filed his Answer on 18 August 2006;

Whereas the Applicant filed Written Observations on 15 November 2006;

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 employed by [ICTR] as [Chief of the Electronic Data Processing Unit, Management of Information Services, (EDP/MIS) at the] P-3 [level] on 1 February 1999 on a one-year, fixed term contract. He received a further one-year extension of his contract to 31 January 2001. He received two renewals for short periods until 15 May 2001, when he was separated from service.

***Summary of Facts***

... In April 2000, [the Applicant's] first and second reporting officers signed [his] PER covering the period 17 February ... to 31 August 1999. [The Applicant] signed on 31 October 2000. In that PER, he received an overall rating of '2', 'A very good performance'.

... By a memorandum dated 17 October 2000, [the] Chief, Division of Administration, ... [who was the Applicant's new] supervisor, informed [the Applicant] ... that an urgent and priority assignment he had given to [the Applicant] had not been done. ...

... On 19 October 2000, [the Chief, Division of Administration,] ... signed off on the non-extension of [the Applicant's] contract beyond its expiry date.

... ... ICTR, by a memorandum dated 20 October 2000, advised [the Applicant] that [it] did not intend to extend his appointment for another year upon the expiry of his contract.

...

... By a memorandum dated 14 December 2000, [the Chief, Division of Administration,] informed [the Applicant] of lapses in [his] performance and [his] 'inability to lead [his] section to ensure effective automation systems are in place to improve the effectiveness of the Tribunal'. According to the memorandum, [the Chief, Division of Administration,] had counseled him over the previous three months [but] ... failed to see any improvement.

... ... [The Applicant] submitted a detailed reply to this memorandum on 15 December 2000.

... ... In February 2001, a one-page form entitled 'Performance Report on Staff Who Have Been Supervised for Less Than 6 Months' [the 'Short Term Report'] covering the period 12 September [to] 31 December 2000 was completed and signed by both the [the Applicant and his supervisor]. The ratings therein consist of '2's and '3's with 5 representing the highest possible rating and 1 the lowest. His overall rating was set at 'Fair', and a comment was included stating [that], '[d]uring the short period of assessment [the Applicant] has demonstrated a lack of leadership and ability to develop and manage his section in an effective manner. He has lost the confidence of his subordinates.'

... After a one-month extension of [the Applicant's] contract to 31 March 2001, by a memorandum dated 28 February ..., [the Registrar, ICTR,] wrote to [the Chief, Division of Administration]: 'Further to my earlier memorandum ..., I am assuming that [the Applicant's] case has already been resolved ... If not, his case should ... be referred to the incoming Registrar and his contract extended pursuant to my earlier memorandum.'

... On 7 March 2001, [the Applicant] was informed that his contract renewal through 15 May ... was his final extension.

... By a memorandum dated 16 March 2001, [the Applicant] requested the constitution of a Rebuttal Panel (RP) regarding the Short Term report.

... On 15 May 2001, [the Applicant] was separated from service.

... [The RP] submitted an Interim Report to the Registrar on 22 May 2001, wherein it found provisionally that there were serious grounds for concern that, a) the disputed report itself was seriously flawed on both procedural and substantive grounds, b) the decision against renewal disregarded basic rules of due process, and c) the provisions of ST/AI/240/Rev.2 [of 28 November 1984] on the PER system had not been observed.

...

... On 18 December 2001, the RP submitted its Final Report. That report contained the following five recommendations for resolution of [the Applicant's] case:

- ‘- that the disputed Short Term Report be annulled in its entirety and removed from [the Applicant's] Personal [sic] Status File;
- that PERs be prepared by the supervisors responsible at the time for the periods 1 September 1999 - 31 January 2000 and 1 February ... - 31 December 2000;
- that the decision of 19 October 2001 not to renew [the Applicant's] contract be rescinded;
- that [the Applicant] be re-instated in his post with effect from 16 May 2001, with no interruption of benefits; and,
- that consideration be given to appointing [him] to a non-supervisory post in a Section of the Tribunal Registry where his technical skills can be usefully deployed.’

...

... By a memorandum dated 21 February 2002, [the Applicant] ... requested notification of what action had been taken to resolve the case. ...

... On 11 March 2002, [the Applicant] sent a letter to [the] Assistant Secretary-General, [Office of Human Resources Management,] requesting her intervention to resolve the matter. [This request was treated as a request for administrative review.]

...

... On 22 May 2002, [the Chief of Personnel, ICTR,] notified [the Applicant] that the [new] Registrar had reviewed the Short Term Report and did not concur with the recommendations of the RP.”

On 12 June 2002, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 19 May 2005. Its considerations, conclusions and recommendation read, in part, as follows:

***“Considerations***

33. ... The Panel finds that the appeal of the decision not to renew [the] Appellant's contract was receivable.

...

35. [The] Appellant claims lack of due process, arbitrariness, bias, and racism underlying the decision not to renew his contract, grounded in an arbitrary and biased evaluation of his performance...

36. The Panel notes the lacunae in [the] Appellant's PER process. As of 19 October 2000 when he was informed of ICTR's intention not to extend the appointment, the only other evaluation of his work at ICTY covered the period 17 February ... to 31 August 1999 and was rated as 'A very good performance'... No documentation exists to indicate that a mid-term review recording lapses in his performance after 31 August 1999 was implemented, nor is there any evidence of any other form of ongoing dialogue during the reporting period that afforded him an opportunity to improve those lapses. The Panel also notes that the only subsequent performance evaluation, the Short Term Report which consisted of a one page form, was requested of [the Chief, Division of Administration,] in the context of the nonrenewal of [the] Appellant's contract only three months after the 19 October memo and lacked a detailed recording of poor performance.

37. The Panel notes, along with the absence of a documented basis underpinning the decision and the perfunctory nature of the Short Term Report, that Appellant's rebuttal process was finalized some seven months *after* he was separated from service on 15 May 2001. This indicates that the decision not to renew Appellant's contract was taken long before the procedure put in place to ensure he receive due consideration was complete. ... [T]o the degree that non-renewal was based on [the] Appellant's performance, that decision should have been taken on the basis of consideration given to the RP[s] finalized report. That patently no such consideration was given implies that administration of this staff person tottered on arbitrariness. The Panel finds that this lapse in procedure violated his entitlement to due process and fair procedure.

38. [The] Appellant also makes several claims of bias and racism in taking the decision against renewal ... Upon reviewing the file in this case, the Panel finds that the evidence did not establish that the decision was motivated by prejudice or other improper motivation on the part of the Respondent.

39. [The] Appellant contends that ICTR should have renewed his contract on the basis of the RP's recommendations to do so. The Panel notes that contractual issues between a staff member and the Administration fall outside an RP's jurisdiction, and ICTR was under no obligation to follow the RP's recommendations to renew the present case. Insofar as the RP's findings and recommendations relate to matters properly before it, i.e., its assessment of [the] Appellant's performance or its assessment of the accuracy of the Short Term Report, the Administration was empowered to disagree. The Panel found no lapse of procedure in this regard.

...

#### ***Conclusions and Recommendations***

41. In light of the foregoing, the Panel *unanimously concluded* that the decision not to renew [the] Appellant's contract was tainted by [the] Respondent's violation of [the] Appellant's right to due process. It therefore *unanimously decided* to recommend that he be compensated in the amount of seven months' net salary at the time of separation, based on the lapse in time between his separation and the finalization of the rebuttal process."

On 8 September 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's recommendation for compensation in the amount of seven months' net base salary.

On 10 September 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent had signified an intent to extend his contract.
2. The Respondent demonstrated a lack of good faith and harassed the Applicant.
3. His rights of due process were violated.
4. The decision not to renew his contract was vitiated by extraneous factors, and improperly motivated.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the legal expectancy of continued employment with the Organization under his fixed-term appointment.
2. The Applicant has been adequately compensated for the violation of his due process rights resulting from the lapse of time between his separation from service and the finalization of the rebuttal process.
3. There is no evidence that the decision not to renew the Applicant's fixed-term appointment was vitiated by extraneous factors or was improperly motivated.

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

I. The Applicant was employed by ICTR as Chief of EDP/MIS on 1 February 1999, on a one-year, fixed-term contract, which was subsequently extended.

On 10 April 2000, the Applicant's then first and second reporting officers signed his PER for the period 17 February to 31 August 1999. He received an overall rating of "2", "A very good performance".

By memorandum of 17 October 2000, the Applicant's new supervisor informed him that an urgent and priority assignment had not been completed. The Applicant replied on 30 October, attaching an earlier memorandum to show his follow-up with the assignment in question. In February 2001, his supervisor completed a one-page form entitled "Performance Report on Staff Who Have Been Supervised for Less Than 6 Months" covering the period 12 September to 31 December 2000. The Applicant was graded with "2"s and "3"s, on a scale where "5" represented the highest possible rating. His overall rating was set at "Fair" but a comment was included about his lack of leadership. On 16 March, the Applicant rebutted this one-page report.

On 15 May 2001, the Applicant separated from service at the expiration of his final fixed-term contract. One week later, in its Interim Report to the Registrar of 22 May, the RP concluded that the disputed report was seriously flawed on both procedural and substantive grounds; that the decision against renewal disregarded basic rules of due process; and, that the PER system had not been observed. In its Final Report of 18 December, the RP recommended the annulment and removal of the one-page report;

preparation of a PER for the period concerned; rescission of the decision not to renew the Applicant's contract; re-instatement; and, consideration for his appointment to a non-supervisory post. On 22 May 2002, the Applicant was notified that the new Registrar did not concur with the RP's recommendations.

The Applicant appealed the decision not to extend his contract to the JAB in New York, which, in its report of 19 May 2005, concluded that that decision was tainted by violations of the Applicant's right to due process. It recommended that he be compensated in the amount of seven months' net base salary, which period was calculated based upon the time between his separation from service and the finalization of the rebuttal process. The Secretary-General agreed to pay this compensation on 8 September.

II. The Applicant challenges the decision not to renew his fixed-term contract on the grounds that he had a legitimate expectancy of renewal; that the decision not to renew his contract was vitiated by prejudice; and, that seven months' net base salary is inadequate compensation for the violation of his due process rights relating to the delayed completion of the PER rebuttal process in his case.

III. In accordance with the Staff Regulations and Rules of this Organization, the Tribunal has consistently and repeatedly held that, in general, fixed-term appointments do not give rise to any expectation for renewal, but expire without notice on the last day of the appointment. In Judgement No. 440, *Shankar* para. IV (1989), the Tribunal held that "employment with the United Nations ceases on the expiration date of a fixed-term appointment and ... a legal expectancy of renewal would not be created by efficient or even by outstanding performance". Similarly, in Judgement No. 496, *Mr. B.* para. VII (1990), the Tribunal stated:

"... [T]he Tribunal recalls its Judgement No. 422, *Sawhney* (1988), paragraph X in which it stated:

'...that a series of successive fixed-term appointments by itself is not enough to detract from the effect of staff rule 104.12(b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any other type of appointment. Moreover, this provision was incorporated verbatim in each and every one of the Applicant's letters of appointment. According to staff rule 109.7(a), such appointments expire automatically and without prior notice.'

This general position may be qualified under certain circumstances. In Judgement No. 1057, *Da Silva* (2002), paragraph IV, the Tribunal held:

"The Tribunal has consistently held that fixed-term contracts do not carry any right of renewal and that no notice of termination is necessary in such cases. Exceptions to this rule may be found in countervailing circumstances, such as an express promise or an abuse of discretion including bias, prejudice or other discrimination against the staff member, or any extraneous or improper motivation on the part of the Administration. (See Judgements No. 205, *El-Naggat* (1975); No. 614, *Hunde* (1993); and No. 885, *Handelsman* (1998).) Obviously, the *onus probandi* is on the Applicant ..."

In Judgement No. 1170, *Lejeune* para. IV (2004), the Tribunal

“reaffirm[ed] that staff members serving under fixed-term appointments have no right to renewal of their contract and that their employment with the Organization ceases automatically and without prior notice upon the expiration date of their fixed-term contract, unless there are countervailing circumstances. ... *These may include abuse of discretion or an express promise by the Administration, thereby creating an expectancy that the appointment will be extended.*” (Emphasis added.)

Moreover, while the Tribunal has repeatedly held that the Administration may take administrative decisions without giving reasons or justifications in support thereof, where it does give a reason, the reason must be supported by the facts and, thus, able to withstand scrutiny. (See *Handelsman (ibid.)* and Judgement No. 1003, *Shasha'a* para. III (2001).)

IV. It is clear that, in the present case, the Administration could have allowed the Applicant’s contract to simply expire, without providing him with any legal basis to protest or challenge that decision. However, there is convincing evidence that his non-renewal was linked to his alleged shortcomings in performance, as the Administration admits that his performance was a determinant factor in its decision making. This is apparent from several documents in the file, in particular in a facsimile transmission dated 22 October 2003, sent by the Chief, Human Resources and Planning Section, which stated that the non-extension of the Applicant’s contract was based on “performance issues as well as operational requirements”.

In view of the irregularities in the Applicant’s performance evaluation, as detailed in the reports of the RP and of the JAB, the Tribunal finds that the stated reason for non-renewal of the Applicant’s fixed-term contract was not legally supported by the facts.

The Tribunal also takes issue with the fact that the Applicant’s contract was allowed to expire while rebuttal proceedings were ongoing. Where the Administration relies upon performance issues in support of its decision not to renew a staff member’s contract, the performance evaluation process - including, if necessary, rebuttal proceedings - must be beyond reproach. As the Tribunal found in Judgement No. 826, *Beliyeva* para. VII (1997), “[b]ecause the evaluation of the Applicant’s performance was a factor, it is unacceptable that the decision as to [his] future was taken before the rebuttal procedure was finalized”. Similarly, in Judgement No. 1237 para. VIII (2005), the Tribunal held:

“Given that the Tribunal has found that the Applicant’s performance evaluation was inextricably linked to the decision not to renew his contract, if not providing the sole basis on which that decision was made, and that the evaluation was immediately and unequivocally challenged by the Applicant, it is unclear to the Tribunal why no consideration was given to approving a limited extension of the Applicant’s services and why no steps were taken to have the rebuttal procedure swiftly concluded.”



In view of these factors, the Tribunal finds that the decision not to renew the Applicant's contract was vitiated by improper motive and by lack of due process, and concurs with the findings of the JAB in this regard.

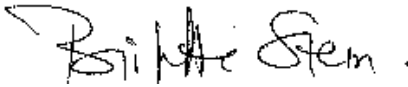
V. Given that the Secretary-General accepted the JAB's recommendation to compensate the Applicant in the amount of seven months' net base salary and paid the recommended compensation, the Tribunal must address the adequacy of said compensation. In view of the Tribunal's decision that the Applicant had no legal expectancy of renewal of his fixed-term contract, it finds the compensation given by the Administration to be sufficient, under the circumstances of this case. (See Judgement No. 1105, *Kingham* para. V (2003).) Accordingly, it makes no award of additional compensation.

VI. In view of the foregoing, the Application is rejected in its entirety.

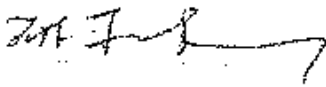
*Signatures*



**Spyridon Flogaitis**  
President

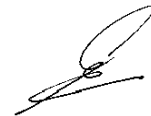


**Brigitte Stern**  
Member



**Goh Joon Seng**  
Member

Geneva, 25 July 2008



**Maritza Struyvenberg**  
Executive Secretary