



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1402

Case No. 1470

Against: The Secretary General
of the International Civil
Aviation Organisation

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena
Wijewardane, Second Vice-President; Mr. Goh Joon Seng;

Whereas, on 3 February 2006, a former staff member of the International Civil Aviation
Organisation (hereinafter referred to as ICAO), filed an application that did not fulfill all the formal
requirements of article 7 of the Rules of the Tribunal;

Whereas, on 14 March 2006, the Applicant, after making the necessary corrections, filed an
Application, requesting the Tribunal:

“12. ... to order:

- (a) That the decision of the [Advisory Joint Appeals Board (AJAB)] be set aside
and that the Applicant’s contract be renewed for a further period of two years.

IN THE ALTERNATIVE,

- (b) That the Applicant be compensated by payment of salary for the period of two
years in respect of which his contract should have been lawfully renewed and
further awarded consequential benefits relating thereto taking into account that
the Applicant would have continuously worked for ICAO up to March 2009.
...”

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 August 2006, and once thereafter until 29 September;

Whereas the Respondent filed his Answer on 26 September 2006;

Whereas the Applicant filed Written Observations on 26 October 2006, and an addendum thereto on 1 November;

Whereas the Applicant filed additional documentation on 20 July 2007, 11 April 2008 and 3 June;

Whereas the Respondent filed comments on the Applicant's Observations and communications on 23 June 2008.

Whereas the statement of facts, including the employment record, contained in the report of the AJAB reads, in part, as follows:

“Summary of Facts

... [The Applicant] entered into the service of the Organization on 1 July 2002, as Deputy Regional Director for the Eastern and Southern African (ESAF) Office in Nairobi at the P-5 level ... His services were rendered on the basis of a non-career, three-year fixed-term appointment, which expired on 30 June 2005. ...

... [The Applicant] was subject to two performance appraisals, one issued on 1 April 2003, the other on 15 April 2004. Both ... rated [his] performance as 'Good'. In the second performance appraisal, [the Regional Director] ... recommended ... the renewal of [his] appointment ...

... [By interoffice memorandum (IOM) to the Secretary General] dated 18 February 2005, [the] Chief, Staff Services, stated, *inter alia*:

'[The Regional Director] has recommended in the performance appraisal report that [the Applicant's] current appointment be renewed for a further two years from 1 July 2005. [The Chief, Regional Affairs Office,] has advised ... that he agrees with this recommendation'.

The IOM concluded ...: 'Before making a final decision, you may wish to discuss this matter with [the Chief, Regional Affairs Office,] in order to seek his opinion regarding [the Applicant's] forthcoming extension.'

[The Chief, Regional Affairs Office, annotated the same IOM on 25 February 2005, as follows:] 'I have my concerns. The oral reports and reflections on [the Applicant's] performance are not positive at all.'

... On 18 March 2005, a confidential report [on the Applicant's performance] was submitted by [the Regional Director] ... to the Secretary General [at the latter's request]. ... [T]he Regional Director commented on [the Applicant's] work in the ESAF Office and, *inter alia*, stated:

...
'The productivity of [the Applicant] on the running of the Regional Office is very low to be of any use. A review on his posting may help him and, obviously the Office and its

staff. The recent review of [his] duties ... makes him look nervous, sometimes, like one about to leave the establishment.’

... On 22 March 2005, an informal discussion took place between [the Applicant] and the Regional Director ... [The Applicant], to whom the IOM dated 18 March ... was not officially communicated, thereafter submitted an IOM dated 23 March ... to the Secretary General on the subject of his performance in order to ‘set the record straight’. In it, [he] stated that for the past three years: ‘nobody has ever hinted to me or even put in writing that I was underperforming’ and mentioned that the remarks which were being leveled against him were clearly contradicted by his performance appraisal reports ...

... On 7 April 2005, in a letter addressed to the Director General of the Kenyan Civil Aviation Authority, the Secretary General advised that it was his intention to re-appoint [the Applicant] to his post for a period of one year from 1 July ..., and requested the Government’s consent for [his continued] release. In a subsequent correspondence dated 16 June ..., the Secretary General requested the Kenyan authorities to disregard his earlier letter ...

... By letter dated 16 June 2005, ... the Secretary General offered [the Applicant] an extension of his fixed-term appointment for a period of six months ... This letter stated that the appointment carried no expectancy of renewal upon expiry and that it would terminate on its expiry date without further notice. On the same day, in a separate letter, the Secretary General advised [the Applicant] ... that his contract would not be extended beyond 31 December 2005, at which time [he] would separate from service. ... ”

On 14 July 2005, the Applicant wrote to the Secretary General, requesting to “appeal against the decision to separate” him and further requested the Secretary General to set up an AJAB to “review [his] case”. On 1 August, the Secretary of the AJAB advised both the Applicant and the Secretary General that his request was being treated as a request for review. Neither party protested this decision. On 18 August, the Applicant lodged an appeal with the AJAB. The AJAB adopted its Opinion on 5 December 2005. Its findings and recommendation read, in part, as follows:

“5. Findings of the Board

5.1 The Board ... has to address the request of the Representative of the Secretary General that the Appeal was not receivable due to a procedural lapse and should be rejected on preliminary grounds. ... [T]he Board has justified its action in treating the [Appellant’s] letter ... dated 14 July 2005 ... as a letter of review as required by staff rule 111.1.1. ...

...

5.3 The Board is mindful of the fact that the Appellant had ... been offered an extension of his fixed-term contract for a period of six months. However, since the usual policy of the Organization is to offer the incumbent a two-year extension of a fixed-term contract, which was in fact offered to [his] predecessors, and, *a fortiori*, the fact that the Appellant occupies a position which is budgeted and there is evidence that [he] was to be offered a longer period of extension than six months, which decision was seemingly abandoned consequent to [his] supervisor’s confidential letter to the Secretary General dated 18 March 2005, the Board considers itself entitled to go into the circumstances of the case. ...

5.4 The findings of the Board are predicated on the fact that up until the issuance of the confidential letter dated 18 March 2005 by the Appellant’s first supervisor, which listed shortcomings of the Appellant, the Appellant was seemingly performing well at his job. His

performance appraisals were above average and in the last appraisal, the Appellant's first supervisor had recommended that [his] contract be renewed and that [he] be given a salary increase. The Board also notes that the Appellant had been given no indication of dissatisfaction on the part of his superiors with his performance. The Board can only conclude that the sudden turn of events would be inconsistent with [the] usual practice of the Organization. ...

5.5 With regard to the issue as to whether the circumstances related to the Appellant's contract of employment gives him a reasonable expectancy of renewal in accordance with the usual practice of the Organization, the Board finds that, given the positive performance appraisals and the absence of proof of unsatisfactory performance (except for allegations made in the letter dated 18 March 2005 by [the Regional Director]), and the fact that the Appellant was occupying a budgeted post in the Organization and was recommended by his immediate supervisor for renewal, the Appellant could have had a reasonable expectation of renewal. ...

5.6 The Board also notes a serious inconsistency between the memorandum dated 18 March 2005 of the Appellant's first supervisor and letter of appreciation dated 18 October ... issued by him to the Appellant ... This inconsistency, when viewed with the refusal by the Appellant's first supervisor to answer the questions put to him by the Board during the hearing, prompts the Board to form an adverse inference against the Administration in its treatment of the Appellant.

5.7 Another serious contradiction which leads the Board to draw an adverse conclusion against the Administration, in particular, the Appellant's first supervisor, is that the latter's letter dated 18 March 2005 advises the Secretary General that the Appellant had started underperforming after a few months of his assuming office. ... The statement ... to the effect that '[t]he productivity of [the Applicant] on the running of the Regional Office is very low to be of any use' is particularly of concern to the Board if it were to reconcile that statement with the formal performance appraisals of the Appellant's service carried out throughout his career at the Organization.

5.8 The Board regrets its inability to fully ascertain the true facts of the case, particularly in light of the refusal of the Appellant's first supervisor to clarify certain issues during the hearing. Therefore, the Board is unable to conclude that the Appellant had a legitimate expectation of renewal of his contract. However, the Board is sympathetic to the Appellant, that there was a certain degree of arbitrariness and inconsistency on the part of the Administration in its treatment of [him] in consistently issuing good performance appraisals and not apprising [him] of his alleged underperformance. ...

6. *Recommendations of the Board*

6.1 In view of the above findings, ... the Board is of the view that the Appellant is entitled to some compensation for the manner in which he was treated by the Administration. Therefore, the Board recommends that the Appellant be paid six months' salary.

6.2 The Board rejects the pleas of the Appellant, that his separation from the Organization on 31 December 2005 be withdrawn and that his appointment be renewed for a period of two years."

On 28 December 2005, the Secretary General informed the Applicant that he accepted the AJAB's "findings and recommendation [to reject the pleas of the Applicant,] 'that his separation from the Organization on 31 December 2005 be withdrawn and that his appointment be renewed for a period of two years'", but that he was unable to agree to pay compensation as so doing would contravene ICAO Regulations and Rules.

On 14 March 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. He is entitled to a renewal of his contract for a further period of two years because a legitimate expectancy of renewal had been created by various positive recommendations.

2. He is entitled to a renewal of his contract for a further period of two years because this was an established administrative policy and practice accorded to all past Deputy Regional Directors who served in the same office.

3. The recommendation of the AJAB that he be awarded only six months' salary in compensation did not reflect its own findings of fact that there was bias, malice, arbitrariness and discrimination in the manner in which he was treated by the Administration.

Whereas the Respondent's principal contentions are:

1. The decision of the Respondent to renew the fixed-term appointment of the Applicant for six months without further renewal was a lawful and proper exercise of his discretionary powers, was not arbitrary and was not motivated by prejudice or other extraneous factors.

2. The Respondent did not create any expectancy that his appointment would be further extended.

The Tribunal, having deliberated from 30 June to 25 July 2008, now pronounces the following Judgement:

I. The Applicant, a Kenyan national, joined ICAO on 1 July 2002 as Deputy Regional Director for the Eastern and Southern African Office in Nairobi, at the P-5 level on a three-year fixed-term appointment. His appointment was subsequently extended for six months and came to an end on 31 December 2005.

II. Before entering into the merits of the case, the Tribunal will address a receivability issue which arose at the AJAB. In accordance with paragraph 5 of ICAO staff rule 111.1, the Applicant ought to have requested administrative review of the decision not to renew his fixed-term contract. He did not, however, make such a request but submitted his appeal directly to the AJAB, albeit addressed through the Secretary General. Notwithstanding the objections of the Respondent, in its Opinion of 5 December 2005, the AJAB accepted receivability of the appeal, finding that the Applicant had combined his request for administrative review into his appeal and that the Respondent could have responded to it as a request for review. The Tribunal observes that the Secretary General appears to have conceded this argument as, in his memorandum of 28 December, he accepted the findings and recommendation of the AJAB with respect to the non-renewal of the Applicant's contract. Accordingly, while the Tribunal takes note of the inclusion of

this preliminary matter in the Respondent's submission to the Tribunal, it does not consider it necessary to enter further into the issue, the Respondent's conduct estopping him from maintaining the objection.

III. With respect to the substance of this case, the fixed-term character of the Applicant's appointment was emphasized by the terms and conditions of his contract which included, as is quite usual in such contracts, the following specific provision: the "appointment does not carry expectancy of renewal or conversion to any other type of appointment and will terminate on its expiry without further notice". This accorded with staff regulation 4.9.1 of the ICAO Service Code, which provides that fixed-term contracts have "no expectancy of renewal".

While the express conditions of the Applicant's contract are such that he had no right to renewal of his fixed-term appointment, it is clear, however, that the decision as to whether to permit a fixed-term contract to end with the effluxion of time or to extend the services of a staff member involves an exercise of discretion on the part of the decision-maker. The jurisprudence of the Tribunal makes it abundantly clear that there is an obligation to exercise that discretion in a transparent and unbiased way:

"unless there exist countervailing circumstances, ... staff members [on fixed-term contracts] may see their relationship with the Organization terminated when the last of their ... appointments expires. Countervailing circumstances may include (1) an abuse of discretion in not extending the appointment, or (2) an express promise by the Administration that gives a staff member an expectancy that his or her appointment will be extended. The Respondent's exercise of his discretionary power in not extending a [fixed-term] contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors that may flaw his decision." (See Judgement No. 885, *Handelsman* (1998).)

In the instant case, the Tribunal does not consider that any express promise was made to the Applicant, unlike, for example, that relied upon in Judgement No. 1234 (2005). However, it must review whether the facts of this case demonstrate an abuse of discretion on the part of the Respondent, resulting in "countervailing circumstances" as envisaged in *Handelsman* (*ibid*).

IV. The Applicant claims that the circumstances of his employment created a legitimate expectation, as well as a legal expectancy, of renewal of his appointment, in accordance with what he asserts is the usual practice of ICAO. There appears to be no dispute between the parties that ICAO routinely extends for a two-year period the fixed-term contracts of staff members whose performance proves satisfactory and, indeed, the AJAB also recognized the existence of this practice. The Applicant, on the other hand, received a very limited, six-month extension of his appointment, as set out above. He is more than disappointed and insists that he was entitled - and had a legal expectancy - to a two-year extension and that the six-month extension he received amounted to discrimination.

The Applicant bases his claim on several factors: the general administrative practice of extending fixed-term contracts; his encumbrance of a budgeted post; his good performance evaluations; the Regional

Director's recommendation of extension of his contract; and, the fact that between July and December 2005, a new salary scale was applied to him. Furthermore, he attempts to rely upon the fact that the agreement of the Kenyan Government was sought and obtained for extension of his appointment.

V. Insofar as the contact with the Government of Kenya is concerned, the Tribunal finds it was a routine enquiry as to whether the Government had any objection to the Applicant's ongoing secondment, made to facilitate the Administration's decision-making. Such enquiries, "completed at the bureaucratic level and not with the Applicant", cannot be construed as giving rise to any legal expectancy for the Applicant. (See Judgement No. 1207, *Di Filippo* (2004).) Equally, the Tribunal finds that application of the modified salary scale was simply normal administrative procedure, giving rise to neither a legal right nor a legal expectancy on the part of the Applicant to any future employment.

With respect to the Applicant's good performance evaluations, performance of even outstanding or exemplary quality does not by itself attenuate the discretion of the Organization to decide on whether to extend the contract of a staff member. (See Judgement No. 1237 (2005).) Likewise, whilst the fact that a staff member encumbers a budgeted post may prove relevant, or at least administratively convenient, to the Administration in the decision to renew his contract, encumbrance of a budgeted post does not automatically give rise to any right to renewal of one's appointment just as, conversely, encumbrance of a project post does not automatically eliminate such a possibility. The recommendation of a supervisor may prove essential to renewal of appointment but does not, in and of itself, give rise to a legal right, as such a recommendation, by its very nature, amounts to little more than an opinion, on the basis of which an administrative decision may be made. As general statements of law and jurisprudence, the Tribunal is satisfied that none of these factors alone would give rise to a legal expectancy of renewal of appointment. In this case, however, these individual factors must be considered together with the administrative practice prevailing at ICAO to renew fixed-term contracts in two-year periods, subject to satisfactory performance. The Tribunal finds that the cumulative effect of these factors, the "surrounding circumstances" as the Tribunal termed it in Judgement No. 614, *Hunde* (1993), is that the Applicant - who had every reason to believe his performance was not only satisfactory but was "good"; who was aware of his supervisor's recommendation; and, who knew his post was not subject to budgetary concerns - was entitled to rely upon the practice of renewal and, therefore, had a legal expectancy of renewal of his contract.

VI. With respect to the Applicant's performance evaluation, the Tribunal takes note of the contradictory position adopted by the Administration. The Applicant received two performance appraisal reports from his first supervisor, the Regional Director, in which his performance was rated as "Good". In the second appraisal, dated 18 May 2004, the Regional Director recommended that the Applicant's appointment be extended for a further two years. In 2005, however, in an annotation to an 18 February memorandum to the Secretary General, the Chief, Staff Services, reported that "oral reports and reflections on his performance are not positive at all". Following a request for further information on the Applicant's

performance, the Regional Director advised the Secretary General in a confidential report of 18 March that the Applicant's performance "after the first few months" had not been satisfactory, stating "[t]he productivity of [the Applicant] on the running of the Regional Office [was too] low to be of any use". This report was apparently never copied to the Applicant, and was certainly not produced in the context of official performance evaluation.

The Tribunal must emphasize its disapproval of such unofficial evaluation which effectively bypasses the formal evaluation process, preventing staff members from exercising their rights of participation and rebuttal, and resulting in a denial of due process. This is particularly so when the future career of a staff member is so clearly linked to his performance. As the Tribunal held in Judgement No. 1092, *El-Hudhud* (2002):

"Had there been ... complaints, they should have been made against him in the ordinary way so that he would have had an opportunity of refuting or explaining them. If his performance was unsatisfactory, or less than satisfactory, this again should have been disclosed by his performance reports so that he would have had the opportunity to rebut such rating. ... It seems to the Tribunal that, when the Administration establishes and operates a formal performance evaluation system, it must take proper cognizance of its findings when deciding the fate of its staff members and cannot substitute for its results a contradictory assessment made behind closed doors, leaving a staff member in the dark as to the reasoning or grounds giving rise to such findings and leaving the staff member without any opportunity of disputing the basis of those adverse findings."

It is apparent to the Tribunal that the decision on renewal of the Applicant's contract was "inextricably linked" to his performance evaluation. (See Judgement No. 1237 (*ibid.*)). As the Tribunal held in that case,

"Whilst good or even outstanding performance does not automatically lead to any conclusion that a fixed-term contract would be extended and creates by itself no entitlement to such an extension, where inadequate performance is the reason for the decision and the process of evaluation is as seriously flawed as in this case, an implication arises that, had a correct evaluation been made, then the Applicant's contract may or would have been extended."

VII. Having concluded that the Applicant had a legal expectancy of renewal of contract, which expectancy was frustrated by the lack of due process which vitiated the discretion on the part of the Respondent, the Tribunal must determine the extent of the harm caused to the Applicant:

"[h]aving determined that the Respondent's decision regarding the renewal of the Applicant's contract was made on the basis of his performance, and that the informal evaluation made of his performance, which undermined the formal rating ... he had received, was improper, the Tribunal finds that the Respondent improperly exercised his discretion in this decision-making process and that the Applicant is, therefore, entitled to compensation". (Judgement No. 1264 (2005).)

In computing such compensation, the Tribunal is mindful of both the violation of the staff member's rights and the likely consequences for his or her career. In Judgement No. 1052, *Bonder* (2002), the Tribunal held:

“Depending on the extent to which proper procedures have been ignored and on the existence of solid prospects for renewal, the Tribunal may conclude that the procedural irregularities do not fundamentally vitiate the decision and that the applicant is entitled only to a limited compensation for the inadequate treatment of his or her case; or it may conclude that, although the applicant does not have a right of renewal, the procedural irregularities were so serious or so relevant to the decision not to renew that the non-renewal decision should be considered illegal and the staff member entitled either to renewal of his or her contract or to compensation in lieu thereof if the Administration refuses to comply. The latter conclusion applies in principle only in cases where there have been serious and manifest violations of the rights of the staff member and also where the likelihood that the staff member’s contract would be renewed was particularly strong for general and/or specific reasons.”

In the instant case, the Tribunal is satisfied that the Applicant had a legal expectancy of renewal of his fixed-term contract. This finding is based on the acknowledged policy at ICAO to renew fixed-term contracts in two-year periods; by the fact that ICAO clearly linked performance and renewal of contract by incorporating the supervisor’s recommendation on renewal into the performance evaluation system; and, moreover, by the evident lengths to which the Organization went in a parallel and contradictory process to determine the Applicant’s performance to be lacking. The Applicant, having been renewed only for a period of six months, is, then, entitled to compensation.


VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of eighteen 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,
2. Rejects all other pleas.

(Signatures)

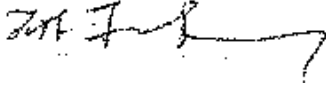


Jacqueline R. **Scott**
First Vice-President



Dayendra Sena **Wijewardane**
Second Vice-President

AT/DEC/1402



Goh Joon Seng
Member

Geneva, 25 July 2008



Maritza Struyvenberg
Executive Secretary