



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1410

Case No. 1481

Against: The Secretary-General
of the United Nations

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

Whereas, on 13 April 2006, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 7 June 2006, after making the necessary corrections, the Applicant filed an Application, requesting the Tribunal:

“11. ... *to find*:

- (a) That the Respondent violated the Performance Evaluation Report [(PER)]/GROWTH ... procedures by evaluating the Applicant's personal performance outside [the Staff Regulations and Rules].
- (b) That the Respondent contravened the relevant rules by the undue signing of the Applicant's PER/GROWTH by the second reporting officer without the Applicant's signature appearing on the document.
- (c) That the Respondent further denied the Applicant due process by contravening the relevant rules that provide for staff members' right to appraisal and rebuttal, especially when performance is a basis for contract renewal.
- (d) That the Respondent's decision not to renew the Applicant's contract was not taken in accordance with ... procedure and the fundamental principles of the Organization.

- (e) That the Respondent disregarded stipulated rules as provided for in the UNICEF Human Resources Manual ...
- (f) That the Respondent's decision not to renew the Applicant's contract was done in bad faith and to avoid paying the Applicant future termination indemnities.
...
- (h) That the Respondent's non-compliance with time limits has prolonged this case causing the Applicant and family huge mental and emotional stress.
...

12. [and] *to order*:

- (a) That the Applicant be reinstated
- (b) That the Respondent completes the Applicant's 2002 GROWTH in compliance with the relevant norms and fundamental principles of the Organization, within a specified timeframe.
- (c) That the Applicant be awarded monetary compensation ...
- (d) That the Applicant be awarded monetary compensation for the unreasonable delay ...”

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 14 November 2006, and once thereafter until 14 December;

Whereas the Respondent filed his Answer on 15 November 2006;

Whereas the Applicant filed Written Observations on 16 December 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] joined [the] UNICEF Lusaka Office on 1 November 2000, on a temporary fixed-term (...) appointment for two months. On 1 January 2001, she obtained a 22-month fixed-term appointment (...) as Assistant Supply Officer at the NO-B level. ... On 1 November 2002, her [appointment] was extended for four months until 28 February 2003, when she was separated upon the expiration of her appointment.

Summary of the facts

... On 21 May 2002, [the] Operations Officer, UNICEF Zambia, and supervisor of the Supply Unit, sent a collective e-mail to all staff including [the Applicant], urging those who had not completed their PER/GROWTH for 2002 to do so by 24 May ...

... On 26 May 2002, [the Operations Officer, UNICEF Zambia,] sent an e-mail to [the Applicant,] reminding her of the complaint letter from ... a supplier, which she had received ten days before. In view of [the Applicant's] failure to discuss the matter with [him] as requested, he reiterated the need to hold a meeting in order to address the delay issue. On 18 September ..., [the] Head, Health & Nutrition Section, UNICEF Zambia, sent an e-mail to [the Operations Officer, UNICEF Zambia], complaining about delays in the Supply Unit, which affected negatively the implementation of the health programme. ...

...

... On 31 October 2002, on the last day of [the Applicant's] appointment, [the] Representative, UNICEF, Lusaka, met with [her] and informed her that her contract would not be renewed.

... In a memorandum dated 1 November 2002, [however, the Representative] informed [the Applicant] ... that her appointment would be renewed for four months (...) as the office intended to [internationalize] the Supply Officer post. ...

...

... On 4 November 2002, [the Operations Officer, UNICEF Zambia,] sent another reminder to a number of staff [including the Applicant]. ... It appeared from the record that [the Applicant] ... did complete her part ... After completion of his part, the Appraising Officer sent the PER to [the Applicant] for her signature. She refused to sign the PER, which remained incomplete.

...

... On 11 April 2003, ... the Representative of UNICEF, Lusaka, requested the conversion of Lusaka Supply Officer Post ... to an international Professional P-3 post.

...

... [The] Deputy Director, Division of Human Resources, in a confidential letter dated 23 May 2003 [to the Applicant], ... stated that he had been informed that [her] performance was unsatisfactory. ... [The Deputy Director advised the Applicant that the decision not to further renew her appointment was taken in compliance with UNICEF policy and procedure.]

... On 6 June 2003, [the Applicant responded that the Deputy Director, Division of Human Resources, had] not address[ed] her grievance. [She] refuted and found baseless the allegations that her performance was unsatisfactory, [and] clarified that the subject of her complaint was not the non-renewal of her appointment but rather the violation of her rights as a staff member during the performance appraisal process.

... On 9 June 2003, [the Applicant] wrote an e-mail to [the] Executive Director, UNICEF, requesting a review of the 'decision rendered in the ... letter from [the Deputy Director, Division of Human Resources]'. ...

... On 15 June 2003, [the Applicant requested] ... a copy of her GROWTH. [She] drew her former supervisor's attention to the fact that her GROWTH had been signed without prior discussion and opportunity for her to review the evaluation of her performance.

...”

On 9 June 2003, the Applicant requested administrative review. On 21 August, the Applicant filed an appeal with the JAB in New York. The JAB adopted its report on 15 December 2005. Its considerations and recommendations read, in part, as follows:

“Considerations

...

40. In the instant case, it was clear to the Panel that the decision not to renew the Appellant’s [fixed-term appointment] was based on the quality of [her] performance. ...

41. The deficiencies that the Appellant’s supervisor felt that had arisen during her second year were reported in her 2002 PER/GROWTH for that reporting period, from May 2002 to February 2003. The Panel noted that the complaints centered on the delays in [supply requisitions] finalization but were never investigated. The Panel further noted that the Appellant’s alleged deficiencies were not adequately documented and in addition, it found no evidence of any guidance by the Appellant’s supervisor to correct them. The GROWTH guidelines provide for an Improvement Plan to be developed should the staff member’s performance be evaluated as ‘ineffective’. The Panel noted that the Appellant’s GROWTH had been assessed as mainly ineffective. However, the Panel failed to find any evidence of a Performance Improvement Plan which would have helped the Appellant improve her performance.

42. Moreover, Part 2.2 of the Appellant’s GROWTH states that the dates of formal performance communication meetings/discussions must be recorded in the review text. In that respect, the Panel noted that the supervisor indicated in pen that a performance communication meeting took place on 20 September 2002 ... However the Appellant called into question this [notation]. In view of the conflicting statements, in addition to the lack of evidence, the Panel was left to determine whether indeed the Appellant had the opportunity to review and discuss her GROWTH objectives during the reporting period.

43. The Respondent had indicated that the Appellant’s GROWTH was incomplete and therefore not included in her official status file. The Panel deemed unacceptable such an assertion, as in accordance with the relevant rules, staff members have the right to be appraised and given the opportunity to rebut the appraisals, especially so when performance is used as the basis for the non-renewal of staff member’s appointments. In the instant case, the Appellant’s performance was called into question; she therefore should have been given the opportunity to challenge these allegations.

...

45. Guided by its interpretation of the relevant administrative norms on ‘Performance Appraisal System’ which place the ultimate responsibility for timely completion and implementation of the PER on the supervisor, the Panel concluded that UNICEF, Lusaka, had failed to take appropriate action with a view to enforcing compliance with the provision of the relevant norms and therefore by its inaction, it had violated the Appellant’s due process rights.

...

47. Still in its consideration of the case, the Panel questioned the rationale behind the four month extension granted to the Appellant despite the concern over her performance. ... It was ... the Panel’s view that the Appellant’s [fixed-term appointment] should have been allowed to lapse at the appointed time, failing to do so and renewing her [appointment] while invoking her inefficiency seemed disingenuous to the Panel.

48. The Panel next considered the Head of the Office's letter informing the Appellant in writing of the intention to [internationalize] her post as being the reason for the non-renewal of the Appellant's [fixed-term appointment]. The Respondent submitted that ... reference to the abolition of the post was a 'miscommunication'. ...

49. The Panel did not accept the argument that the notification to the Appellant with respect to the abolition of her post as the basis for the non-renewal of her [appointment] was a miscommunication. Such a notification followed by a retraction on the part of the Administration in the view of the Panel was not in keeping with the principle of good administration. The Panel felt that it engaged the responsibility of UNICEF and consequently entitled the Appellant to ... compensation.

...

Recommendations

51. In light of the foregoing, the Panel *unanimously agreed* that there was evidence that substantive and procedural irregularities tainted the decision of the non-renewal of the Appellant's appointment.

52. While acknowledging UNICEF discretionary power not to renew the Appellant's [fixed-term appointment], the Panel *unanimously agreed* that UNICEF had failed to rigorously and objectively determine the unsatisfactory nature of the Appellant's service.

53. The Panel *unanimously agreed* that the Appellant was wrongfully notified of UNICEF['s] intention to internationalise her post.

54. In view of the aforesaid, the Panel *unanimously recommends* that the Appellant receive 3 months' net base salary as compensation for UNICEF['s] improprieties.

55. The Panel also *unanimously recommends* that UNICEF ensure that the Appellant's 2002-2003 GROWTH be completed in compliance with the rules and regulations of the Organization within a reasonable time frame."

On 7 February 2006, the Secretary-General accepted the JAB's recommendation for payment of compensation, but determined that its recommendation regarding the Applicant's PER/GROWTH could not be implemented as the GROWTH format was no longer used and her supervisor no longer worked for UNICEF.

On 7 June 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. She was entitled to renewal of her contract for a further period of two years because a legitimate expectancy of renewal had been created.
2. She was entitled to renewal of her contract for a further period of two years because this was an established administrative policy and practice.
3. The recommendation of the JAB that the Applicant be awarded three months' salary as compensation was not proportionate with its findings of fact.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the expectancy of continued employment with the Organization, and the non-renewal of her fixed-term appointment did not violate her rights. The decision not to renew her appointment was not vitiated by improper motivation or other extraneous factors.
2. Proper rules and procedures were followed in taking the contested decision not to renew the Applicant's appointment.
3. The Applicant has been adequately compensated for the irregularities found by the JAB.
4. The Applicant's plea for additional monetary compensation is without merit, as are her pleas for retroactive reinstatement and for completion of her 2002 PER/GROWTH report.

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

I. The Applicant entered the service of the Organization on 1 November 2000 on a two-month temporary fixed-term appointment as an Assistant Supply Officer. On 1 January 2001, her contract was extended for an additional fixed term of 22 months. On 1 November 2002, after having completed two years of service, the Applicant was advised that she would be granted a final extension of four months and that she was to be separated upon expiry of this newly extended fixed-term contract. On 17 January 2003, the Applicant stated that she was dissatisfied, not with the non-renewal of her contract, but with the manner in which it was handled.

II. On 21 May 2002, the Applicant's supervisor sent a collective e-mail to all staff including the Applicant, urging those who had not yet completed their PER/GROWTH for 2002 to do so by 24 May. On 4 November, her supervisor reiterated his request, reminding her that she needed to finalize her PER/GROWTH and further stating that it was expected for discussion on 7 November. The Applicant complied only on her last day in office, on 28 February 2003, and, upon receiving the Appraising Officer's comments, refused to sign the PER/GROWTH. She has, to date, refused to sign the document. The Applicant denies certain of the Respondent's allegations with respect to her evaluation but admits that she did not sign and date the document. Of course, an unsigned document is simply a piece of paper. Even if it materially existed prior to 28 February 2003, the evaluation process could not really be expected to have proceeded until the Applicant formally completed her part of the evaluation. It remains uncontested, then, that she did not produce such document until the day of her departure, which was well past the last possible date.

The facts in this case make it apparent that there were concerns expressed to the Applicant about her performance well before the expiration of her contract. On 26 May 2002, her supervisor reminded her of a complaint letter from a supplier which the Applicant had received ten days before, and repeated a prior request to discuss the matter with her. On 18 September, a senior UNICEF official complained to the

Applicant's supervisor about delays in the supply unit. Her supervisor's evaluation, according to the Applicant, "used the term *ineffective* on four occasions and even created the term *highly ineffective* on one occasion". The dates of this litany of events are clearly prior to, or contemporaneous with, the Respondent's decision not to renew her contract, save for a four-month final extension by way of notice.

III. The Tribunal will next consider the process by which the Respondent reached his decision not to renew the Applicant's contract.

On 25 September 2002, one month before the expiration of the Applicant's contract, her supervisor was asked to submit his recommendations as to whether she should be offered an extension of her contract. The supervisor responded neither to this request nor to a reminder on 29 October. In view of the facts set out in paragraph II, above, these omissions seem quite clearly to the Tribunal not to have been the product of casual forgetfulness or negligent inaction, but rather the result of a very deliberate decision.

On 31 October 2002, the last day of her appointment, the Applicant met with the UNICEF Representative, Lusaka, who advised her that, in view of her "sub-standard" performance, her contract would not be renewed, but rather extended for a final four-month period. On 1 November, the Representative told her that the four-month renewal was a result of her post being "internationalized". She subsequently contested this decision. On 4 November, the Applicant was reminded that she needed to finalize her PER/GROWTH. On her last day in office she completed her part of the PER/GROWTH but, upon receipt of her supervisor's comments, simply failed to sign it. On 28 February 2003, the Applicant's final fixed-term contract expired. On 23 May, the Division of Human Resources in New York confirmed that her contract had not been renewed in view of her "unsatisfactory" performance.

In its report of 15 December 2005, the JAB unanimously agreed that there was evidence that substantive and procedural irregularities had tainted the non-renewal decision; that the Organization had failed to rigorously and objectively determine the unsatisfactory nature of the Applicant's service; and, that the Applicant was wrongfully notified of the Organization's intention to internationalize her post. It recommended:

- (a) that the Applicant receive three months' net base salary as compensation for the Organization's improprieties; and,
- (b) that the Organization should ensure that the Applicant's 2002-2003 PER/GROWTH be completed within a reasonable time.

On 7 February 2006, the Secretary-General accepted the JAB's recommendation for payment of compensation, but determined that he was unable to adopt the recommendation regarding her PER/GROWTH as the format was no longer in use and the Applicant's supervisor no longer worked with the Organization.

IV. The right of the Organization to renew or not to renew a fixed-term contract is uncontested, even if the consequences might vary according to the circumstances. It is evident, however, that from the Organization's perspective, there is little to be gained from continuing the evaluation process of a staff member whose fixed-term contract had been permitted to expire. While the Applicant might be considered to have more interest in having a valid performance evaluation, the Tribunal cannot overlook the fact that she herself was to blame for its timely lack of completion while she was in office, despite repeated reminders to complete her part of the PER/GROWTH form, and that she only completed her part on her last day in office and, further, refused to sign the completed evaluation once she received her supervisor's comments. In this regard, the Tribunal recalls its Judgement No. 1294 (2006), in which it held:

“...whilst evaluation of staff members is a managerial responsibility which should be performed by supervisors through the procedures established by the Organization for such assessment, the Tribunal recognizes that the process requires the input and active cooperation of both supervisor and supervisee....”.

The Secretary General relied upon neither the lack of interest of the Organization nor the Applicant's responsibility in the evaluation process, but found himself unable to accept the recommendation of the JAB with respect to the PER/GROWTH procedure for logistical reasons: the GROWTH format was no longer in use and her supervisor at the time of her employ no longer worked for the Organization. While the Tribunal finds it hard to believe that the first of these difficulties could not have been surmounted, the second one is certainly a credible problem, given that the Organization has no way of compelling a former staff member to complete performance evaluations of any staff member, regardless of the standard of their performance. Accordingly, it accepts the Respondent's position that it was factually impossible to comply with this part of the JAB's recommendation. Indeed, the argument seems insurmountable, for no one can be ordered to accomplish the impossible.

V. The Tribunal is aware that both parties have to make a reasonable good faith effort in the performance evaluation process. (See Judgement No. 1294 (*ibid.*)) The Applicant, however, was first late and then remiss in contributing her own part in the proceedings. Thus, the Tribunal holds that the lack of timely completion of her PER/GROWTH evaluation was her fault, not the Organization's, despite the seemingly contrary view held by the JAB. Accordingly, it considers that the Applicant has been reasonably compensated by the payment of three months' net base salary. Moreover, the Tribunal recalls that she did receive a final four-month extension as notice of the ultimate non-renewal of her fixed-term contract.

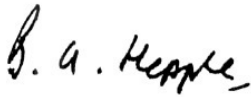
While the Tribunal is in agreement with the JAB that there were improprieties in the way the Applicant's separation from service was handled, the Tribunal does not find that they are of such a nature as to justify further compensation. The sum awarded is proportionate to the time the Applicant actually served in office; the four-month notice period she received and the corresponding contractual extension given; and, the other factual circumstances of the case, as set out above.

VI. For the foregoing reasons, the Application is denied in its entirety.

(Signatures)



Jacqueline R. **Scott**
Vice-President

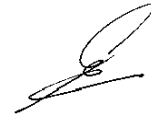


Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary