



Administrative Tribunal

Distr. Limited  
30 January 2009

Original: English

---

ADMINISTRATIVE TRIBUNAL

Judgement No. 1416

Case No. 1488

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Ms. Brigitte Stern;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 1 June 2006;

Whereas, the Applicant filed an Application dated 17 May 2006, which was received by the Tribunal on 10 July, requesting the Tribunal, inter alia:

“2. On the merits, ... to declare:

(a) That the non-renewal of the Applicant’s fixed-term contract in February 2003 [was] the outcome of a series of arbitrary and discriminatory decisions taken in bad faith by the Respondent between July 2002 and January 2003;

(b) That this situation was noted by the various appeal and recourse bodies of the United Nations, in particular the Geneva Joint Appeals Board [(JAB)].

3. ... [And] to order:

(a) The rescission of the Respondent’s decision not to renew his fixed-term appointment;

(b) His reinstatement in the United Nations;

(c) Or failing that, the payment of compensation equivalent to two years’ [net] base salary on the date of separation;

(d) The payment of compensation equivalent to two years' [net] base salary on the date of separation, for moral and psychological damage ...”

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 10 January 2007, and once thereafter until 10 February;

Whereas the Respondent filed his Answer on 9 February 2007;

Whereas the Applicant filed Written Observations on 15 April 2007;

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

***“Applicant's professional history***

... On 9 April 2001 the Applicant joined the Office of the United Nations High Commissioner for Human Rights (hereinafter ‘OHCHR’) in the Research and Right to Development Branch as an Expert in information technology systems, at the ... [P-4, step 1 level], under a fixed-term contract of 11 months scheduled to end on 8 March 2002. The Applicant's entry level was retroactively raised to P-4, step 2, on 9 April 2001.

... After a mandatory break of two weeks, the Applicant was then offered a new fixed-term contract for the period 25 March 2002 to 24 February 2003 on the same post, at the P-4, step 3 level.

***Summary of the facts***

... On 4 April 2002, a workplan was drawn up and approved by the Applicant's supervisor retroactively for the period 9 April 2001 to 31 March 2002.

... On 17 July 2002 the Applicant's two reporting officers, the Chief of the Administrative Section and the Chief of the Research and Right to Development Branch (...) produced a performance appraisal for the Applicant for the period from 1 January 2001 to 31 March 2002, with the rating ‘does not meet performance expectations’. On 18 July 2002 the Applicant signed this appraisal, indicating his intention to initiate a rebuttal procedure. ...

... On 18 July 2002 the Chief of the Administrative Section and the Chief of the Research and Right to Development Branch sent the Applicant a memorandum informing him that, having reviewed his performance and having noted that he did not meet the requirements of the post, they were obliged to give him one month's notice of the termination of his contract, with immediate effect ...

... On 25 July 2002 the Applicant requested [the] Chief of the UNOG Human Resources Management Service [(HRMS)], to defer the termination of his contract pending the outcome of the PAS rebuttal, stressing that the assessments contained in the performance appraisal in question were completely inconsistent with the earlier evaluations of his work.

...

... On 2 August 2002 the Applicant sent a memorandum dated 18 July 2002 to the Secretary-General requesting a review of the administrative decision to terminate his contract. He stated his intention of lodging a complaint of harassment and *mobbing* against his supervisors ...

... On 5 August 2002 the Applicant submitted a request for suspension of the said administrative decision to the Secretary of the Joint Appeals Board (JAB) in Geneva. In this request he stated that it should at least have been necessary to await the outcome of his PAS rebuttal before terminating his contract. ...

... On 14 August 2002, ... the Applicant ... [was] informed ... that ... the Secretary-General had agreed to suspend the enforcement of the decision to terminate the Applicant's contract until a decision had been taken under the PAS rebuttal procedure ...

...

... In a memorandum dated 16 August 2002 the Applicant [advised] the Chief of the Administrative Section [that] the provisions of several sections of administrative instruction ST/AI/1999/14 of 17 November 1999 had been infringed ...

...

... On 9 October 2002 the Applicant sent a memorandum to the Chief of the Administrative Section requesting her to communicate to him the information relating to his duties and goals 'following his reinstatement ..., in accordance with the Secretary-General's decision of 14 August 2002'.

... In a memorandum dated 18 October 2002, the Chief of the Administrative Section informed the Applicant that, since the PAS rebuttal procedure had not yet been completed, it would not be appropriate to draw up a workplan for him and entrust him with responsibility, during the transitional period, for the continuing implementation of the project for which he had been recruited.

... On 1 November 2002, the Rebuttal Panel ... transmitted its report ... to the High Commissioner for Human Rights ...

...

... In a memorandum dated 11 December 2002, ... OHCHR ... informed the Applicant that the Rebuttal Panel had concluded that his performance appraisal should be declared invalid and that a new appraisal should therefore be prepared for the period in question. It specified that the Applicant should take an active part in the procedure for producing the new appraisal. ...

...

... On 13 January 2003, on the Applicant's initiative, he and the Chief of the Administrative Section met to discuss the performance appraisal and the Applicant's workplan.

... On 27 January 2003, the Chief of the Administrative Section, referring to the meeting of 13 January 2003 ..., pointed out to the Applicant that it would be desirable for his appraisal to cover the period from 1 April 2002 to 31 March 2003. With regard to his workplan, she stated that she would review it as soon as she returned from leave, for there had been some changes in the project's focus.

... On 28 January 2003, ... OHCHR ... informed the Applicant that his fixed-term contract would not be extended beyond 24 February 2003 ...

...

... On 24 March 2003, the Applicant sent to the Secretary-General a request for administrative review of the decision ... not to extend his contract beyond 24 February 2003 ...

...”

On 27 June 2003, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 12 September 2005. Its considerations, conclusions and recommendation read, in part, as follows:

***“Considerations***

...

*Merits*

43. The Panel stressed at the outset that the subject of the present appeal was the decision of 28 January 2003 not to renew the Applicant’s contract beyond 24 February 2003. It found that, although the later decision was separate from the decision of 18 July 2002, it should be considered in the context of that earlier decision and in particular in the light of the performance appraisal for the period 1 January 2001 to 31 March 2002, which had been revoked following the Applicant’s rebuttal. The Panel expressed surprise in that connection that on the expiry of the Applicant’s first contract on 8 March 2002, his supervisors had decided to award him a new 11-month contract after the mandatory two-week break. That renewal was glaringly inconsistent with the negative appraisal of the Applicant’s work during the period of the preceding contract made four months later by the same supervisors.

...

46. In the present case the Panel found that, in its memorandum of 5 December 2003, the Respondent had stressed that the non-renewal of the Applicant’s contract [was] clearly the result of his unsatisfactory professional performance. The Panel found that the Respondent had thus given *a posteriori* an explicit reason for its decision not to renew the Applicant’s contract.

47. The Panel pointed out that it was not competent to give an opinion on the Applicant’s professional performance but that ... it should consider whether there was sufficient documentary evidence supporting the reason given in justification of the non-renewal of the Applicant’s contract - i.e. his unsatisfactory professional performance.

48. In that connection the Panel recalled that the performance appraisal for the period from 1 January 2001 to 31 March 2002 had been revoked and should therefore be regarded as null and void. Furthermore, the Panel regretted that the PAS Rebuttal Panel had confined itself to declaring that appraisal invalid owing to defects of procedure and had not given its opinion on the final assessment of the Applicant’s work.

49. With regard to the period from 25 March 2002 to 24 February 2003 - i.e. the period covered by the Applicant’s second contract - the Panel found that no evaluation of the Applicant’s work had been made, even though the need to produce a performance appraisal for that period had been pointed out on several occasions ... and the Applicant had indicated his willingness to collaborate ...

50. The Panel found that the file contained no official document clearly evaluating the Applicant's professional performance and that the reason given by the Respondent in justification of the non-renewal of the Applicant's contract was therefore not borne out by the facts.

*Conclusion and recommendations*

51. The Panel **concludes** that by citing grounds not borne out by the facts the Respondent exercised his discretionary authority improperly. The Panel **recommends** therefore that the Secretary-General should award the Applicant one month's net [base] salary in compensation for the harm suffered.

52. The Panel recommends to reject all other pleas."

On 26 January 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

"The Secretary-General regrets that he is unable to agree with the JAB's conclusion that the justification given for the non-renewal of your contract is not borne out by the facts: on the contrary, the broader context in which the JAB reviewed your appeal indicates quite clearly dissatisfaction with your work. While it is true that the PAS rebuttal panel revoked your PAS, it did so for procedural defects, and did not opine on the substance of your performance, a substance with which your supervisors were dissatisfied, and which was the basis for the contested decision. The Secretary-General further notes that the circumstances of your case are quite distinct from those of the *Shasha'a* judgment [No. 1003 (2001)]: in the latter case, there was clear evidence that the Applicant's performance was satisfactory and thus a discrepancy existed between the stated reason and the real reason for the non-renewal of Applicant's appointment. This discrepancy was the basis for awarding the Applicant US\$ 5000 in compensation in that case. No such discrepancy exists in your case. In the light of these considerations, the Secretary-General has decided not to accept the JAB's recommendation and to take no further action on your appeal."

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

Whereas the Applicant's principal contentions are:

1. The non-renewal of his fixed-term contract in February 2003 is the outcome of a series of arbitrary and discriminatory decisions taken in bad faith by the Respondent between July 2002 and January 2003.
2. His rights were violated.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to renewal of his contract.
2. The decision not to renew the Applicant's contract was not tainted by bias, prejudice or other extraneous motives.

The Tribunal, having deliberated from 10 to 26 November 2008, now pronounces the following Judgement:

I. This case concerns a fixed-term contract and the proper characterization of the circumstances leading to the decision not to renew the Applicant's contract. The Applicant's case is that the decision was the outcome of a series of "arbitrary and discriminatory" actions and was made in "bad faith". He claims compensation on that basis. The Applicant also claims that the circumstances created a legal expectancy that his contract would be renewed. These are independent, albeit related, claims and call for separate consideration.

II. The Applicant joined OCHCR in 2001 as an Information Expert in the Research and Right to Development Branch, at the P-4, step 1 level. His initial contract was from 9 April 2001 to 8 March 2002. Subject to a short break, the contract was, in effect, extended for a further term from 25 March 2002 to 24 February 2003. On 28 January 2003, he was informed that his contract would not be renewed and he was subsequently separated from service. There was an earlier attempt to bring his contract to an end on 18 August 2002 with one month's notice given on 18 July. That was not implemented, because the Applicant filed a request for suspension of action, supported by the JAB and accepted by the Secretary-General.

III. There is little question that the Applicant's contract was not extended because his performance did not meet expectations. On 18 July 2002, the Applicant signed his PAS covering the period 1 January 2001 to 31 March 2002 (even though he was hired only on 9 April 2001), but indicated that he would rebut the rating, which he did on 16 August. On 1 November, the Rebuttal Panel recommended in its report, that the Applicant's performance evaluation for the contested period (i.e., 9 April 2001 to 31 March 2002) be invalidated and that a new performance evaluation be prepared for the said period. Consequently, the PAS attached to this performance evaluation was invalidated as well. It was invalidated for numerous failures that had occurred: no work plan had been prepared and no mid-year review had been done, as required by ST/AI/1999/14. The involvement of the reporting officers in monitoring supervision and evaluation of the Applicant's work was considered "uneven and perfunctory". Even worse, the Applicant was deprived of the opportunity to discuss his work plan with his supervisors and did not receive any feedback or guidance which he, particularly as a new recruit, should have had, according to the administrative instructions in place.

IV. The Respondent does not really deny these matters. His position is rather that these were procedural failures and do not support any finding of discrimination against the Applicant. The Respondent correctly points out that the report does not "mention any discrimination, bias, illegitimate motive or other extrinsic factors operating against the Applicant". The Tribunal takes the view that, whilst these irregularities in the performance assessment do raise questions, they do not constitute adequate and sufficient evidence for the discharge of the burden of proof which rests on the Applicant.

V. The Tribunal is troubled by the fact that an extension of contract took place whilst there were question marks over the Applicant's performance and, indeed, that the extension was made at a more favourable step level than the original contract itself. There is, however, an explanation for this. It would seem that, apart from administrative confusion as to the Administration's obligations regarding the Applicant's performance assessment, the accelerated increased step given to the Applicant was not attributable to his performance but, rather, to "pending negotiation of the entry level" by the Applicant. In the circumstances, the Tribunal does not consider this as inconsistent action on the part of the Administration which could have supported the Applicant's allegations of discrimination.

VI. The Tribunal has reiterated that a fixed-term contract is just that and normally it simply ends with the effluxion of time. The starting point is clearly that a staff member has no right to a renewal or extension of a fixed-term contract. To emphasize this principle, the Tribunal reaffirms its holding in Judgement No. 1264 (2005), paragraph III, that a staff member should have no expectation that his contract will be extended, however good or even outstanding his performance might have been:

"[I]n accordance with both the Staff Rules and the jurisprudence of the Tribunal even excellent performance does not give rise to any legal expectancy of renewal. (See [Judgement No. 1237 (2005).]) Indeed, the renewal of a fixed-term contract may be denied even if the staff member in question had the most brilliant PER."

VII. In the Tribunal's view, even a statement by the Supervisor to enter into discussions, with the Applicant on his performance at the eleventh hour, does not, by itself, create any legal expectancy.

This is an appeal where there were doubts about the staff member's performance leading to the non-extension of his contract. But the corollary of the principles elaborated by the Tribunal is that, even if a staff member's performance is found wanting, he is entitled to the protection of the rules and regulations, as reflected in the jurisprudence of the Tribunal. He has to be treated with respect and given the protection and guidance to which he is entitled under the applicable regime. His supervisors and the management cannot cast him aside to the end of his contract or deny him the guidance to which he is entitled. If the basis of the non-renewal is bad performance, management is under an obligation to demonstrate that the performance was properly evaluated and that a staff member received the guidance and care due especially to a new recruit. The facts in this case show otherwise.

VIII. The Tribunal takes the view that the failure to comply with the established procedures has led to an improper exercise of the discretion whether to renew the Applicant's contract or not to do so. The Applicant's due process rights have been violated and therefore he is entitled to compensation on this basis. The Tribunal considers the recommendation made by the JAB in this case to be reasonable.

IX. It is regrettable that the staff member had to battle his way through two committee proceedings to obtain relief: a suspension of action proceeding, pending a finding on the rebuttal of his PAS and,

subsequently, a rebuttal proceeding. The Tribunal considers that, once rebuttal proceedings were filed or given notice of, it should have led to a stay of the action by the management in a case like this, where the question of the Applicant's performance was at issue and so intimately connected with the decision not to renew his contract. It is always best to reduce the number of proceedings, because they are time-consuming for both parties and give rise to a great deal of anxiety for the staff member concerned.

X. For the foregoing reasons the Tribunal:

1. Orders the Secretary-General to pay the Applicant the sum of one month's net base salary at the rate in effect at the time of his separation from service, 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;
2. Rejects all other pleas.

*(Signatures)*



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



Dayendra Sena **Wijewardane**  
Second Vice-President



Brigitte **Stern**  
Member

New York, 26 November 2008



Maritza **Struyvenberg**  
Executive Secretary