



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1417

Case No. 1489

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 31 May 2006;

Whereas, on 30 May 2006, the Applicant filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 July 2006, the Applicant, after making the necessary corrections, filed an Application requesting the Tribunal, inter alia:

“9. ... *[T]o find:*

- (a) that the decision of the Respondent not to extend the Applicant’s fixed-term appointment violated his right to due process;
- (b) that the action of the Respondent in placing the Applicant against a post for which he was not performing the functions unjustly penalized the Applicant;
- (c) that the Respondent made no effort to consider the Applicant in a fair and objective manner for continued employment, in violation of his rights;
- (d) that the remedy recommended by the Joint Appeals Board [(JAB)] is [disproportionate] to the damage suffered by the Applicant;

(e) that the remedy decided by the Secretary-General is [disproportionate] to the damage suffered by the Applicant.

10. ... [And] *to order*:

(a) that the Applicant be immediately reinstated with [the International Criminal Tribunal for the former Yugoslavia (ICTY)] at the level at which he was separated from the Organization and that he be awarded appropriate compensation for the loss of emoluments for the period from 6 July 2004 to the date of judgement, or failing that;

(b) that the Applicant be awarded 18 months' net base pay for the actual, consequential and moral damages suffered to his *career* and professional reputation;

(c) that the management of the ICTY be held to account for their deliberate violation of the Applicant's rights ..."

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 22 January 2007, and once thereafter until 21 February;

Whereas the Respondent filed his Answer on 21 February 2007;

Whereas the Applicant filed Written Observations on 16 March 2007;

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 initially employed as an Investigator, on secondment from the British Government, in the Office of the Prosecutor (OTP), at ... ICTY from 1 May 1995 to June 1998. On 8 July ..., the [Applicant] accepted a [fixed-term appointment] with ... ICTY for one year at the P-3 level ... which was subsequently renewed ... effective 6 July 1999. On 1 October 2000, the [Applicant] was promoted to the P-4 level ... and his functional title was changed to Investigations Team Leader. The [Applicant's fixed-term appointment] was subsequently extended several times until 5 July 2004, when he separated from service.

Summary of the facts

... By e-mail dated 15 September 2003, [the] Chief of Investigations, OTP, ICTY, informed the [Applicant], *inter alia*, as follows:

'As for your personal situation, and as I informed you on Friday, your position as a P-4 will be abolished sometime before the end of June 2004. This is a consequence of the completion strategy and of the fact that the post on which you are sitting, the Head of mission in Skopje, will have to be deleted next year with the closure of the Office in Macedonia.'

... In an address of 23 September 2003, [the] Prosecutor of the ICTY, informed staff that[, in accordance with Security Council resolution 1503,] all investigations were to be completed by the end of 2004 and that about 60 posts would be removed from the Investigations Division in the course of 2004 and 2005. The Prosecutor stressed that ICTY would rely on natural attrition as much as possible and, if necessary, would resort to the non-renewal of contracts.

... On 7 November 2003, the [Applicant] requested suspension of action on the decision notified to him by e-mail dated 15 September 2003 and at the same time he also requested administrative review of the contested decision.

... On 10 March 2004, a JAB Panel submitted its report to the Secretary-General regarding the request of suspension of action [and, on 24 June, the Applicant was informed that Secretary-General had decided not to grant his request.]

...”

On 17 March 2004, the Applicant lodged an appeal on the merits with the JAB in New York. The JAB adopted its report on 28 November 2005. Its considerations, conclusion and recommendation read, in part, as follows:

“Considerations

18. The Panel first considered the preliminary issues of competence and receivability. The Panel found itself competent to consider and recommend on this case. ...

...

20. The Panel first considered the contention made by the Appellant that he was given notice of the non-renewal of his contract before the Completion Strategy was finalized. The Panel noted that this fact has not been contested by the Respondent. The Completion Strategy was agreed upon and approved after the contested decision was taken. From the records of this case, it appears that the Appellant was the only staff member from OTP who was excluded from the Completion Strategy process. The Panel agreed that the Appellant was denied a review process enjoyed by the generality of OTP staff amounted to a denial of his due process rights. The Panel was of the view that ICTY should have reviewed the Appellant’s case within the context of the Completion Strategy as it had done with other staff members of OTP.

21. The Panel turned to consider the contention made by the Appellant that he was adversely affected by the fact that his post was funded from a different P-4 post ‘Head of Mission in Skopje’. In this regard, the Panel noted that the Respondent submitted contradictory statements ...

22. The Panel found that the fact that the Appellant was placed against the P4 position ‘Head of Mission in Skopje’ indeed had consequence on his contractual relationship with the Organization. As such his contractual rights were affected. It was specifically because of the abolition of the said post that the Appellant was given notice of the non-renewal of his contract. ... The Panel was of the view that Appellant was unjustly penalized because he was ‘sitting on’ the P-4 post Head of Mission in Skopje, for ‘budgetary reasons’ which should have been of no consequence as to his contractual status.

23. The Panel further considered the contention made by the Appellant that the Organization did not make a serious attempt to consider him for further employment at ... ICTY. ...

24. ... [T]he Panel found that no evidence was provided by the Respondent to prove beyond doubt that all *bona fide* efforts had been made to consider the Appellant in a fair and objective manner for future employment with ... ICTY. The Panel found troubling that a few months after the separation of the Appellant from OTP, ICTY there was a vacancy announcement issued for a P-4 Investigations Team Leader post. The Appellant applied for that post but he was deprived of his right to be considered in a fair manner among other candidates who benefited firstly from being reviewed within the Completion Strategy and secondly from being considered as internal

candidates. From the records of this case, the Panel could not find any evidence of the steps the Administration took in order to show that 'reasonable consideration' was given to the Appellant for future employment with the ICTY.

Conclusion and recommendation

25. The Panel *unanimously concluded* that the contested decision not to renew the Appellant's contract was tainted by the Respondent's violation of the Appellant's right to due process.

26. Accordingly, the Panel *unanimously recommends* that the Secretary-General urge ICTY to consider the Appellant for any suitable post he has applied for, bearing in mind the long service of the Appellant at the OTP of ICTY and taking into account his expertise, qualities and ability as well as his seniority. *Alternatively*, should the Secretary-General consider the above recommendation not implementable in the interest of the Organization, the Panel *unanimously recommends* that the Appellant be awarded the monetary compensation equivalent to six months' net base salary at the rate in effect for his level on the date of his separation from service ...

..."

On 15 February 2006, 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] unanimous recommendation that ICTY consider you for any suitable post you have applied for that is commensurate with your expertise, ability and seniority".

On 19 July 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The remedy recommended by the JAB, and accepted by the Secretary-General, is not commensurate with the injuries sustained.
2. The Respondent violated his rights by placing him against a post the functions of which he was not performing, and then citing the deletion of that post as a reason for not extending his contract.
3. The Respondent's failure to fairly and objectively consider him for future employment also violated his rights.

Whereas the Respondent's principal contentions are:

1. The Applicant has no legal expectancy of renewal of his fixed-term appointment.
2. The decision not to renew the Applicant's fixed-term appointment was linked to the change of work carried out by ICTY pursuant to Security Council resolution 1503.
3. The Secretary-General's decision was the appropriate remedy and the Applicant is not entitled to monetary compensation.

The Tribunal, having deliberated from 11 to 26 November 2008, now pronounces the following Judgement:

I. This case concerns the Applicant's due process rights in connection with the expiration of his fixed-term contract on 5 July 2004. If it is accepted that his rights were violated, the question is whether he received appropriate and adequate compensation.

II. The Applicant was initially employed as an Investigator, on secondment from the British Government in ICTY, from 1 May 1995 to July 1998. On 8 July, the Applicant accepted a fixed-term appointment with ICTY for one year at the P-3, step III level. This appointment was renewed on 6 July 1999. On 1 October 2000, the Applicant was promoted to the P-4 level and was given the functional title of Investigations Team Leader. In this capacity his contract was extended several times. The last extension was for two years ending on 5 July 2004, when he separated from service.

III. The events leading to the expiration of his contract arose some nine or ten months earlier. At a meeting held on Friday, 12 September 2003, it was decided that Team 11, which the Applicant was then leading, should be merged, administratively, with Team 5. The number of staff members working in Team 11 did not justify the need to have a P-4 Team Leader as their head. The Applicant effectively lost his position as a P-4 Team Leader. In a memorandum written three days later, his supervisor described the situation affecting the Applicant in this way:

“[A]s I informed you on Friday, your position as a P-4 [Team Leader] will be abolished sometime before end of June 2004. This is a consequence of the completion strategy and the fact that the post on which you are sitting, the Head of mission in Skopje will have to be deleted next year with the closure of the office in Macedonia.”

IV. In August 2003, the Security Council had passed resolution 1503 calling, inter alia, on ICTY “to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strateg[y])”. The Completion Strategy for ICTY itself was announced to the ICTY staff in an address by the Prosecutor, on 23 September 2003.

V. The Applicant feels aggrieved by the way his contract was allowed to come to an end and claims that he had been “unjustly penalized” when compared with the way his colleagues were treated. He appealed the non-renewal of his contract. The Respondent maintains that the decision bringing the Applicant's appointment to an end was in line with and mandated by the overall changing nature of ICTY's mandate. The Tribunal observes that, pursuant to the call of the Security Council, some 27 OTP investigation staff were, in fact, separated from service with ICTY in the course of 2004. Nonetheless, the JAB concluded that in coming to the decision affecting the Applicant, his due process rights had been violated for three reasons, which are summarized in the letter dated 15 February 2006 to the Applicant from the Under-Secretary-General for Management, as follows:

“The JAB, having considered your appeal in the light of existing rules and jurisprudence, concluded that the contested decision was undertaken in violation of your due process rights. It based this conclusion on the following consideration: (a) the non-reviewing of your case within the context of the Completion Strategy, as was done with all other staff members: (b) the fact that, for budgetary reasons, you were placed against a post that was to be abolished, thus creating a link between your contractual status and the funding of posts that adversely affected you: (c) the fact that, while you worked for over five years with the ICTY, there was no adequate evidence that all *bona fide* efforts had been made to give you a fair and objective consideration for future employment with the ICTY, as is evidenced by the fact that your application to a post following your separation was not thus considered first, because you did not have the benefit of having been reviewed within the context of the Completion Strategy and, second, because you were not considered an internal candidate. In light of these conclusions, the JAB unanimously recommended that the ICTY be urged to consider you for any suitable post you *have* applied for that is commensurate with your expertise, qualities, ability and seniority or, should the Secretary-General consider that this recommendation is not implementable, that you be awarded the monetary compensation equivalent to six months’ of your net base salary on the date of your separation.

The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances and has decided to accept its unanimous recommendation that ICTY consider you for any suitable post you have applied for that is commensurate with your expertise, ability and seniority. ...” (Emphasis added.)

VI. It is clear that despite having voiced a somewhat different view in June 2004, when responding to the JAB’s interim recommendation for suspension of administrative action, the Secretary-General decided, in 2006, to accept the conclusions and recommendations of the JAB, after it had exhaustively and substantively considered the Applicant’s case. The Tribunal acknowledges that the Secretary-General accepted the JAB’s finding that there had been a violation of the Applicant’s due process rights. However, the Tribunal notes that the Secretary-General agreed to implement only the first part of the remedy proposed by the JAB, i.e., to consider him for any suitable post he had applied for, that is, commensurate with his “expertise, qualities, ability and seniority”.

VII. In the Tribunal’s view, however, the recommendation was not “implementable” in good faith, because the Applicant could not have been considered for the one post he did apply for - the one that was advertised on 30 May 2005 - as by then he was no longer an “internal candidate”. It was, in fact, a hollow victory for the Applicant, and he got no real remedy. For this, the Tribunal awards the Applicant the six months’ net base salary proposed by the JAB.

VIII. In view of the foregoing, the Tribunal:

1. Orders the Administration to pay the Applicant six months’ net base salary at the rate in effect on the date of the Applicant’s 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; and,

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