



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1423

Case No. 1500

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Ms. Brigitte Stern; Sir Bob Hepple;

Whereas, on 18 September 2006, a former staff member of the United Nations, filed an Application requesting the Tribunal, inter alia:

“7. ...

...

(c) *to decide* to hold oral proceedings ...

8. On the merits ...:

...

(c) *to order* the Applicant's reinstatement in service in an appropriate post;

(d) *to award* appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's failure to provide her with a proper working environment, failure to handle her claims of harassment and sexual harassment in a proper manner, and for the personal and professional consequences to the Applicant for the Respondent's actions or lack thereof;

(e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *to award the Applicant as cost, the sum of [US\$ 7,500.00] in legal fees and [US\$ 500.00] in expenses and disbursements.”*

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 9 March 2007, and twice thereafter until 30 April;

Whereas the Respondent filed his Answer on 27 April 2007;

Whereas the Applicant filed Written Observations on 25 September 2007;

Whereas, on 7 November 2008, the Tribunal decided not to hold oral proceedings in the case;

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] United Nations Iraq-Kuwait Observation Mission (UNIKOM) in July 2001 as Secretary, at the G-4 level. The [Applicant] resigned ... at the end of August 2001. ...

Summary of the facts

Non-Renewal of Contract

... On 1 September 2001, the [Applicant] accepted a three-month [fixed-term appointment] as [a] Programme Clerk, G-2 level, UNDP Kuwait ...

...

... The [Applicant]’s appointment with UNDP Kuwait was successively extended from 1 September 2001 through 31 August 2002.

... In December 2001, the [Applicant] was informally advised that due to a re-profiling exercise, her [fixed-term appointment] with UNDP Kuwait would not be reclassified.

... Due to another re-profiling exercise at UNDP Kuwait, the [Applicant] was separated from [service] effective 31 August 2002. Subsequently, at a job fair, the [Applicant] applied for two posts at the G-6 and G-7 level but was unsuccessful. ...

... On 15 July 2002, [a new RR/RC of UNDP Kuwait was appointed].

... On 1 September 2002 the [Applicant] entered into a three-month [SSA] ... to expire on 30 November 2002. Under the SSA, the [Applicant] provided secretarial support to the RR/RC ...

... On 21 October 2002, the [Applicant] requested special leave without pay from 1 to 14 November 2002. On 21 October ..., [the RR/RC] approved [the Applicant]’s request for special leave. The [Applicant] alleges that she was informed by the Administration/Personnel Assistant UNDP Kuwait, ... that [the RR/RC] did not want her to return to the office ... The [Applicant] did not return to UNDP Kuwait after the expiration of her special leave on 14 November ...

... On 30 November 2002, the [Applicant]’s SSA contract expired and was not renewed.

... **Complaint of Sexual Harassment**

... In July 2003, the [Applicant] and another complainant filed a sexual harassment complaint against the ... RR/RC ... On 15 September ... the [Applicant] was informed ... that [her] sexual harassment complaint was referred to the UNDP/United Nations Population Fund/United Nations Office for Project Services Grievance Panel on Sexual Harassment [(Grievance Panel)] to initiate the investigation into her claims. In November 2003, [the RR/RC] submitted a detailed response to the two allegations of sexual harassment.

... [Following extensive interviews, on] 8 April 2004, the Grievance Panel submitted its report, which found verbal abuse, unnecessary touching, 'pressure for sexual activities made by the perception that [the RR/RC] was threatening their re-employment and physical assault'. The Panel concluded by stating that '[a]ll these elements of the Sexual Harassment Policy are present in this case in so far as there was a perception that there was *quid pro quo* and the staff member created a hostile environment of a sexual nature' ...

... In a letter dated 14 April 2004, [the] Coordinator [of the] ... Grievance Panel ... sent [an] advance copy of the report ... [to the Director of the Office of Human Resources (OHR) and advised him] that ... he was 'requested to take appropriate action' ... On 18 April 2004 [the RR/RC] resigned. ...

... On a number of occasions since April 2004, both via telephone and e-mail, the [Applicant] sought to obtain information regarding the Grievance Panel's report. ... The [Applicant] received the Grievance Panel's cover letter and report on 17 July 2004.

... By e-mail correspondence dated 26 July 2004, the [Applicant] requested ... clarification from [the Director, OHR,] regarding the Administration's decision to discontinue any action against [the RR/RC] due to the fact that he had resigned and that the Grievance Panel only found that there was a perception of *quid pro quo*.

... By e-mail correspondence dated 27 July 2004, [the Director, OHR,] acknowledged that the Grievance Panel's report 'vindicated your allegations and directly contributed to the [RR/RC] resigning'. Additionally, [he] affirmed that he could have refused [the RR/RC]'s resignation but custom and legal sources 'strongly suggested that it is better to get the person out of the office and the system asap. Also, pursuing summary dismissal or other actions take some time and can be contested/appealed. This may have involved staff in more litigation and taken them through further processes which would not have been the best for staff'. [The Director, OHR,] ... informed the [Applicant] that once a staff member resigns, no further action may be taken.

... On 31 August 2004, the [Applicant] requested compensation for the sexual harassment she experienced while working with [the RR/RC], unfair dismissal and other claims.

... On 15 September 2004, [UNDP], informed the [Applicant] that her claims of sexual harassment against [the RR/RC] were taken seriously and handled pursuant to the UNDP policy on sexual harassment and thus her claims for compensation were denied. [The Applicant was further] informed ... that the conduct she complained of was a 'perception of *quid pro quo*' because [her fixed-term appointment] was cancelled after a re-profiling exercise and in advance of [the RR/RC]'s assumption of post as the new RR/RC, and that [her] SSA simply expired. Lastly, [she was advised that the RR/RC]'s resignation precluded the Administration from pursuing the matter any further. This is the contested decision."

On 31 May 2005, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 10 April 2006. Its considerations, conclusion and recommendation read, in part, as follows:

“Considerations

...

Non-Renewal of Contract

...

37. The Panel noted that due to a re-profiling exercise and the Appellant’s lack of success during the internal job fair, the Appellant was informed that her [fixed-term appointment] would not be renewed and that she would be separated effective 31 August 2002. The Panel further noted that the Appellant was informed of this Administrative decision in advance of [the RR/RC] assuming his post on 15 July 2002. The Panel concluded that the Appellant’s FTA was slated for expiration before the Appellant began working with [the RR/RC] and therefore, there was no expectancy of renewal.

38. With regard to the Appellant’s SSA, the Panel considered that the Appellant was only offered this Agreement because the recently hired executive secretary of [the RR/RC] was learning Arabic at the time and could not adequately assist him. Additionally, the Appellant was informed regarding the end-date of her SSA, 30 November 2002, and the circumstances surrounding its duration.

39. In the context of the foregoing, the Panel concluded that the Appellant had no legal expectancy to renewal and that her rights were not violated by the non-renewal of the [fixed-term appointment] or the SSA.

Complaint of Sexual Harassment

...

42. The Panel examined the Grievance Panel’s report and noted that its findings were based on several testimonies, additional charges of sexual harassment and two other cases known to other staff members that corroborate the allegations of sexual harassment against [the RR/RC]. In the Appellant’s case, the Grievance Panel found ‘verbal abuse...unnecessary touching (e.g. patting, leering at a person’s body; constant brush[ing] against a person’s body); pressure for sexual activities made by the perception that he was threatening their re-employment; and physical assault’. The Grievance Panel stated that ‘[a]ll these elements of the Sexual Harassment Policy are present in this case in so far as there was a perception that there was *qui[d] pro quo* and [that the RR/RC] created a hostile environment of a sexual nature’. Consequently, the Grievance Panel stated there was a ‘solid basis for immediate action’.

43. ... The Panel was mindful that, on 18 May 2004, [the RR/RC] tendered his resignation. The Panel expressed its concern that given the Grievance Panel’s report citing the two sexual harassment complaints and other similar charges against [the RR/RC] the UNDP Administration accepted [the RR/RC]’s resignation. The Panel examined [the Director, OHR,]’s email dated 26 July 2004 addressed to the Appellant where he stated that the Grievance Panel’s report ‘vindicated your allegations and directly contributed to the [RR/RC] ... resigning.’

...

45. The Panel found that UNDP’s acceptance of [the RR/RC]’s resignation in light of the sexual harassment complaints and other charges against him left the Appellant without any legal recourse and precluded any further action on the Appellant’s complaint against [the RR/RC]. Therefore, the Panel further found that UNDP’s acceptance of [the RR/RC]’s resignation thwarted the Appellant’s due process rights to have her sexual harassment complaint fully processed and

thwarted her rights to any damages she might have gained had UNDP refused [the RR/RC]'s resignation.

46. ... The Panel expressed its concern that the Appellant only received the Grievance Panel's report on 17 July 2004, after repeated requests and three months after the Grievance Panel first issued its report. The Panel found no justification for this delay and concluded that it constituted a violation of the Appellant's rights.

Conclusion and Recommendation

47. In light of the foregoing, the Panel *unanimously concluded*:

- (a) that the Respondent created no expectancy of renewal of the Appellant's [fixed-term appointment] or SSA;
- (b) the Respondent thwarted the Appellant's due process rights by accepting [the RR/RC]'s resignation ... thereby leaving the Appellant without any legal recourse; and,
- (c) the Respondent's three-month delay in forwarding the Grievance Panel's report to the Appellant for no satisfactory reason also violated her due process rights.

It therefore *unanimously decided* to recommend that she be compensated in the amount of [US\$ 10,000] for failure to observe her due process rights by accepting [the RR/RC]'s resignation and the unacceptable delay of three months in forwarding the Grievance Panel's report. The Panel makes no other recommendation in the present case."

On 22 June 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that:

"The Secretary-General ... agrees with the JAB's conclusion that you had no legal expectancy to a renewal of your [fixed-term appointment] or your SSA. As for the JAB's conclusion regarding the timing of your receipt of the Grievance Panel's report, the Secretary-General has been informed that it was necessary to prepare two different versions of the report since it addressed issues raised by two different complainants and it was essential to ensure confidentiality for both of them. Thus, the three-month period for releasing the report was purely administrative, related exclusively to the required internal process of revision of the report, and was not excessive. Moreover, the applicable procedures do not stipulate a time limit for submission of reports and the three-month period did not adversely affect the outcome of the case. Regarding UNDP's acceptance of the RR/RC's resignation, the Secretary-General notes that the validity of a resignation is not conditional upon acceptance by the Administration (...). However, the notice period need not be waived by the Administration, so that disciplinary proceedings can at least be initiated. In light of the entire record of this case, the Secretary-General has decided to accept the JAB's recommendation, albeit for different reasons, and to compensate you in the amount of US\$ 10,000.00.

..."

On 18 September 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred as a matter of law and equity in failing to provide appropriate and adequate compensation for the harm done to her for denial of due process and violation of her rights under the Staff Regulations and Rules.

2. The JAB erred in finding that her legitimate expectation of continued employment was not adversely affected by the hostile working environment created by her supervisor.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal is limited to the administrative decisions detailed in her letter to the UNDP Administrator.

2. The Applicant was employed pursuant to a fixed-term appointment, which carried neither the right nor the legal expectancy of continued employment with the Organization: the decision not to renew the Applicant's appointment did not violate her rights.

3. The Applicant's complaint was handled appropriately.

4. The award to the Applicant of US\$ 10,000.00 constitutes appropriate compensation.

The Tribunal, having deliberated from 7 to 26 November 2008, now pronounces the following Judgement:

I. The Applicant joined UNDP on 1 September 2001, on a fixed-term appointment as a Programme Clerk at the G-2 level, in Kuwait. Her appointment was successively extended for a period of one year. As a result of a re-profiling exercise and her lack of success during an internal job fair, the Applicant was separated from service effective 31 August 2002. On 1 September, the Applicant entered into an SSA with UNDP, Kuwait, to provide secretarial support to the RR/RC. The Applicant was granted special leave without pay from 1 to 14 November, and, on 30 November, at the expiration of her SSA, she separated from service.

II. In July 2003, the Applicant, together with several other staff and ex-staff members, filed a sexual harassment complaint against the RR/RC. The Grievance Panel responsible for investigating the complaint submitted a report on 8 April 2004, which cited numerous examples of inappropriate behaviour by the RR/RC and which concluded that he had created "a hostile environment of a sexual nature" and that there was a "perception" of "*quid pro quo*". On 18 April 2004, after the competent authorities had been invited to take appropriate action, the RR/RC resigned.

III. On 17 July 2004, having received the report of the Panel, the Applicant requested an explanation from the Director, OHR, regarding the fact that the immediate resignation of the RR/RC had been accepted and that no disciplinary action had been taken against him. The Director, OHR, replied that he could have refused the RR/RC's resignation but that it is better to get the person out of the office and avoid litigation.

IV. On 31 August 2004, the Applicant requested compensation for the damage caused by the sexual harassment to which she had been subjected. That request was denied on the grounds that her separation from service with the Organization was unrelated to the environment of sexual harassment in which she had been working: her contract had simply expired on the due expiry date. On 31 May 2005, the Applicant requested this decision to be reviewed before the JAB. The JAB found that the Applicant had no expectancy of renewal of her contract, however, concluded that the Applicant's rights to due process had been violated in view of the Administration's acceptance of the RR/RC's resignation, which prevented any disciplinary proceedings against him, and in view of the fact that the Grievance Panel's report had been transmitted to her only three months after its submission. The JAB recommended that compensation in the amount of US\$ 10,000 should be awarded to the Applicant. The Secretary-General agreed to award compensation in the amount of US\$ 10,000.

V. Before the Tribunal, the Applicant contests the recommendations of the JAB on two points: on the one hand, she contends that the JAB erroneously found that her legitimate expectations were not thwarted owing to the hostile environment created by the RR/RC, who was found guilty of sexual harassment; on the other hand, she considers that the compensation awarded to her is insufficient in view of the harm caused and she requests greater compensation to repair the moral damage suffered as a result of the harassment to which she was subjected and which, in her opinion, the Administration has not properly redressed. The Applicant requests the Tribunal to reinstate her in her post, to award her appropriate compensation equivalent to three years' net base salary and to reimburse her for the costs of the proceedings.

VI. In support of her claims, the Applicant argues that the RR/RC had promised her a permanent post following her SSA. It was for that reason, despite the untenable environment in which she was working, that the Applicant chose to remain in the post and even refused another offer of employment from a different international organization. The Applicant also claims that she did not return to work after her special leave without pay because she had been informed by e-mail and telephone that the RR/RC did not wish her to return. In short, the Applicant claims that the RR/RC went back on his promise to provide her with a permanent post.

VII. The Respondent contends that there is no requirement for the Tribunal to take action on the request to reinstate the Applicant in her post, since this request was not formulated at the initial stage of the proceedings. He also emphasizes that there is no evidence that the Applicant had an expectancy to see her contract renewed after the expiry of her last SSA. Furthermore, the Respondent maintains that there is no link between the normal expiry of the Applicant's contract and the hostile environment created by the RR/RC. The Respondent also disputes the fact that the Applicant's rights to due process were violated and

considers the compensation she has received to be entirely appropriate. Lastly, the Respondent claims that the Applicant's request to be reimbursed for the costs of the proceedings is without merit.

VIII. The Tribunal shall consider each of the different points raised by the parties in turn.

IX. First of all, concerning the request related to the reinstatement of the Applicant in her post, the Tribunal is compelled to note that this request was not initially submitted to JAB. Thus, this issue does not fall within the jurisdiction *ratione materiae* of the Tribunal (see, in this connection, Judgement No. 1196, *Maia-Sampaio* (2004)).

X. Regarding the issue of possible legitimate expectations on the part of the Applicant, the Tribunal once again finds itself faced with a situation where the Applicant claims to have a legal expectancy that her contract would be renewed, while the Administration maintains the opposite. When dealing with such situations, the Tribunal has always been very cautious in the determination of possible legitimate expectations or prospects for the renewal of a contract or for an appointment to a permanent post. In this case, the Tribunal fully concurs with the JAB's conclusions that the Applicant had no expectation to see her contract renewed.

XI. Admittedly, the Tribunal has recognized that in certain "countervailing circumstances" (see Judgements No. 885, *Handelsman* (1998) and No. 1170, *Lejeune* (2004)), such expectations could be strengthened and give rise to certain rights (see Judgement No. 1052, *Bonder* (2002)). However, it has done so only in exceptional circumstances. There must be a combination of specific and clear factors which leave no doubt as to the nature and content of the expectations that an applicant could rely upon to plan his or her career in the future.

XII. In this case, the Respondent correctly observed that nothing in the history of the Applicant's career gave any reason to believe that she had any expectation to have her contract renewed. She joined the United Nations on the basis of a fixed-term contract. In that respect, article 104.12 (b) of the Staff Rules states that "the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". Moreover, one of the provisions in the letter of appointment that she expressly agreed to, referred to this condition very clearly.

XIII. The Applicant claims to have received the RR/RC's assurance that she would obtain a permanent post. However, the Tribunal concurs with the JAB that she has not provided any evidence of this promise. The Tribunal has previously held that a promise from the Administration to renew a staff member's appointment could constitute "countervailing circumstances" which provided certain rights. However, the

Tribunal has always required that this be a clear promise (*Handelsman (ibid.)* and *Lejeune (ibid.)*). In this case, the promise in question is far too tenuous and uncertain to be taken into consideration by the Tribunal.

XIV. The Applicant again cites Judgement No. 480, *Lopez (1990)* to argue that she had a legal expectancy to have her contract renewed, since the duties she performed continued after the expiration of her contract. In paragraph II of that Judgement, the Tribunal affirmed that

“a staff member who, on the expiration of his or her contract of employment, continues to perform the same functions but is denied the status of a staff member and is given special service agreements instead, has the right to have the original status continued for the duration of those agreements”.

However, the Tribunal must note that the continuation of duties beyond the duration of a staff member's fixed-term appointment does not, in itself, give rise to a legal expectancy of renewal of contract. In any event, in the instant case, it cannot be considered that the duties performed by the Applicant continued after the expiration of her contract on 31 August 2002. The Applicant joined UNDP as an interpreter/translator. The post that she then occupied under the special service agreement was that of executive assistant, who in no way carries out the same functions as an interpreter. Furthermore, and decisively, the Tribunal must underline that the functions performed by the Applicant during the time of her SSA were, *by nature*, temporary. The Applicant obtained this post because of a combination of circumstances: her last contract had just expired and the incumbent of the post to be filled was still not ready to work since he had to take language classes. It was understood that once the incumbent had mastered Arabic, he could immediately assume his functions. The Tribunal, therefore, does not see any evidence from the Applicant's career to indicate that she had any prospect to remain in the service of the Organization.

XV. As far as this finding is concerned, the Tribunal must conclude that there is no link between the Applicant's departure and the hostile environment created by the inappropriate behaviour of the RR/RC. The Applicant's departure was merely due to the expiration of her very last contract - an SSA - which did not give rise to any particular right upon its expiration.

XVI. On the question of whether the Applicant received appropriate compensation for the violation of her rights to due process, the Tribunal will first consider the impact of the acceptance of the RR/RC's resignation on the Applicant's rights. It will then consider whether or not the Grievance Panel's report was transmitted to her within a reasonable time period.

XVII. First of all, regarding the acceptance of the RR/RC's resignation, which prevented any disciplinary action from being taken within the Administration, the Tribunal recognizes that the Applicant may have felt aggrieved by such an outcome to the situation, which leaves a sense of impunity. However, it is not the purpose of disciplinary proceedings initiated within the Administration to satisfy persons who feel

aggrieved by the inappropriate behaviour of a member of staff. From this point of view, the Respondent is right to recall that disciplinary proceedings are actions which take place only between the person whose behaviour has been inappropriate and the Administration. The Tribunal does not concur with the Panel's reasoning that the Applicant should be compensated for the violation of her rights to due process owing to the absence of a prosecution against the RR/RC.

XVIII. However, it should be recalled that the Applicant sustained a more general violation of her rights, as the Grievance Panel found numerous examples of inappropriate behaviour on the part of the RR/RC, and concluded that he had created "a hostile environment of a sexual nature" and that there was a "perception" of "*quid pro quo*".

XIX. The Tribunal would now like to consider the issue of the period that elapsed between the time the Grievance Panel issued its report and the time that report was forwarded to the Applicant. The Applicant received the Grievance Panel's report three months following its submission, after making repeated requests to obtain a copy. The Tribunal notes that the JAB found that the three-month period that elapsed between the time the Grievance Panel issued its report (upon its signature on 8 April 2004) and the time that report was transmitted to the Applicant (who received it on 17 July) was abnormally long. For his part, the Secretary-General believed that the transmission of the file took a certain amount of time owing to the fact that the sexual harassment complaint had been initiated by two different people. It had therefore been necessary to prepare two different versions of the report to ensure the confidentiality of certain information. In the opinion of the Secretary-General, the three-month period was attributable solely to administrative reasons and should not be seen as excessively long. The Tribunal sees no reason to contest the findings of the Secretary-General on this point.

XX. Since the Tribunal has found that there was a violation of her rights, it must now determine whether the US\$ 10,000 in compensation awarded to her is appropriate. The amount of compensation can vary depending on the circumstances of the case. In this instance, the Tribunal considers the US\$ 10,000 in compensation awarded to the Applicant to be adequate in view of the harm caused to her.

XXI. Lastly, the Tribunal will consider the Applicant's request to be reimbursed for the costs of the proceedings. The Applicant claims US\$ 8,000. She justifies her request by invoking the exceptional circumstances of the case, which made it very difficult to bring her suit before the Tribunal.

XXII. It is well-established in the Tribunal's case law that it responds favourably to this type of request only in extremely rare and exceptional cases, when the facts of the case have made the proceedings before the Tribunal far more difficult (see Judgements No. 237, *Powell* (1979), and No. 1041, *Conde Estua* (2001)), or when the Applicant has been urged by the Administration to file an application before the


Tribunal (Judgement No. 665, *Gonzalez de German* (1994)). In this case, the Tribunal does not see any exceptional circumstances that would require it to order that costs be awarded. This request must therefore be rejected.

XXIII. For the foregoing reasons, the Application is rejected in its entirety.

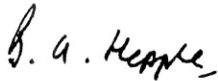
(Signatures)



Dayendra Sena **Wijewardane**
Vice-President



Brigitte **Stern**
Member



Bob **Hepple**
Member

New York, 26 November 2008



Maritza **Struyvenberg**
Executive Secretary