



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1429

Case No. 1497

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane, Vice-President; Mr. Goh Joon Seng;

Whereas, on 26 April 2006, a former staff member of the United Nations Development Programme/World Food Programme (UNDP/WFP), filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 September 2006, the Applicant, after making the necessary corrections, filed an Application requesting the Tribunal to order:

- “- The rescission of the contested decision [not to renew the Applicant’s contract];
- The nullification of the 2000 and 2001 [performance] evaluations;
- The withdrawal of all the documents in the Applicant’s files that contain false accusations;
- The reinstatement of the Applicant and assignment to a post that matches her qualifications;
- The reimbursement of the Applicant for her legal expenses (US\$ 3,000);
- The payment of the Applicant’s salary from January 2002 to February 2003; [and,]
- The payment of damages in the amount of US\$ 50,000.”

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 February 2007, and twice thereafter until 14 April;

Whereas the Respondent filed his Answer on 16 April 2007;

Whereas the Applicant filed Written Observations on 27 November 2007;

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***

... According to [the Applicant's] submission, she was recruited by [WFP] on 8 November 1999 on a short-term contract as a programme assistant to work in Tindouf, Algeria. [The Applicant] was appointed under a UNDP letter of appointment on a fixed-term contract in October 2000. Her contract ended 7 January 2002.

***Summary of the facts***

... In June 2001, [the Applicant] received a performance evaluation covering the period 1 February 2000 to 1 January 2001. Her supervisor wrote the following comments:

[staff member] performed her assigned tasks satisfactorily. She is encouraged to practice her English as it is the first [United Nations'] language and try to improve it by conversations and writing all internal WFP sub-office documents. Attention should be given to all the points of 4 rating, improvement is required in these areas and to be reflected in the coming performance. Interpersonal skills should be improved to avoid frictions with colleagues and implementing partners.'

[The Applicant's] comments stated:

'My present supervisor has been in Algeria since the end of October 2000, is rarely present in Tindouf, as well, his judgement concerning my performance could be premature. At no time has my supervisor described the tasks that I needed to accomplish, my post description was never reviewed. In addition, I deplore the arbitrary manner in which I have been evaluated.'

... On 18 June 2001, [the Applicant] signed her performance evaluation.

... A Career Review Group (CRG) examined [the Applicant's] evaluation and finalized its recommendation on 27 June 2001. The CRG checked the box stating '[t]he staff member must show significant improvement in the areas indicated in the Performance Evaluation by the end of the next evaluation period'.

... On 15 July 2001, [the Applicant] submitted a request for rebuttal proceedings ... to the Resident Representative.

... By a memorandum dated 8 September 2001, the Acting Resident Representative informed [the Applicant] that a Rebuttal Panel ... had been constituted to review her rebuttal. ...

... By an email dated 26 November 2001, [the Applicant's] supervisor informed [her] of certain contentions regarding her performance ...

... By a memorandum dated 27 November 2001, [the Applicant] responded to her supervisor's email.

... On 29 November 2001, [the Applicant's] first reporting officer completed her evaluation - the Management and Appraisal of Performance (MAP) for the period 1 January ... through 31 December 2001. [The Applicant] received a global rating of '5' or 'Unsatisfactory'.

...

... On 4 December 2001, [the Applicant] was informed that her fixed-term contract would not be renewed.

... On 13 December 2001, [the Applicant] submitted a request for an investigation to the WFP Inspector-General. In an email message dated 10 January 2002, the Office of the Inspector General informed [the Applicant] that all documents submitted and the notes of the [CRG] for her 2000 and 2001 performance evaluations had been evaluated. The Office considered there was no need for further action in respect of her claim.

... On 12 March 2002, a Rebuttal Panel (...) was constituted to consider [the Applicant's] rebuttal of her 2001 MAP. The [Rebuttal Panel] found that, despite the introduction of 'three new elements', none of these required a change in the MAP.

... According to [the] Respondent's submission, on 27 June 2002, [the Applicant] appealed the decision not to renew her contract in an email addressed to the WFP Executive Director. By a letter dated 2 July ..., [the] Director, Office of Human Resources, ... responded to [the Applicant's] letter of 27 June ..., informing her that, based on the substance of her claims and on the grounds of receivability, she could not act on her request. She stated:

'I consulted with the Office of the Inspector-General recording your complaint and reviewed their dossier. Based on the documents at my disposal, the reason that your contract was not renewed was due to the quality of your performance, judged insufficient by your superiors, and not due to any harassment to which you contend you fell victim. This is also the conclusion of the Office of the Inspector-General ...'

... According to [the] Respondent's submission, on 18 August 2002, [the Applicant] filed an application with the International Labour Organization Administrative Tribunal, and was advised to address her application to the United Nations Administrative Tribunal (UNAT).

... On 6 October 2002, [the Applicant] submitted an application to UNAT.

... By a letter dated 15 January 2003, [the Executive] Secretary, UNAT, informed [the Applicant] that her submission did not satisfy the conditions of article 7 of the UNAT Statute. She advised [the Applicant] that her application was premature, as [the Applicant] had neither requested administrative review, nor submitted her case to the JAB.

... By a letter dated 19 May 2003, [UNDP] informed [the Applicant] that

'Eligibility to file an appeal: It is clear that your matter is not one for the [JAB]. This is because in order to be heard by the JAB you must first seek a review of the administrative decision in question (see staff rule 111.2 (a) (ii)), and in your request to file an Appeal you clearly state that you have not done so ... Administrative review: You correctly rebutted the performance evaluation before the Rebuttal Panel but when the decision of the Panel was not in your favour you sought to appeal. Please note there is no further avenue of appeal for performance evaluations. If you were to decide to seek a review of the decision not to renew your appointment you would be too late as the same staff rule ... provides that the review of an administrative decision must be requested

within two months from the date the staff member received notification of the decision in writing. In your case, that would be 2 July 2002. Unfortunately you made your request on 2 March 2003, eight (8) months after the decision was communicated to you.'

... On 26 November 2003, [the Applicant] filed another application with UNAT.

... By a letter dated 9 February 2004 ... [the Executive Secretary, UNAT,] transmitted a copy of [this] application [to UNDP] ...

... By a letter dated 4 March 2004, [UNDP] informed [the Applicant:] ... 'You have the right to appeal the letter of 19 May 2003 before the JAB, assuming you submit your statement within thirty days of your receipt of that letter, in conformity with the Staff Rules. Considering that you have amply exceeded the requisite time limits, I am afraid your submission, if submitted now, would not be considered receivable by the JAB.'

...”

On 15 February 2005, the Applicant lodged an appeal with the JAB in New York. On 24 February 2005, the JAB met to consider receivability of the appeal and determined that the Applicant had demonstrated exceptional circumstance beyond her control and that her consistent efforts to appeal her case “demonstrated an active intent to contest the decision not to renew her contract”. Accordingly, the JAB declared the appeal receivable.

The JAB adopted its report on the merits of the Applicant’s case on 6 January 2006. Its considerations, conclusion and recommendation read, in part, as follows:

***“Considerations***

...

31. The Panel notes that [the] Appellant received two overall negative performance evaluations. While the respective reports of the CRG and the [Rebuttal Panel] show those bodies upheld the poor performance rating, those documents reflected this with little or no specific detail.

...

32. With regard to [the] Appellant’s 2001 MAP, the evaluation describes but does not substantiate performance problems. The First Reporting Officer refers to ‘critical incidents’ transpiring during the review period, and poor conduct vis-à-vis ‘the refugees, implementing partners and her direct supervisor’. However many of these ‘critical incidents’ might have occurred, only two were described in the documentation. ... In both these cases, the Panel saw documentation whereby [the] Appellant was held blameless.

33. Other than these dispelled allegations, at no time in the interim four months between the July 2001 CRG on her [performance evaluation] for 2000 and the November MAP for 2001 was any other ‘critical incident’ reported. With regard to the allegations of poor conduct, the First Reporting Officer states in the MAP that [the] Appellant had been notified and queried for clarification. Although the Second Reporting Officer stated that he himself had witnessed [the] Appellant’s ‘callous and disrespectful behaviour’ towards the refugees, no contemporaneous document exists in the record to show [the] Appellant was approached on the subject. The First Reporting Officer alleges that [she] was ‘barred from attending the distribution, and carrying on the monitoring activities due to frictions and constant antagonism with implementing partners’. There is no record substantiating this, apparently at least in part because the ‘CO’ (ostensibly an

implementing partner) declined to put the complaint in writing in order not to intervene in WFP internal staff management. Also, there is no record that [the] Respondent attempted to verify [the] Appellant's fault, to ascertain the nature of these conflicts, or to give [her] an opportunity to respond to the complaints thereof.

34. The Second Reporting Officer's statement regarding [the] Appellant's behaviour notwithstanding, the lack of supporting proof in this case obfuscates the basis of the decision all the more in the absence of any evidence that the other phases of the appraisal management process were observed. ...

35. [The] Appellant did receive a rebuttal process. However, here as well, the report of the [Rebuttal Panel] recommending [the] Respondent to uphold the ... ratings was short on much detail. ... The absence of these benchmarks throughout the performance management process leads the Panel to find that, to the degree [the] Appellant's performance was lacking, WFP failed to document it with much transparency.

36. In addition, the Panel also notes an apparent urgency in moving the process towards non-renewal of her contract. ...

37. In line with this urgency, the Panel notes that [the] Appellant's contract was allowed to expire several months before the [Rebuttal Panel] had met to consider her rebuttal. ...

...

39. The Panel cannot conclude that, had proper procedures been followed and [the] Appellant's [performance evaluation] been conducted in a timely manner, [her] contract would have been extended. Nevertheless, the Panel finds that the appeal merits a recommendation for damages for [the] Respondent's failure to respect her entitlement to due and fair process.

#### ***Conclusions and recommendation***

40. In light of the foregoing, the Panel *unanimously concluded* that the decision not to renew [the] Appellant's contract was tainted by [the] Respondent's violation of [her] right to due process. It therefore *unanimously decided* to recommend that she be compensated in the amount of four months' net salary at the time of separation."

On 15 May 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General had decided to accept the JAB's recommendation that she be compensated four months' net base salary.

On 6 September 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Her former supervisors abused their authority.
2. Unfounded accusations against her tainted her evaluations.
3. The administrative procedures undertaken by the Respondent were vitiated.

Whereas the Respondent's principal contentions are:

1. The Applicant was not entitled to the renewal of her fixed-term contract.
2. The Applicant has been adequately compensated by the JAB.

3. The Applicant's pleas for costs and legal expenses have no merit.

The Tribunal, having deliberated from 31 October to 26 November 2008, now pronounces the following Judgement:

I. The Applicant was initially recruited by WFP on 8 November 1999, on a special service agreement to work in Tindouf, Algeria. In October 2000, she was granted a fixed-term contract as a Programme Assistant at the G-6 level, under a UNDP letter of appointment. This contract was subsequently extended once. The Applicant separated from service on 7 January 2002, at the expiration of her final fixed-term contract.

In June 2001, the Applicant's performance for the period 1 February 2000 - 1 January 2001 was evaluated. She was encouraged to improve her performance in a number of areas. The Applicant protested this assessment, indicating that her supervisor was rarely present and had not informed her of her functions. In its recommendation of 27 June 2001, the CRG indicated "[t]he staff member must show improvement in the areas indicated ... by the end of the next assessment period". The Applicant unsuccessfully attempted to rebut this evaluation.

In November 2001, the Applicant's performance appraisal for the year 2001 was completed. Her performance was rated at "5", the lowest level possible. In particular, her interpersonal skills were heavily criticized, and it was noted that she had "fostered difficult working relation[s] between the three ... entities working for the refugees". Similarly, the CRG recorded "critical incidents" wherein the Applicant's performance had caused serious problems for WFP as well as complaints about her which had been received from WFP partners as well as dignitaries. Again, the Applicant unsuccessfully attempted to rebut this evaluation.

On 4 December 2001, the Applicant was informed that her fixed-term contract would not be renewed. She requested an investigation into alleged psychological harassment and abuse of authority on the part of her supervisors. On 10 January 2002, however, the Office of the Inspector-General informed her that, upon evaluation of the documents she had submitted, there was no need for further action in her case.

After some confusion regarding the appeals process, the Applicant attempted to file an application with the Tribunal in October 2002, but was advised that her case was premature. Thereafter, on 16 January 2003, she lodged an appeal with the JAB in New York. By letter dated 19 May 2003, she was advised by UNDP that her case could not be considered by the JAB, as she had not requested administrative review of the decision not to renew her contract and the time limits for so doing had by then expired. UNDP later advised her that the 19 May 2003 letter constituted the Administration's formal response that her request was time-barred and, as such, was a decision appealable to the JAB. Accordingly, on 15 February 2005, the Applicant again lodged an appeal with the JAB. In view of protests from the Respondent, the JAB met to address the receivability of the appeal and, on 24 February 2005, the JAB found that the Applicant's

hospitalization and medical treatment from December 2001 onwards constituted exceptional circumstances beyond her control. In addition, the JAB took note of the fact that, while initially misdirected, the Applicant had made repeated efforts to appeal, thus demonstrating “an active intent” to contest the decision not to renew her contract. Accordingly, the JAB decided it would consider the case receivable.

On 6 January 2006, the JAB reported on the merits of the case. The Applicant had claimed that her performance evaluations were unfair, vitiated by harassment and bias and that the cited complaints were false. She alleged that her evaluations and the decision not to renew her contract were tainted by bias and violations of her rights of due process. The JAB determined that, while it could not “conclude that, had proper procedures been followed and [the Applicant’s appraisal] been conducted in a timely manner, [her] contract would have been extended”, there had been a series of violations of her rights of due process - in, e.g., the evaluation process; the haste to separate her; and, not awaiting the outcome of the rebuttal process - and recommended compensation of four months’ net base salary. The Secretary-General accepted this recommendation on 15 May 2006. On 6 September 2006, the Applicant filed an Application with the Tribunal, claiming, inter alia, rescission of the decision regarding renewal of her contract, reinstatement, nullification of the performance evaluations and damages.

II. The Tribunal finds the case very similar to various cases upon which it has passed Judgement, in particular, to Judgement No. 1237 (2005), in which it stated:

“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”.

The Tribunal held in that Judgement that, “whilst the Applicant did not have a right to extension of his contract, the facts reveal that were it not for the flawed evaluation process, his contract might have been extended”.

III. In the present case, in an internal memorandum dated 4 December 2001 to the Resident Representative, the Country Director wrote: “The CRG having confirmed the rating of 5 awarded by [the Applicant’s] supervisor, I would be grateful if you could inform her that her contract will not be extended”. Notwithstanding the broad discretion of the Secretary-General in personnel matters, when reasons are given for decisions made in his name, those reasons must be true, and they are examined by the Tribunal for their truthfulness. As the Tribunal held in Judgement No. 1003, *Shasha’a* (2001),

“when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence.”

In *Shasha'a*, the Tribunal held that the Respondent had relied upon “an unsupported reason”, and had thus “improperly exercised his discretion”.

It is necessary, then, for the Tribunal to evaluate whether the reason given for the decision not to renew the appointment of the Applicant in the present case, i.e. her poor performance, was “supported”. It finds that it was not. The Tribunal - or, for that matter, the JAB - cannot determine whether a staff member’s performance was satisfactory. It can, however, review the process which resulted in negative performance evaluations. In the instant case, the Secretary-General accepted the JAB’s recommendation that the Applicant be compensated for various violations of her rights. In that context, the JAB found that the comments of the Applicant’s reporting officers and the review and rebuttal bodies lacked specific detail and that there was no evidence that she had received the appropriate guidance to improve her performance. Accordingly, the JAB identified a lack of transparency in the documentation of the Applicant’s performance as unsatisfactory. The Tribunal agrees and finds that, as the Applicant’s performance assessment was fundamentally flawed, it could not form the basis for a decision regarding her future employment.

IV. Where the reasons offered are not supported by the facts of a case, the Tribunal may - but does not automatically - vitiate the impugned decision. As it found in Judgement No. 1238 (2005), “[i]t must be surely self-evident and recognizable from first principle that where the reason invoked as justifying the making of a discretionary decision transpires to be false or disingenuous, the validity of the decision itself may be rendered invalid or infirm”. Nonetheless, the Tribunal held in that case:

“Where there is no right, the giving of a wrong reason cannot create such a right nor place an Applicant in a position where he should be treated as if he had enjoyed such a right. Such reasoning would be illogical. However, nothing contained in this present Judgement should be construed as implying that the Administration is automatically immune from the imposition of financial or other consequences where it should seek to explain or justify its decision by proffering a false or disingenuous reason. The giving of a false or invalid reason for a discretionary decision is, in itself, maladministration which may breach a staff member’s right to be treated fairly, honestly and honourably. A breach of such a staff member’s right may entitle the staff member to compensation for that very wrong, rather than on the basis that the giving of a false reason is evidence in itself that, had it not been given, the staff member would have enjoyed an extension of contract or some other benefit that was ‘lost’ because of the falsity of the reason proffered.”

In the instant case, the Tribunal concludes that the Applicant ought to be compensated but not reinstated in service, as she had no right to extension of her fixed-term contract and the decision to extend or not to extend her contract falls within the discretion of the Respondent, and the Tribunal will not substitute its discretion for his.

V. At this point, the Tribunal wishes to comment upon the timing of the Respondent’s impugned decision. The Applicant’s first reporting officer completed her evaluation on 29 November 2001, and the



Applicant was informed of her “unsatisfactory” rating on 1 December. On 4 December, she was informed that her fixed-term contract, which was scheduled to expire on 7 January 2002, would not be renewed. The Rebuttal Panel was not constituted to consider her case until 12 March 2002.

In Judgement No. 1237 (*ibid.*), the Tribunal held:

“Given that ... the Applicant’s performance evaluation was inextricably linked to the decision not to renew his contract, if not providing the sole basis on which that decision was made, and that the evaluation was immediately and unequivocally challenged by the Applicant, it is unclear to the Tribunal why no consideration was given to approving a limited extension of the Applicant’s services and why no steps were taken to have the rebuttal procedure swiftly concluded. ... The Tribunal recalls in this regard its Judgement No. 826, *Beliajeva* (1997):

‘Having undertaken a consideration of the Applicant’s situation, it was incumbent upon the Respondent to make his determination in accordance with fair procedures. Because the evaluation of the Applicant’s performance was a factor, it is unacceptable that the decision as to her future was taken before the rebuttal procedure was finalized.’

The institutional indifference to the Applicant’s situation is demonstrated by the Administration’s failure to make an effort to get the process on track when it might have, and this appears to have rather aggravated the consequences of the flawed process.”

The same holds true in this case. While, ultimately, the outcome of the Rebuttal Panel was not favourable to the Applicant, the timeline set out above precluded the possibility of the completion of rebuttal proceedings prior to the decision regarding her future employment being made, or implemented. Like the JAB, the Tribunal wishes to register its concern at this situation.

VI. The Tribunal now turns its attention to the quantum of appropriate compensation under the circumstances of this case. It recalls its Judgement No. 1237 (*ibid.*), in which it held:

“where inadequate performance is the reason for the decision [not to renew a contract] 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. Certainly, the Tribunal finds no difficulty in taking this into consideration for the purposes of assessing compensation payable for denial of due process and, in this context, the fact that the Applicant had only served one year is irrelevant in the particular circumstances of this case. He unfairly lost an opportunity to increase his length of service. As observed above, the unfair prejudice in regard to his future employment opportunities with the Organization was expressly recognized by the Respondent. Consequently, whilst, generally speaking, length of service is undoubtedly a factor in considering compensation, in this case the Tribunal finds the argument to be circuitous when the Respondent claims that three months’ net base salary is sufficient compensation because the Applicant had only served the Organization for one year. The Respondent cannot rely on the Administration’s own flawed process and the impugned decision made on that basis in order to limit the compensation payable.”

In that case, the Tribunal awarded the Applicant an additional nine months’ salary under this heading, for a total of one year’s compensation. For the same reasons, the Tribunal believes that the appropriate compensation in the instant case would be one year’s net base salary, and takes note of the fact that the

Secretary-General has already agreed to the JAB's recommendation that the Applicant be compensated four months' net base salary for the violation of her rights.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of an additional eight 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;

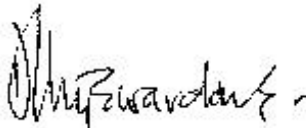
2. Orders the Respondent to remove the evaluations in question, and any related documents, from the Applicant's Official Status file, if it has not already done so; and,

3. Rejects all other pleas.

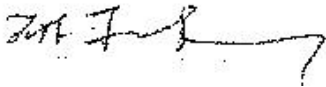
*(Signatures)*



Spyridon **Flogaitis**  
President



Dayendra Sena **Wijewardane**  
Vice-President



**Goh Joon Seng**  
Member

New York, 26 November 2008



Maritza **Struyvenberg**  
Executive Secretary