



Administrative Tribunal

Distr. Limited
30 September 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1438

Case No. 1510

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

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 December 2005, and four times thereafter until 30 September 2006;

Whereas, on 3 October 2006, the Applicant filed an Application in which he requested the Tribunal, inter alia:

“II. PLEAS

10. ...[T]o find:

(a) that since the Secretary-General accepted the recommendations of the dissenting member of the JAB [Joint Appeals Board] panel which, in effect, determined that the Applicant was not accorded due process during the reviews conducted by the two Panels established locally in UNOHCI [United Nations Office of the Humanitarian Coordinator for Iraq] for the renewal of his appointment, appropriate substantive remedies should be made, including his reinstatement, apart from the financial compensation of three months net base salary;

(b) that the financial compensation given to [the Applicant] by the Secretary-General is not adequate for the cessation of his service in UNOHCI, for the mental anguish he suffered for the irreparable damage to his reputation, for the negative psychological impact [on] him and for the loss of his income.

11. ...[T]o order:

- (a) that the Applicant be reinstated for mission service;
- (b) that the Applicant be given additional financial compensation for the irreparable harm to his professional standing, for the mental anguish he suffered for a protracted period [of time and] for the psychological harm inflicted upon him due to the arbitrary and unjustified actions by the UNOHCI [A]dministration.”

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 8 May 2007, and once thereafter until 8 June;

Whereas the Respondent filed his Answer on 7 June 2007;

Whereas the Applicant filed Written Observations on 24 May 2008;

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 employed with the United Nations Disengagement Force in Damascus, Syria [from] 1985 to 1987, serving as electrician/technician. He was appointed from 31 January 2001 to 30 June 2001 as BMS [Building Management Services] assistant on an ALD [Appointment of Limited Duration] at the FS-3 level at ... (UNOHCI) in Baghdad. His contract was extended on 1 July 2001. On 31 December 2001, his ALD expired and he was separated from the Organization.

Summary of Facts

... [The Applicant] was transferred in early February 2001 to North Iraq and [was] assigned as Supervisor GSS [General Service Section] North, under the supervision of [the] DCAO [Deputy Chief Administrative Officer], and [the] Administrator.

... According to [the Applicant’s] submission, in May 2001, he informed [the DCAO] of several criminal acts he had witnessed. He claimed that many local staff members were illegally siphoning off United Nations-generated electricity. This was part of what [the Applicant] characterized as an elaborate crime racket whereby local contractors were provided with inside-information contained in sealed contractor bids to help them win contracts with the largest possible profit margin in return for direct payment to the local staff members. These contractors would consequently insist that [the Applicant] pay the local staff members rather than the contractors themselves. The system was complicated when the staff members failed to pay the contractors, causing them to complain to [the Applicant]. [The Applicant] claims he devised a system whereby local staff members signed a copy of the requisition form upon receipt of payment in order to establish accountability. He also informed [the DCAO] that local staff members were using [United Nations] cars at night under apparently suspicious circumstances. [The Applicant] contends that he witnessed other disturbing practices, some of which included his supervisors, [as] set out in his statement of appeal.

... By a memorandum dated 22 June 2001, [the] Chief, [GSS] informed [the Applicant] that
‘1. Effective 25 June 2001, [Mr. S.] is appointed Officer-in-Charge, General Services Section, Northern Iraq and will take over the duties and appointment from [the Applicant] until further notice. ...

2. With effect from 25 June 2001, [the Applicant] will assume the duties as Administrative Assistant, GSS Northern Iraq, working directly under OIC GSS Northern Iraq, until further notice. His general functions include coordination of all GSS North administrative requirements, completion and submission of a survey report on the provision and supply of UNOCHI Generator electricity power for the accommodation units of International Staff, National Staff and Other Agencies Staff in Northern Iraq. This report is submitted to CGS (sic) by 15 July 2001.'

The record shows that, effective 13 July 2001, duties of Supervisor GSS North were taken up by [Mr. S.], UNIFIL [United Nations Interim Force in Lebanon].

... On 25 June 2001, [the Administrator], in the 'Special Report for Staff Mission Service' for the period 31 January to 30 June 2001, submitted a favourable evaluation on [the Applicant]'s performance, rating him 'fully satisfactory' and recommending him for extension. [The Applicant's] contract was renewed from 1 July 2001 to 31 December 2001. On the same day, [the Applicant] was reassigned to the position of Administrative Assistant, GSS Northern Iraq. A local staff member formerly supervised by [the Applicant] was promoted to fill [the Applicant's] former post, thereby becoming his supervisor.

... According to Respondent's submission, the Humanitarian Coordinator, on 22 July 2001, constituted an Investigation Panel (IP) to ascertain the veracity of [the Applicant's] contentions.

... On 24 July 2001, [the Applicant], at his own request, was transferred to Baghdad Headquarters for security reason. According to his submission, [the Applicant] had been told that someone had informed local staff that [the Applicant] had told officials about thefts.

... On that same day he received a memorandum requesting him to appear before a Panel convened by the Humanitarian Coordinator to conduct an initial investigation 'into certain matters.' According to [the Applicant's] submission, he attended and answered questions on 26 July 2001 regarding his allegations.

... On 4 August 2001, the IP concluded that its findings did not substantiate [the Applicant's] allegations.

... By a memorandum dated 15 August 2001, [the Chief GSS] informed [the Applicant] of what he considered to be unsatisfactory performance. He stated, in part:

'As Administrative Assistant GSS North you were directed to submit a report on the provision and supply of UNOHCI General electricity power for the accommodation units of International and National Staff and other Agencies Staff in Northern Iraq by ... 15 July 2001 to CGS. ...

On my return [from] leave on 12 August 2001, I ...was told that [the report] was not received. On 13 August 2001, I called you to my office (by then you were reassigned to Baghdad as per letter from Personnel and report on 24 July 2001) and on inquiring about the report, you submitted ... the copy [to] my office.

On going through the report with you, I voiced my total disappointment to you that your report did not meet all the requirements. ...

I visited Northern Iraq from 16 June to 23 June 2001. During my visit, due to the existing Management weakness in GSS North, I had to extend my visit to address and resolve GSS Management Weakness Problems.

After discussion and in consultation with Deputy CAO on GSS North management weakness, you were reassigned from your appointment, Supervisor GSS North on 25

June 2001 to Administrative Assistant GSS North ... This decision was made [in the best interest of the Organization] and [Mr. S.] a national staff was appointed as Supervisor GSS North. ...

In my opinion as your direct Supervisor, based on your performance thus far, I have no confidence in your experience, capability, ability to meet deadlines, being responsible and quality of work ... In view of your unsatisfactory performance, lack of experience and incapacity, as Chief General Services, I am unable to assign you an appointment to be gainfully employed in this Section.'

... By a memorandum dated 22 October 2001, [the Applicant] submitted a statement ... entitled 'Disagreement with your report of August, 25 2001.' In that memorandum, [the Applicant], *inter alia*, pointed out that [the Chief GSS] had based his assessment on a total of twelve hours spent with [the Applicant]. He rebutted [the Chief GSS's] report

... On 23 October 2001, [the Applicant] filled out a form 'Recommendation for Extension of Appointment/Assignment to UNOHCI.' Under 'Description of Functions' he had written 'General duties as assigned or tasked by CGSS.' In Part B of that form, [the Chief GSS] wrote 'Staff Member's Performance has been not satisfactory.' By that form, [the Applicant] was not recommended for extension.

... In a memorandum dated 23 October 2001, the Chief [GSS] ... informed [the Applicant] that his ALD was expiring on 31 December 2001 and that 'in accordance with the relevant Staff Rules, there is no expectancy of renewal regarding your temporary appointment with UNOHCI.'

... On 22 November 2001, following the approval of the Humanitarian Co-ordinator and in consultation with the Staff Association, an Advisory Panel on Personnel Issues (APPI) at UNOHCI reviewed, *inter alia*, the non-extension of [the Applicant's] appointment. [The DCAO] was among the members. The APPI,

'16. ... noted that [the Applicant's] Special Report ... was wrongfully completed by an Administrative Officer in the North. The staff member's Special Report should have been initiated by the Chief of General Services. ... On 22 October 2001, [the Applicant] submitted an unsigned memorandum providing therein allegations against the [Chief GSS] which he subsequently copied to senior managers at New York Headquarters ...

17. The Panel was informed of UNOHCI's intention to establish an investigation panel to review the allegations contained in [the Applicant's] unsigned memorandum. However, the Panel, after a careful study of all the issues surrounding the case of [the Applicant], was unanimously convinced that there was no misconduct committed by the staff member and therefore an investigation panel was not required. It proceeded to review the case of [the Applicant] which is about the non-extension of the staff member's appointment ...

18. After a serious deliberation of all administrative issues surrounding [the Applicant's] claims, having given due considerations to the grievances he forwarded in his unsigned memorandum, and taking into account the investigation already ... concluded ... the Panel unanimously recommended that the staff member's appointment [with] UNOHCI not be extended beyond 31 December 2001.'

... On 20 December 2001, an *ad hoc* panel of review was constituted to consider the non-extension of [the Applicant's] appointment. The Panel stated, *inter alia*:

'The Panel noted that [the Applicant] did not have a clear job description since he joined UNOHCI on 22 January 2001 at the FSL-3 level under an [ALD].'

...

The Panel expressed serious concern on the fact that [the Applicant] was supervised by a local staff member and subsequently transferred from Erbil Northern Iraq to Baghdad Headquarters by decisions of the [Chief GSS].

Furthermore, the Panel recognized that the [Chief GSS] lacked the ability to listen to others, the interest to ask questions to clarify, and to accurately interpret messages and respond appropriately. However, it recognized that [the Applicant] was accorded his due rights through a review of his case by the Advisory Panel on Personnel Issues at its meeting no. 4 held on 22 November 2001 while understanding the provisions in the relevant Staff Rules relating to temporary appointments.

The Panel was of the opinion that it would be difficult, if not impossible, for the [Chief GSS] and [the Applicant] to continue working together. At the same time, due to the carpentry and electrical work background of [the Applicant], it would be difficult to transfer him to a different post or function within UNOHCI even if he were to be granted a further extension of appointment.

Based on the foregoing, the Panel nevertheless supported the recommendation of APPI on the non-extension of [the Applicant's] Appointment ... beyond 31 December 2001 with the condition that the staff member will be reappointed against a suitable post to another DPKO [Department of Peacekeeping Operations] mission effective 1 January 2002.

It also recommended that the [Chief GSS] as well as all other Chiefs of Sections should ensure that each staff member under their overall or direct supervision have a work plan, goals, mid-year performance review with fair, consistent and objective assessment of the staff members' abilities, as well as to foster continuing and constructive dialogue on work performance including job related discussions.'

... By a letter dated 11 December 2001, [the CAO], UNOHCI, informed [the Applicant] that management of UNOHCI was unable to extend his temporary appointment beyond 31 December 2001 'following its recent review of staff member's contractual status.'

... On 23 December 2001, [the CAO] submitted a memorandum to [the] Executive Officer, Office of the Iraq Programme and [the] Chief, PMSS [Personnel Management and Support Service]/FALD [Field Administration and Logistics Division]/DPKO. Referring to an email message sent by [the Applicant] [on] 24 October 2001 to the Deputy Secretary-General, Under-Secretary-General for DPKO, the Director of FALD/DPKO, the Chief of the Investigation Unit OIOS [Office of Internal Oversight Services] and the Executive Director of the Office of the Iraq Programme, [the CAO] stated:

'It was on this basis that UNOHCI [APPI], which was recently created at UNOHCI to review personnel issues including non-extension/termination of appointments, convened a meeting ... resulting [in] a unanimous recommendation not to extend [the Applicant]'s appointment ...

...The only Special Report issued for [the Applicant] for the period 31 January 2001 to 30 June 2001, which was not a Performance Evaluation Report nor Performance Appraisal System (sic)... The Special Report did not include what the staff member performed for the period covered therein. It was at the time used only for the purpose of obtaining the recommendation of the staff member's supervisor relating to extension or non-extension of his appointment. ...

The UNOHCI Special Report has now been cancelled. In future, only a recommendation from the respective Chief of Section will be sufficient to determine whether or not the appointment of a staff member will be extended ... based on satisfactory performance.'

... On 26 December 2001, [the Applicant] met with [the CAO], [the] Deputy Humanitarian Coordinator, UNOHCI, [the] Chief Civilian Personnel Officer, UNOHCI, [and the] Staff Representative, UNOHCI. According to the minutes of that meeting, [the CAO] informed [the Applicant] that the decision not to extend his contract rested totally with him as CAO. He stated that the decision was based not on performance, but [on the fact that] his specialty was no longer required by UNOHCI, and that he was aware that as soon as [the CAO] arrived in the mission, he had taken the initiative of outsourcing services to outside companies to provide the services encompassing [the Applicant's] qualifications.

... On 14 February 2002, [the Applicant] sent an e-mail letter to the Office of the Secretary-General which was received by the Administrative Law Unit (ALU) on 5 March 2002 and was treated as a request for administrative review."

On 3 May 2002, the Applicant filed an appeal with the JAB. On 3 February 2005, the JAB adopted its report. Its considerations, conclusions, and recommendation read, in part, as follows:

“Considerations

...

35. In the instant case, a majority of the Panel members considered that, while the additional information and evidence sought in the Panel's interrogatories might have been helpful, it was incumbent on the Panel to act on the basis of the evidence before them. Based on this evidence, a majority of the Panel concluded that Appellant was afforded due process in the decision not to renew his contract. A majority of [the] Panel noted that two previous panels, APPI and the ad hoc panel of review, were set up at UNOHCI to consider Appellant's case. With regard to Appellant's contention of improper motive, it considered that those panels had in forming its conclusions considered Appellant's allegations of retaliation against him. Noting that the burden of proof in an appeal to the JAB on the question of improper motivation lay[s] with Appellant (UNAT Judgements No. 674, *Gonda* (1994), No. 553, *Abrah* (1992), No. 442, *Motamedi* (1989) and No. 350, *Raj* (1985)), a majority of the Panel found that there may have been an improper retaliatory motive, but the evidence provided by Appellant was insufficient to prove such motive. A majority of the Panel further noted that the rationale for the non-renewal – the implementation of an outsourcing policy within UNOHCI to achieve optimum cost effectiveness – constituted a legitimate exercise of administrative discretion, and UNOHCI's subsequent inability to retain Appellant's services constituted an unfortunate consequence from that policy's implementation.

36. In this vein, the Panel unanimously found that, given that the decision arose on operational grounds[,] there was no basis to conclude that Appellant's performance was in any way unsatisfactory. In fact, performance was not at issue within Respondent's rationale at all and, in the absence of a PAS process, of course could not be. The Panel therefore found nothing that should impede consideration of Appellant for appropriate future posts to which he may wish to apply.

Conclusions and recommendation

37. In light of the foregoing, the majority of the Panel members concluded that the evidence was insufficient to prove improper retaliatory motive, and that due process was afforded to Appellant in the decision not to renew his ALD contract.

38. A majority of the Panel agreed to make no recommendation in respect of the present appeal.”

A dissenting member of the JAB concluded:

“4. On the basis of the above dissent, I am not convinced that [the Appellant] was accorded due process during the two review panels. While there is no direct evidence of retaliatory action on [the Appellant] for submitting allegations of illegal actions in the Northern sector, I cannot find conclusively that the examination by these panels took into account the full information available in making their review, especially in ... light of the omission of any reference to policy decisions on outsourcing.

5. Also on this basis, I would recommend that [the Appellant] be given three months ... net base salary ... to compensate him for the procedurally inappropriate review panels.”

On 6 July 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case. In the light of the concerns expressed by the UNOHCI *ad hoc* review panel and those of the dissenting JAB member, he has decided to accept the recommendation of the dissenting JAB member that you be awarded compensation in the amount of three months’ net base salary.”

On 3 October 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. His due process rights were violated by the two panels established by UNOHCI to consider the matter of his contract renewal.
2. He should be appropriately compensated for the violation of his rights, including reinstatement and additional compensation.
3. The three months’ net base salary awarded as compensation by the Secretary-General is inadequate in comparison to the irreparable harm caused to his career and personal life, including mental anguish.

Whereas the Respondent’s principal contentions are:

1. The Applicant had no legal expectancy of renewal of his appointment of limited duration, and the decision not to renew his appointment did not violate his rights.
2. The Applicant has failed to carry the burden of proof to support his claim of prejudice.
3. The award to the Applicant of three months’ net base salary constitutes appropriate compensation for the alleged irregularities in the Applicant’s case.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. The Applicant had previously been employed by the Organization as an electrician/technician in his native country, Syria, until 1987. He was granted an ALD from 31 January to 30 June 2001 in Baghdad. In February 2001, the Applicant was transferred to Northern Iraq. In May 2001, he reported an “elaborate crime racket” involving local United Nations staff members and the siphoning of the Organization’s electricity. As noted in the JAB report, on 21 July, the Applicant considered his life to be at risk. The following day, an Investigation Panel was formed to investigate his allegations. On 24 July, he was transferred, at his own request and for security reasons, back to Baghdad Headquarters. On 25 July, the Applicant’s performance was appraised as “fully satisfactory” and his ALD was extended to 31 December 2001.

II. On 4 August 2001, the Investigation Panel concluded that there was no basis for the Applicant’s allegations, and on 15 August, his new supervisor rated his performance as not satisfactory and recommended that his contract not be extended. The Applicant was notified on the same day. On 22 November, a report was made by an Advisory Panel on Personnel Issues, in consultation with the Staff Association and with the previous approval of the Humanitarian Coordinator. This Panel concluded that the Applicant’s allegations were unfounded and recommended that his ALD should not be renewed beyond 31 December 2001.

III. On 11 December 2001, the Chief Administrative Officer informed the Applicant that his contract would not be renewed beyond 31 December. On 20 December, an ad hoc panel was constituted to further consider the non-extension of the Applicant’s contract. The ad hoc panel supported the same recommendation of non-renewal “with the condition that the staff member will be reappointed against a suitable post”. On 26 December, the Chief Administrative Officer, in the presence of the Deputy Humanitarian Coordinator, the Chief Civilian Personnel Officer, and a Staff Representative, informed the Applicant that the decision not to extend his contract had not been taken on grounds of performance but on the premise that services as those provided by the Applicant would be outsourced to outside companies. Thereafter, his contract expired and he was separated from service.

IV. The Tribunal finds that the fact that the Organization convened these two panels to fully evaluate the renewal or non-renewal of the Applicant’s ALD clearly demonstrates that his due process rights were fully respected up to that point in time.

V. The Tribunal has consistently held that

“... staff members serving under fixed-term appointments have no right to renewal of their contract and that their employment with the Organization ceases automatically and without prior notice upon the expiration date of their fixed-term contract, unless there are countervailing circumstances. (See Judgements No. 1048, *Dzuverovic* (2002); No. 1057, *Da Silva* (2002); and, No. 1084, *Sabbatini* (2002)). These may include abuse of discretion or an express promise by the

Administration, thereby creating an expectancy that the appointment will be extended.”
Judgement No. 1170, *Lejeune* (2004).

The Administration, in its discretion, may decide not to renew or extend the contract without justifying that decision. (See Judgement No. 1003, *Shasha’a* (2001), citing Judgements No. 440, *Shankar* (1989); and No. 496, *Mr. B* (1990)). However, “when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts.” (See *Shasha’a* (ibid.), citing to Judgement No. 885, *Handelsman* (1998)).

VI. The Tribunal notes that the Applicant appealed the non-renewal decision to the JAB. The majority of the JAB found that he had failed to substantiate his claim that the contested decision constituted a retaliatory act for the denunciation of the alleged “criminal racket”.

VII. On the contrary, the JAB’s dissenting member recommended compensation of three months net base salary, for the procedurally inadequate review panels. The dissenting member stated that “[w]hile there is no direct evidence of retaliatory action ... for submitting allegations of illegal actions ... I cannot find conclusively that the examination by these panels took into account the full information available in making their review”. The dissenting member specifically referred to the fact that the review panels did not and could not take into account the new outsourcing policy finally invoked in the pertinent communication, consequently giving rise to the suspicion that it was therefore improperly invoked after the panels’ evaluations. In his opinion it was a mere pretext to justify the non-extension of the Applicant’s contract.

VIII. The Secretary-General’s decision of 6 July 2005 stated that the Applicant’s case was examined in light of the concerns expressed by the ad hoc review panel and those of the JAB’s dissenting member. The Secretary-General “decided to accept the recommendation of the dissenting JAB member that [the Applicant] be awarded compensation in the amount of three months net base salary”.

IX. The Tribunal finds that such a decision is in compliance with its jurisprudence. In Judgement No. 1416 (2008), the Tribunal stated:

“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.”

X. The Tribunal considers, as it did in Judgement No. 1443 (2009), also rendered during this session, that it is important to note that this is a case where the concerns of an ad hoc review panel and the favorable recommendation of a dissenting JAB Panel member, were willingly accepted by the Administration. By

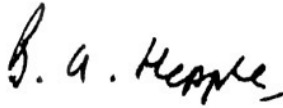
paying the amount that the Tribunal would normally award in cases such as the present one, the Secretary-General has shown a willingness to timely submit and accept the findings of independent organs of control and accountability.

XI. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)



Spyridon **Flogaitis**
President



Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary