



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1453

Case No. 1533

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, on 18 March 2007, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

“II. PLEAS

...

(b) rescind [the] decision contained in [the] letter dated 15 February 2005[,] from UNDP [United Nations Development Programme] Deputy RR [Regional Representative] (DRR) [Deputy Resident Representative] Operations, India, based on [advice] from the UNODC [United Nations Office on Drugs and Crime], that [the] Applicant’s fixed-term contract ... [not be] extended beyond 31 March 2005.

(c) [t]he non-renewal of [the Applicant’s] contract ... was flawed”

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 29 October 2007, and once thereafter until 29 November;

Whereas the Respondent filed his Answer on 15 November 2007;

Whereas the Applicant filed Written Observations on 25 January 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] joined the ... UNODC in New Delhi as a Division Assistant on 1 January 2003 on a fixed-term appointment for three months at the G-5 level. She received extensions thereafter, until 31 March 2005, when she was separated from service.

Summary of Facts

... In January of 2004, [the RR] ... took up his assignment to serve in that capacity. The RR was [the Applicant’s] supervisor.

... By a letter dated 6 July 2004, the RR ... raised a number of concerns regarding [the Applicant’s] performance. [The Applicant] replied [on] 20 August 2004.

... By a letter dated 15 February 2005 from the ... [DRR notified the Applicant] ... [that her] contract would not be extended beyond its 31 March 2005 expiry.

... By a letter dated 23 February 2005 to the DRR, [the Applicant] requested to be informed as to the reasons for the non-extension. She thereafter wrote again to the DRR on 11 March, stating:

‘After telephone discussions held on 10 March 2005 with ... [the] Chief, HRMS [Human Resources Management Services], UNODC, Vienna, I was informed that because of re-profiling of the ROSA Office structure and fixed-term appointment[s] [do] not carry any expectation of renewal, my service[s] [were] not required beyond 31 March 2005. Therefore I am withdrawing my letter [dated 23 February 2005].’

... On 16 March 2005, both the RR and [the Applicant] signed off on her 2004-05 Results Competency Assessment (RCA). The RR recommended an overall rating of ‘partially met expectations.’

... By a letter dated 12 April 2005, [the Applicant] wrote to the UNDP Administrator requesting a review of the decision not to renew her contract. She received a reply from the Bureau of Management on 1 July 2005.”

On 15 July 2005, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 18 December 2006. Its considerations and recommendation read, in part, as follows:

“Considerations

18. Appellant refutes the argument that her appointment was allowed to lapse; rather, she contends, a positive decision was taken by UNODC Administration not to extend her appointment. She attacks the decision largely on contention that the RR, UNODC New Delhi developed a bias against her shortly after taking up his assignment, and particularly during an incident involving the importation of his personal vehicle. The Panel notes that, under the jurisprudence of the United Nations Administrative Tribunal (UNAT), the ‘burden of proof is on the Applicant where allegations of such extraneous motivation are made.’ (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); and, No. 870, *Choudhury et al* (1998).) In such cases, the Appellant must adduce ... clear and convincing evidence in support of his/her case.

19. The Panel requested Appellant to provide additional documentation or evidence to prove her contention of bias. Appellant replied that she was unable to provide further documentation, given that she is barred admittance into the premises and that none of her former colleagues would dare to give a statement supporting her allegation. While it is sensitive to the difficulties facing an Appellant – and particularly an Appellant no longer with the Organization – in proving bias, the Panel finds the circumstantial evidence which she points to is insufficient to establish her claim. She has not adduced any evidence that the workload assigned to her, while it may very well have been heavy, was ‘unfairly’ so. If she felt she was frequently subjected to humiliation at staff meetings for whatever reason, she does not supply any contemporaneous documentation showing she raised an objection on one of those frequent occasions or corroborating her characterization of the treatment. With regard to the other two examples she gives – the change in duration of her contract extension for no reason from one year to three months and the RR’s attempt to withhold Appellant’s Within Grade Increase – there is no evidence contradicting the former’s contention that he was simply mistaken as to the requirements under the rules regarding within grade increases; the change in the duration of contract could have been due to a number of other reasons, such as Appellant also includes as an example the ‘undeserved negative rating in the RCA’ as proof of bias. The JAB, however, has no competence to substitute its judgment with that of the Administration with regard to a staff member’s performance; Appellant failed to offer any proof, either by the considerations of a rebuttal panel or otherwise, that the evaluation was undeserved, or that, if it was, it was bias and not a simple difference in how the manager perceived her performance.

20. The Panel next reviewed Appellant’s contention that she had a right to reasonable consideration for renewal. Here, it notes that such a right exists in the context of a non-renewal where a justification is given for the non-renewal; in that case the reason must be supported by the facts. *See* Judgement No. 885, *Handelsman* (1998). The general rule is that fixed-term contracts carry no expectation of renewal and, secondly, that the Administration need not give reasons for a non-renewal. The Tribunal emphasized this in its Judgement No. 1191, *Aaergeerts* (2004):

‘II. It has been the long-standing jurisprudence of the Tribunal that, in general, fixed-term contracts do not carry any expectancy of renewal. The Tribunal has also repeatedly stated that the Organization does not have to provide any reason when deciding not to renew a fixed-term contract upon its expiration. However, as has also been repeatedly stated by the Tribunal, when the Administration chooses to give reasons for its decision not to renew a fixed-term contract, the validity and acceptability of these reasons are subject to judicial review. In Judgement No. 1003, *Shasha’a* (2001) the Tribunal stated as follows:

II. The Tribunal has consistently held that, in general, an employee serving under a fixed term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12(b). The Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances the contract terminates automatically and without prior notice, according to staff rule 109.7. (See Judgements No. 440, *Shankar* (1989); and No. 496, *Mr. B.* (1990).’

In the instant case, Respondent chose not to justify the decision. The Panel therefore finds no legal basis for it to enter into surrounding circumstances such as issues of performance shortcomings. The Panel takes note [] ... that the Career Review Group (CRG) changed Appellant’s rating from ‘partially met expectations’ to ‘fully met expectations.’ However, given the Respondent’s decision not to give a reason for the non[-]renewal, a legal expectancy of renewal is not created by efficient or even by outstanding performance. (*Cf* Judgements No. 173, *Papaleontiou* (1973); No. 205, *El-Naggar* (1975); No. 422, *Sawheny*; No. 427).)

21. The Panel observes that, while conveying no reason in its official correspondence with Appellant, the UNODC Regional Office for South Asia was being delegated authority to open its own bank account and as a consequence the job description of the Finance Assistant post encumbered by [Appellant] was being revised. The Panel further noted that the head of UNODC ROSA had advised his headquarters that the Appellant did not have the required competencies to carry out the new functions of the reprofiled post. Given the proximity in time between the reprofiling exercise and the non[-]renewal, the latter decision and the justification thereof could well be considered the *de facto* justification for the former.

22. Even here, however, the evidence indicates that the decision regarding the reprofiled post was not arbitrary. The Panel observes that past performance evaluations reflected concerns with the Appellant's work in the area of finance. The CRG, in [Appellant's] 2003-04 RCA, for example, noted concerns by the former Representative regarding the management of financial reporting and complying with deadlines, and for this reason, [the Appellant] received a rating of 'partially achieved' under work plan results in the area of finance. The CRG consequently stated the need for [Appellant] to demonstrate improvement. Her 2002 RCA, while noting a fully satisfactory performance, indicated that for a period she had been asked to take charge of a function other than finance as it was felt that she needed more training in that area. While the RCA also indicated that she had taken time to learn difficult financial issues, she evidently transferred before taking charge of financial functions in that office again.

23. The Panel further noted that her evaluation for 2001 reflects a solid, fully satisfactory performance by Appellant, although at that point her tasks lay in the area of administration/management, information management, secretarial and others, but not finance. Thus, while it is apparent that Appellant performed well in a number of areas, there was a basis in the record to justify the concern that the reprofiled post may have been a poor fit. Again, the Panel is mindful that, provided that the discretion in question has not been vitiated by procedural irregularities, prejudice, abuse of power or any other extraneous factors, it may not substitute its own judgment for that of the Administration in this regard. (*See* Judgements No. 396, *Waldegrave* (1987); No. 541, *Ibarria* (1991); and No. 1136, *Sabet & Skeldon* (2003)).

24. In light of the foregoing, the Panel finds insufficient evidence to support the contention that the decision not to renew her contract was arbitrary or ill-motivated.

Conclusions and recommendation

25. In light of the foregoing, the Panel *unanimously concluded* that Appellant's rights were not violated in the decision not to renew her contract. It therefore *unanimously decided* to make no recommendation in the present appeal."

On 18 March 2007, the Applicant filed the above-referenced Application with the Tribunal.

On 24 April 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"The Secretary-General acknowledges the JAB's findings and accepts its conclusion. He has accordingly decided to take no further action on this appeal."

Whereas the Applicant's principal contentions are:

1. The decision not to extend her contract was vitiated by prejudice and improper motivations.

2. The decision should be rescinded.
3. She should be compensated for the injury caused to her, professionally and personally, by the decision not to renew her contract.

Whereas the Respondent's principal contentions are:

1. The Applicant did not have any expectancy that her contract would be renewed.
2. The decision not to extend the Applicant's contract was not vitiated by prejudice or improper motive.
3. The Applicant's claims as to compensation are without merit and all pleas should be rejected.

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

I. The Applicant alleges that the decision of the Administration not to renew her fixed-term contract beyond its expiration date of 31 March 2005, of which she had been given advance notice on 15 February 2005, was vitiated by bias and improper motives, and was not substantiated by the facts. On 18 December 2006, the JAB unanimously found that these allegations were unsubstantiated and made no recommendation. On 24 April 2007, the Secretary-General agreed with the JAB that the Applicant's rights were not violated.

II. The Tribunal notes the Applicant's contention that her supervisor was biased against her because she had reported that the importation of his used automobile would be contrary to the then applicable national rules. The Tribunal is unconvinced by the Applicant's allegations, as the Applicant's own records attest that at least five of her colleagues concurred in writing with her assessment as to the importation of the Applicant's supervisor's used automobile to India. No contention is made that the Applicant's colleagues suffered any kind of reprisal, despite their position on the matter.

III. The Tribunal considers that if that episode suggested to the Applicant a possible cause for the alleged animosity on the part of her supervisor as she now contends, then she should have attempted to timely substantiate her claims of hostility, bias, and other improper motivation, in the decision not to renew her contract, as the burden of proof rested on the Applicant. (See Judgment No. 1299 (2006)). The Tribunal finds that the Applicant failed to meet that burden.

IV. The Tribunal notes that when the Administration did not offer a reason for the non-renewal decision, the Applicant initially requested the rationale for this decision. The Applicant subsequently withdrew her request when she was orally informed that a re-profiling of the Office was to take place, and

that fixed-term contracts do not carry any expectancy of renewal. (See Judgement No. 1048, *Dzuverovic* (2002)).

V. In relation to the changes and upgrade of the Applicant's former job description, the Tribunal finds that the explanations provided by the Administration were reasonable and within the Administration's discretionary powers.

VI. As for the Applicant's challenges of the validity of the JAB's proceedings and recommendation, as well as its authenticity, the Tribunal is satisfied that the JAB's findings and recommendation were substantiated by the facts, and that the Applicant offered no evidence to invalidate the same.

VII. Additionally, the Tribunal notes that when the Applicant received her 2003-2004 rating of "3" (fully meets expectations) in the RCA, and that when subsequently, the CRG recommended that she should "demonstrate significant improvement in areas specified...", she did not rebut this recommendation.

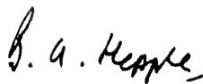
VIII. The Tribunal further notes that the Regional Representative recommended an overall rating of "partially met expectations" for the 2004-2005 reporting cycle, and that the CRG's subsequent recommendation to change this rating to "fully met expectations" does not by itself support the Applicant's claim that the Administration acted inappropriately. The Tribunal again recalls that the Respondent did not explain the reason for the non-renewal of the Applicant's fixed-term contract. The fact that the Applicant's performance rating was later upgraded cannot by itself serve as a reason to contest the non-renewal decision.

IX. 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