



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1474

Case No. 1553

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Mr. Goh Joon Seng;

Whereas, on 19 June 2007, a former staff member of the United Nations, filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 2 November 2007, the Applicant, after making the necessary corrections, filed an Application requesting the Tribunal, *inter alia*:

“II. Pleas

The Applicant respectfully requests the Tribunal to:

(a) decide if staff members serving under FTA [Fixed Term Appointments] have a right to renewal of their contract as the Respondent and the JAB [Joint Appeals Board] grounded their actions and conclusions, *inter alia*, on the assertion that ‘staff members serving under FTA have no right to renewal of their contract’ ...;

(b) find that the governmental decision not to extend secondment of a staff member does not put the UN[United Nations] under the legal obligation not to consider him/her for further employment;

(c) acknowledge that no specific obligation of a seconded staff member forbids him/her to have a legal expectancy of renewal of the contract; to be considered in the interest of the Organization for further employment as a non-seconded official on the basis of his performance; to enjoy due process and fair procedure, as well as to enjoy other rights fixed in the UN Charter, Staff Regulations and Staff Rules and other applicable legislations;

- (d) recognize that the express promises to extend his appointment for the next two years given to the Applicant by his programme manager during 2004-2005 constituted a Respondent's commitment and created [in] the Applicant [the] legal expectancy of renewal of the contract;
- (e) recognize that the Respondent gave no consideration of the Applicant for further employment;
- (f) recognize that the Administration denied to the Applicant due process and fair procedure in order to ensure an impartial examination of all relevant facts before the termination of the Applicant's appointment;
- (g) recognize that there were prejudice and arbitrariness from the part of the UNOG's [United Nations Office in Geneva] Director-General ... towards the Applicant;
- (h) recognize the existence of extraneous reason in the Administration's actions and appropriate non-actions that finally led to the termination of the Applicant's contract;
- (i) recognize that the Applicant was fully entitled by rules of the International Civil Service Law, to turn down his secondment status at any moment for the purposes of extension of his appointment on a non-seconded basis;
- (j) recognize that the Applicant's secondment status, that he was in no position to contest in 2001, 2003 and 2004, does not diminish his right to full, fair and objective consideration for further appointment in UNOG in 2005, as well as to due process and fair procedure;
- (k) recognize that the Respondent violated Regulation 1.2 with regard to the Applicant;
- (l) recognize that the treatment of the Applicant by the Respondent [violated his rights, which included, the restriction] to enter the UN premises as a UN retiree, was arbitrary and illegal and deprived the Applicant of possibility to find necessary competent assistance, as well as to have access to documents and facilities in preparing his case;
- (m) rescind the decision of the Respondent not to extend the Applicant's contract beyond 17 August 2005;
- (n) order the Applicant's immediate reinstatement with reasonable consideration at the earliest opportunity for a permanent appointment;
- (o) order the Respondent to allow Applicant to have free access to the UN premises as a UN retiree;
- (p) order payment of full salary and applicable allowances and benefits from the date of the Applicant's separation from service to the date of reinstatement;
- (q) award the Applicant additional compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant to his health, career and reputation as a result of the Respondent's actions or lack thereof;
- (r) fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at 3 years' pay in view of the specific circumstances of the case;
- (s) award the Applicant, as costs, the sum of 5 000.00 euros."

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 6 May 2008, and once thereafter until 6 June;

Whereas the Respondent filed his Answer on 21 May 2008;

Whereas the Applicant filed Written Observations on 21 July 2008;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

“[Applicant]’s Professional Record

... On 11 March 1999, the Secretary of the Appointment and Promotion Board addressed a memorandum to the then Director-General of the United Nations Office in Geneva (hereinafter UNOG), informing him that the Appointment and Promotion Board (APB) recommended and that the Under-Secretary-General for Management approved on 10 March 1999 the appointment of the [Applicant] for two years, as Chief, Russian Translation Section (P-5), UNOG. On 21 June 1999, a Human Resources Officer Personnel Service sent an offer of appointment to the [Applicant], offering him a FTA for the above-mentioned post, on secondment from the Government of the Russian Federation. The [Applicant] signed this offer on 24 June 1999.

... The [Applicant] thus entered [the] service of UNOG, Conference Services Division on 18 August 1999, as Chief of the Russian Translation Section, at the P-5 level, on the basis of a FTA of two years. The letter of appointment signed by the [Applicant] on 2 September 1999 contained a special condition clarifying that ‘staff member is on secondment from the Government of the Russian Federation’.

... On 9 August 2001, the [Applicant] signed another letter of appointment, renewing his FTA for another two years as of 18 August 2001, same post, same grade. As with the former letter of appointment, this new letter of appointment contained the special condition that ‘staff member is on secondment from the Government of the Russian Federation’. On 18 August 2003 and on 18 August 2004 respectively, the [Applicant’s] contract was renewed for one year, same post, same level. The corresponding letters of appointment each contained the above-mentioned special condition with respect to the [Applicant’s] status of secondment.

... The [Applicant’s] FTA expired on 17 August 2005, and was not renewed.

Summary of Facts

... On 3 July 2001, the Secretariat of the United Nations wrote an official note to the Permanent Mission of the Russian Federation to the United Nations Office and other International Organizations in Geneva (hereinafter Permanent Mission of the Russian Federation) informing it that the Organization had offered the [Applicant] a two-year extension of his FTA, and asking the Government to provide details on the [Applicant’s] secondment status. In its request, the Secretariat of the United Nations stressed that ‘in order to record the details of the secondment in a way that is consistent with the jurisprudence of the United Nations Administrative Tribunal, the Secretariat would appreciate receiving from the Government the necessary information, preferably in the format attached’. On 17 July 2001, the Permanent Mission of the Russian Federation established an official note confirming ‘the availability of [the [Applicant]] for the position of Chief of the Russian Translation Section [...] on secondment from the Government of the Russian Federation for a period of two years expiring on 17 August 2003’.

... On 4 August 2003, the Secretariat of the United Nations addressed again an official note to the Permanent Mission of the Russian Federation with the same terms as the note of 3 July 2001

..., informing it that the Organization had offered the [Applicant] another extension of his FTA, and asking to be provided with detailed information on the [Applicant's] status of secondment. On 7 August 2003, the Permanent Mission of the Russian Federation addressed an official note to the Secretariat of the United Nations confirming the availability of the [Applicant] for the post of Chief, Russian Translation Section for a period of one year. It indicated, 'The Government undertakes to protect the accrued pension and promotion rights of the seconded official and to guarantee that [the [Applicant]] has the right to return to the service of the Government after the period of secondment to the United Nations'. It further specified that the [Applicant] 'ha[d] indicated to the Government a wish to be considered for an appointment to the Secretariat on secondment from Government Service in order to protect all pension and promotion rights and to retain the right to return to the service of the Government after the expiration of the appointment on secondment'. Upon request of the Secretariat of the United Nations, the Permanent Mission established another official note in the same terms on 11 August 2004.

... On 26 July 2005, the Permanent Mission of the Russian Federation sent an official note to the Secretariat of the United Nations indicating 'pursuant to the secondment agreement with the United Nations, the Ministry of Foreign Affairs of the Russian Federation would like [the [Applicant]] to return to the service of the Government and will offer him another assignment with the Ministry at the appropriate level' and that 'consequently, the Government of the Russian Federation [did] not intend to further extend the secondment to [the Applicant] of his present contract on 17 August 2005'.

... On 2 August 2005, the [Applicant] sent a memorandum to the Officer-in-Charge Human Resources Management Service (hereinafter O-i-C HRMS) informing him that '[he] should not consider [him] on secondment any longer' as he 'decided to leave the Russian civil service and to continue to work for multilingualism within the UN', and that 'the Russian authorities have been informed about [his] decision'. He stressed that his working relations with the MFA of the Russian Federation ceased on 17 August 1999 when he was discharged from the MFA. The [Applicant] enclosed 'copy of the record in [his] work-book'.

... By a second memorandum of the same day, the [Applicant] asked the O-i-C HRMS to inform him of the administration's intention concerning the extension of his contract beyond 17 August 2005. He highlighted that 'without the reply from [him] by close of business on Friday 5 August 2005, [he would] interpret [his] silence as confirmation that [his] contract is not being extended and will pursue all available recourses'.

... By memorandum dated 4 August 2005, the O-i-C HRMS informed the Director, Conference Service Division that '[they had] received an official note from the Permanent Mission of the Russian Federation in which it informed UNOG that pursuant to the secondment agreement with the UN Secretariat, the Russian Ministry of Foreign Affairs [wished] to recall [the [Applicant]] to the service of the Russian Government and is offering him an assignment within the Ministry'. He underlined that the Ministry would therefore not extend the [Applicant's] secondment beyond the date of the expiration of his present appointment. The O-i-C HRMS asked the Director CSD to inform the [Applicant] accordingly and to take appropriate action.

... By memorandum dated the same day, the O-i-C HRMS informed the [Applicant] that he took due note of his wish to no longer be considered on secondment from the Government of the Russian Federation, and asked him to be provided with a copy of his official communication to the Russian authorities, 'informing them of [his] resignation from the service of [his] Government'. He stressed that the [Applicant] would maintain his status as a seconded official until the expiration of his current appointment.

... The same day, the [Applicant] wrote a letter to the Deputy permanent Representative of the Permanent Mission of the Russian Federation in Geneva indicating

‘suite à notre entretien de ce jour je confirme avoir pris la décision de continuer d’œuvrer dans les années à venir à l’amélioration du fonctionnement de la Section russe de traduction de l’Office des Nations Unies à Genève [...], et demande à ne plus être considéré comme membre de la fonction publique nationale détaché auprès de l’Organisation des Nations Unies.’

... On 5 August 2005, the [Applicant] wrote a memorandum to the O-i-C HRMS referring to the latter’s memorandum of 4 August 2005 ... The [Applicant] expressed his surprise that despite his memorandum of 2 August 2005 ..., the O-i-C still treated him as being on secondment status. The [Applicant] stressed that as he was no longer on secondment, ‘no concurrence of the Government of the Russian Federation is necessary for the extension of [his] appointment given [his] performance record and the legitimate expectancy stemming from it’.

... The same day, the [Applicant] sent a memorandum to the Secretary-General, requesting review of the administrative decision not to renew his contract beyond 17 August 2005. He further wrote to the Secretary of the Geneva Joint Appeals Board to request a suspension of action of the above-mentioned administrative decision, stressing that it ‘ha[d] been made on a wrong presumption that [he] was a seconded official’.

... On 8 August 2005, the Chief, Languages Service sent a memorandum to the Director Conference Services Division recommending the extension of the FTA of the [Applicant] for a period of two years.

... The same day, the [Applicant] sent a memorandum to the O-i-C HRMS referring to the latter’s memorandum dated 4 August 2005 ..., enclosing a copy of the [Applicant’s] ‘letter of resignation from the Russian civil service’ (i.e. his letter dated 4 August 2005 to the Permanent Mission of the Russian Federation ...).

... On 11 August 2005, the Permanent Mission of the Russian Federation addressed an official note to the Secretariat of the United Nations, informing it that ‘[the [Applicant]] was offered a post not lower than the one he occupied before leaving for Geneva, that is Deputy Director of Department of the Foreign Ministry of the Russian Federation.’

... On 12 August 2005, in view of the note of the Permanent Mission of the Russian Federation of 11 August 2005, the [Applicant] submitted a memorandum to the O-i-C JAB Secretariat, reiterating that no post in the MFA of the Russian Federation had been offered to him.

... On 15 August 2005, the Panel on suspension recommended to the Secretary-General to reject the [Applicant’s] request for suspension of action. The Secretary-General accepted said recommendation on 16 August 2005.

...”

On 14 October 2005, the Applicant filed an appeal with the Geneva JAB. The JAB, adopted its report on 21 February 2007. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

Admissibility

27. Considering admissibility *ratione temporis*, the Panel noted that no time-limits had been waived in this case and that the Appellant had complied with Staff Rule 111.2(a).

28. Concerning admissibility *ratione materiae*, the Panel confirmed that the Appellant did indeed contest an administrative decision under the terms of Staff Regulation 11.1.

29. In view of the foregoing, the appeal was deemed admissible.

Applicable law

30. Regarding the legal provisions applying to the case, the Panel noted that Staff Regulation 4.1 states that ‘upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations [...]’. It stressed that Annex II (c) to the Staff Rules reads ‘the letter of appointment of a staff member on secondment from government service signed by the staff member and by or on behalf of the Secretary-General, and relevant supporting documentation of the terms and conditions of secondment agreed to by the Member State and the staff member, shall be evidence of the existence and validity of secondment from government service to the Organisation for the period stated in the letter of appointment’. The Panel finally put forward that Staff Rule 109.7 (a) provides that ‘[a] temporary appointment for a fixed-term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment’ and that Staff Rule 104.12 (b) (ii) foresees that ‘the FTA does not carry any expectancy of renewal or of conversion to any other type of appointment’.

Merits of the case

31. The Panel recalled the object of the present appeal, i.e. the administrative decision not to extend the Appellant’s FTA beyond 17 August 2005. It also remembered that the main motif evoked by the Administration for the non-renewal of the Appellant’s FTA was his status as seconded official from the Russian Federation and that by an official note of 26 July 2005, the Russian Federation had informed the United Nations that it did not intend to extend the secondment beyond 17 August 2005.

32. The Panel was aware that the legal issues involved in the present case were interspersed with considerations stemming from the Appellant’s relationship with the Russian government, and stressed that it could only deal with the legal issues pertaining to the UN.

33. The Panel recalled that the UNAT has consistently upheld that staff members serving under FTAs 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 (cf. judgements n° 1048, Dzuverovic (2002); n° 1057, Da Silva (2002); and, n° 1084, Sabbatini (2002)). Such countervailing circumstances may include abuse of discretion or an express promise by the Administration, thereby creating an expectancy that the appointment will be extended. (cf. judgement n° 1170, Lejeune (2004)). The Panel stressed that in accordance with the jurisprudence, while the Administration has indeed a discretionary authority in deciding on the non-renewal of FTAs, such discretionary power has to be exercised free of prejudice and other extraneous factors (cf. UNAT judgement n° 885, Handelsman (1998)). In this respect, the Panel recalled that according to the jurisprudence, in case of a non-renewal, the Administration if ‘[it] gives a justification for [the] exercise of discretion, the reason must be supported by the facts’ (cf. UNAT judgement n° 1177, Van Eeden (2004)).

34. The Panel further highlighted that UNAT clarified that the status on secondment of a United Nations staff member is based upon a valid secondment agreement between the three parties concerned - i.e. the releasing Government, the seconded official and the International Organization (cf. UNAT judgment n° 192 Levick (1974)). The Panel put forward that in the same judgment, UNAT defined secondment as a term implying ‘that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits’ (cf. UNAT judgment n° 192 Levick (1974)). The UNAT in subsequent judgments reiterated that genuine secondment must be materialized ‘in writing by the competent authorities in documents specifying the conditions and particularly the duration of the secondment’ and that such

documents – if they exist – must be brought to the attention of the Applicants in order to obtain their consent (cf. judgment n° 482 Qiu, Zhou, Yao (1990)). The Panel found that UNAT also [held] that ‘any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously requires the agreement of the three parties involved’ and ‘when a Government which has seconded an official to the Secretariat of the United Nations refuses to extend the secondment, the Secretary-General of the United Nations, as the administrative head of the Organization, is obliged to take into account the decision of the Government’. In other words, ‘in the absence of a secondment agreed to by all parties concerned in conformity with the above-mentioned principles, the Respondent cannot legally invoke a decision of a Government to justify his own action with regard to the employment of a staff member’ (cf. UNAT judgment n° 192 Levčik (1974)).

35. The Panel stressed that this position was confirmed by the General Assembly which, in Resolution 47/226 of 8 April 1993 stated that the General Assembly ‘decides that the renewal of a fixed-term appointment that extends the secondment status of a staff member seconded from government service shall be subject to agreement by the Organization, the Government and the staff member concerned’. In the same Resolution, the General Assembly also decided to amend Staff Regulation 4.1 and Annex II to the Staff Rules ... It further called upon the Secretary-General ‘to develop a standardized contracting procedure to be used for secondments into and out of the Organization that would take into account the legitimate interests of all the three parties [...] while assuring that the conditions set out in Articles 100 and 101 of the Charter and in the Staff Rules are respected’.

36. In view of the foregoing, the Panel examined whether based on the information contained in the JAB file it could be concluded that there was indeed a valid secondment agreement between the three parties concerned (i.e. the Government of the Russian Federation, the Appellant and the UNOG Administration), and if consequently the justification given by the Administration not to renew the Appellant’s FTA was valid.

37. In this respect, the Panel put forward that first, the status of the Appellant as a seconded official was formally specified in his letter of offer dated 21 June 1999, which was signed and therefore accepted by him on 24 June 1999. The Panel further highlighted that the Appellant never contested his secondment status when his appointment was renewed, i.e. in 2001, 2003 and 2004, and that each of his letters of appointment – which he signed - stated, as a special condition, that he was ‘on secondment from the Government of the Russian Federation’. The Panel further found that the related Personnel Actions for the Appellant also made a specific mention of the Appellant’s status as a seconded official. The Panel further noted that at each renewal of appointment (in 2001, 2003, 2004 and 2005) the Secretariat sought the agreement of the Russian authorities, which in turn provided the Organization with information concerning the conditions and duration of the Appellant’s secondment. It stressed that the official note addressed by the Russian authorities to the UN on 17 July 2001 mentioned (only) that they had ‘the honour to confirm the availability of [the Appellant] for the position [...] UNOG, on secondment from the Government of the Russian Federation for a period of two years expiring on 17 August 2003’. The Panel took note that both in 2003 and 2004, the official notes of the Permanent Mission of the Russian Federation stating that the Appellant would be available on secondment indicated not only the duration, but also detailed information on the conditions of the secondment. The Panel recalled that the official note of the Permanent Mission of the Russian Federation dated 26 July 2005 ... recalling the Appellant to the service of the Government stated that the Russian Federation would fulfil its obligations to reintegrate the Appellant into the services of the Government.

38. In view of the documents on file, the Panel found that the agreement reached between the Government and the Respondent on the matter of secondment did specify the starting point of the secondment, the Applicant’s post in his country and the conditions relating to his return to that post, and that the consent of the Appellant on the former was obtained. The Panel was therefore satisfied that the Appellant’s administrative ties with the Ministry did not cease on signature of his

appointment with the UN, and that in principle, in view of his secondment status, he retained the right to return to the service of the Government after the expiration of the appointment on secondment and that his pension and promotion rights were being protected.

39. Furthermore, in view of the submission of the Respondent dated 10 January 2007, the Panel's understanding was that the standard document which is sent to the respective Government and the note sent back by the Government to the UN in secondment cases correspond to the documents contained in the JAB file and in the Official Status File of the Appellant. As the Appellant had the right to consult his OSF, and in view of the other documents on the JAB file, the Panel was satisfied that there was 'evidence of the existence and validity of secondment from government service to the Organisation for the period stated in the letter of appointment' in accordance with Annex II (c) to the Staff Rules. The Panel found that this agreement covered the whole period stated in his different letters of appointment, including for his FTA from 18 August 2004 to 17 August 2005.

40. The Panel subsequently addressed the argument of the Appellant according to which in fact according to the Russian Labour Code, he was discharged from his functions at the Ministry of Foreign Affairs when he joined the UN in 1999 and that in view of the new Russian law on the public civil service of 2004 'the reality is that there is no notion of secondment in the current Russian legislation'. The Panel felt that it was not within its mandate to examine the national law of a member state, here of the Russian Federation, but that it was limited to consider whether the applicable rules of the International Civil Service Law ... and the case law of UNAT related to secondment have been respected. Even though the Panel did therefore not enter into this line of argument made by the Appellant, it found the explanations of the Appellant in this respect contradictory: The Panel pointed out that while the Appellant claims that he was no longer on secondment status since he joined the UN in 1999 and that since 2004, there was no notion of secondment in the current Russian legislation, he still felt the need to 'resign' from the service of the Government of the Russian Federation in August 2005 ... The Panel also reiterated that at each renewal of his appointment, the Appellant confirmed his secondment status.

41. The Panel specifically examined the Appellant's argument that as through his letter to the Permanent Mission of the Russian Federation dated 4 August 2005 he 'resigned' from his position as a seconded official of the Government of the Russian Federation, his FTA should have been extended on a non-secondment basis. The Panel stressed that according to the jurisprudence of UNAT, a unilateral decision taken by an Applicant to consider him-/herself not bound any more by the special conditions of secondment cannot stand alone, as he/she cannot extract him-/herself unilaterally from the tripartite agreement concerning the secondment status (cf. judgement UNAT n° 763 Stepanenko (1996)). The Panel agreed that the contract remained in effect, and that any changes to its terms must be mutually agreed upon by the parties, and that therefore for the United Nations, the unilateral action of the Appellant to resign from the secondment had no impact on his status as a seconded official under the FTA which terminated on 17 August 2005.

42. The Panel therefore concluded that in view of the foregoing, since the Appellant's FTA was based on a valid secondment agreement throughout its duration (i.e. until 17 August 2005), its renewal was subject to the agreement of the Government of the Russian Federation. As this agreement was not obtained, the decision not to renew the FTA was in conformity with the applicable rules and the case law of UNAT. Furthermore, the Panel did not find sufficient elements on file providing adequate evidence to establish that the decision was based on other, extraneous considerations.

43. Incidentally, the Panel also recalled that the jurisprudence stressed that while the unilateral action of an Applicant concerning his status on secondment is not relevant concerning the extension of the initial contract on secondment, it also found that the first secondment contract does not preclude the possibility of the Applicant's further employment on a non-secondment basis (cf. judgement UNAT n° 763 Stepanenko (1996)). Therefore, the jurisprudence considered that if the Respondent advertises the post encumbered by the Applicant upon expiration of the

appointment on secondment, and if the Applicant applies for the post, he/she would be entitled to full and fair consideration without reference to his prior secondment or the consent of his Government (cf. judgement UNAT n° 763 Stepanenko (1996)). The Panel noted that in the present case, the post encumbered by the Appellant was advertised and that he applied for it, but that he was found not suitable, as he did not have the language exam required in the vacancy announcement. Based on the evidence provided to it, the Panel concluded that the Appellant was given full and fair consideration without reference to his prior secondment or the consent of his Government.

Conclusions and Recommendations

44. In view of the foregoing, the Panel concludes that the Appellant had no right to the renewal of his FTA beyond 17 August 2005 and that on the contrary, by not extending it, the Respondent acted in conformity with the applicable rules/established procedures, and in accordance with the jurisprudence of UNAT.

45. Accordingly, the Panel recommends to the Secretary-General to reject the appeal.”

On 25 July 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General accepts the JAB’s findings and conclusions and in accordance with its unanimous recommendation, has decided to reject your appeal.”

On 2 November 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s case was properly submitted and both receivable *ratione materiae* and *ratione temporis* before the JAB in accordance with the Staff Rules. Hence, the JAB erred in finding that the appeal was time-barred.

2. The JAB Secretariat and the Presiding Officer erred in law by failing to follow the Rules of Procedure and Guidelines of the JAB in effectively supervising the appeal process and taking timely procedural decisions concerning Applicant’s appeal prior to the constitution of the JAB Panel which considered the appeal. The onus falls on the JAB Secretariat and the Presiding Officer to ensure that all the technical aspects of the appeal were satisfied prior to presenting a case to the constituted Panel.

3. The JAB Panel erred in law and misdirected itself by incorrectly, interpreting Rule F and G of the JAB Rules of procedure with regard to the receivability of the appeal before the JAB and applied subjective reasoning and value judgments of Applicant’s motive without taking into account the exceptional circumstances that would justify a waiver, even if the said Rules were applicable to this case.

Whereas the Respondent’s principal contention is:

1. The Applicant had neither the right to nor the expectancy of renewal of his 100 series fixed-term appointment.

2. The Applicant was appointed to the Organization on a valid secondment and, accordingly, the Organization was obliged to take into account the decision of the Government when determining whether to extend the secondment.

3. The Applicant was given full and fair consideration for further employment with the Organization on a non-seconded basis.

4. The Applicant's request for review of his treatment by the Respondent upon separation from service is not receivable.

The Tribunal, having deliberated from 9 July to 31 July 2009, now pronounces the following Judgement:

I. The Applicant brings his appeal to the Tribunal, challenging the Organization's decision not to renew his fixed-term appointment as Chief, Russian Translation Section in the Conference Services Division at UNOG, when it expired on 17 August 2005. Specifically, the Applicant alleges that his programme manager made express promises to him that his contract would be reinstated and that this created a legitimate expectation of renewal, which the Organization refused to honor. In addition, the Applicant, on secondment from the Russian Government for the entire duration of his service with the Organization, asserts that he was free to terminate his secondment unilaterally, and that once he did that, the Organization should have offered him a secondment-free contract to continue in service. The Applicant also alleges that he was not afforded due process and fair procedure in the context of his appointment and the non-renewal and that he suffered prejudice and arbitrary treatment at the hands of UNOG's Director/General. Finally, the Applicant alleges that he was not fully and fairly considered for his post, which was advertised subsequent to the expiration of his fixed term contract.

II. The Respondent denies all charges, asserting that the non-renewal was proper, that the Applicant was afforded due process, and that the Applicant was not treated unfairly by the Director/General. Furthermore, the Respondent alleges that the Applicant was given full consideration for the re-advertised post of Chief, Russian Translation Service, but that he was ineligible, as he had not passed the required language exam.

III. The Applicant joined the service of the Organization in August, 1999 as Chief, Russian Translation Service. Prior to his joining the Organization, an offer of a two year fixed term contract was recommended by the APB and approved by the Organization in March 1999. In a memorandum dated 11 March 1999, the APB specifically noted that it had agreed to recommend the recruitment of the Applicant provided that "his appointment [would] be limited to service on posts considered outside the system of desirable range." In other words, the Applicant would not be eligible to hold posts that were subject to geographic distribution.

IV. On 21 June 1999, the Organization sent an official offer letter to the Applicant, offering him the two year fixed-term contract recommended by the APB and approved by the Secretary-General. In that offer letter, the Organization specifically set out the fact that the appointment was being offered subject to his secondment from the Russian Government. The Applicant accepted this offer in writing with his signature, dated 24 June 1999. Thereafter, the Applicant commenced his service with the Organization on 18 August 1999. On 25 August 1999, the Organization issued its Letter of Appointment to the Applicant, in which it was noted under the heading "Special Conditions", the following: "Staff member is on secondment from the Government of the Russian Federation. This appointment is limited to service on posts considered outside the system of desirable range".

V. The Applicant accepted the Letter of Appointment, including its "Special Conditions", by signature dated 2 September 1999, wherein he specifically accepted the appointment described, "subject to the conditions specified therein".

VI. On 4 July 2001, the Organization sent a Note Verbale to the Permanent Mission of the Russian Federation, offering a two year extension of the Applicant's appointment, from 18 August 2001 to 17 August 2003. The Note Verbale included an acknowledgement that the appointment was subject to the Applicant's secondment from the Russian government. The offer was accepted by the Russian government, by written communication dated 17 July 2001. In its response, the Russian government noted the Applicant's secondment, which would continue for a period of two additional years, until 17 August 2003. Thereafter, another Letter of Appointment was sent to the Applicant on 9 August 2001. Again, this Letter of Appointment included the "Special Conditions" of the previous Letter of Appointment, and, again, on 2 August 2001, the Applicant accepted the appointment "subject to" those "Special Conditions."

VII. On 4 August 2003, 13 days before the Applicant's appointment was due to expire, the Organization offered the Applicant an extension of his contract, this time for only one year. In response, the Russian Permanent Mission confirmed the availability of the Applicant for the position. In addition, the Note Verbale, in relevant part, specifically noted that:

"As [the Applicant] is presently in the service of the Government of the Russian Federation with the Ministry of Foreign Affairs the Government proposes that the Secretary-General consider him for an appointment on secondment to the Secretariat of the United Nations for a period of 1 year.

The Government undertakes to protect the accrued pension and promotion rights of the seconded official and to guarantee that [the Applicant] has the right to return to the service of the Government after the period of secondment to the United Nations.

[The Applicant] has indicated to the Government a wish to be considered for an appointment to the Secretariat on secondment from Government Service in order to protect all pension and promotion rights and to retain the right to return to the service of the Government after the expiration of the appointment on secondment."

VIII. Thereafter, in August 2004, the Organization again offered, via Note Verbale to the Russian Government, to extend the Applicant's fixed-term contract for an additional year, commencing 18 August 2004 and ending 17 August 2005. In response, the Russian government agreed to continue the Applicant's secondment for another year, including in its response the exact same language regarding secondment as it had included in its agreements to continue the Applicant's secondment in 2001 and 2003.

IX. In June 2005, the Chief of the Languages Service wrote to the Director of the CSD proposing that the Division of Conference Services seek a two year extension of the Applicant's contract. Thereafter, on 8 August 2005, she reconfirmed in writing her recommendation to extend the Applicant's contract for two years. The Applicant alleges that these two recommendations were two examples of the Chief's consistent "express promises to recommend at least a two year's extension of the Applicant's appointment on the basis of his performance...".

X. On 2 August the Applicant sent a memo to the Organization, indicating that he had just learned that day that his contract would not be extended, and he asked the Administration to confirm the non-renewal. In another memorandum, dated the same day, the Applicant informed the Organization that it should not consider him to be on secondment "any more". In that memorandum, the Applicant indicated that he had informed the Russian authorities of his decision. Specifically, he explained that, in fact, his official working relation with the Ministry of Foreign Affairs had ceased in August 1999, when he was, he claims, discharged from the Ministry. In support of his position, the Applicant included a copy of the record in his work-book, a box chart, allegedly translated from Russian, which indicated that on 19 August 1999, the Applicant was discharged, at his demand, from the functions in the Ministry of Foreign Affairs of the Federation of Russia on the occasion of his affiliation with the United Nations at Geneva. The translated box chart is not printed on official stationery of the Russian government, but simply on a blank piece of paper.

XI. On 4 August, the Applicant further confirmed his demand of the Russian government that he not be considered a member of the national Russian civil service seconded to the Organization. On that same day, in an internal memorandum of the Organization, the Organization confirmed its receipt from the Russian government of an official note notifying the Organization of that government's intention to "recall [the Applicant] to the service of the Russian government and [offer] him an assignment within the Ministry" and of the government's decision not to extend the Applicant's secondment beyond the expiration of his fixed-term contract. The Director of the Conference Service Division was then directed to notify the Applicant of his government's intentions. Also on that same day, the Applicant received a memorandum from the Officer-in-charge, HRMS, taking note of the Applicant's wish to no longer be considered on secondment from the Russian Government and confirming that the Organization would continue to treat the Applicant as a seconded official until the expiration of his fixed term appointment.

XII. On 5 August, in another memorandum to the Organization, the Applicant reconfirmed to the Organization his position that he should no longer be treated as a seconded official and that, as such, the Organization did not need the concurrence of the Government of the Russian Federation to extend his appointment. Moreover, the Applicant stated his belief that he had a legitimate expectation of renewal “given [his] performance record”.

XIII. On 17 August, the Applicant was separated from service, upon the expiration of his fixed-term contract.

XIV. Thereafter, on 6 October 2005, the post previously held by the Applicant was advertised. Although the Applicant applied, he was determined to be ineligible for the position, as he did not meet the stated requirements for the post; that is, he had not passed the United Nations Competitive Examination for Russian Translators.

XV. The Tribunal turns its attention to the Applicant’s claim that the non-renewal of his fixed term appointment was improper and that he had a legitimate legal expectancy of renewal of his contract. In this regard, the Tribunal notes staff rule 104.12(b)(ii), which provides, in relevant part, that a “fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”. Moreover, staff rule 109.7 (a) provides that a “temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment”. This principle is also specifically codified in the several Letters of Appointment signed by the Applicant, each of which provided that “[t]he Fixed-Term Appointment does not carry any expectancy of renewal or conversion to any other type of appointment ...”.

XVI. “The Tribunal has consistently held that fixed-term contracts do not carry any right of renewal and that no notice of termination is necessary in such cases ... (see Judgement No. 839, *Noyen* (1997)).” Judgement No. 1057, *Da Silva* (2002), paragraph IV. The Tribunal has held, however, that where an express or implied promise to continue employment is made to the staff member, he or she may indeed have a legitimate expectancy of renewal. (See Judgement No. 1234 (2005)). Furthermore, where there is evidence that the non-renewal of a contract was the result of abuse of discretion, prejudice or discrimination, improper motivation or other extraneous factors, the Tribunal has found that expectancy of renewal may exist. (See Judgements No. 981, *Masri* (2000), paragraph VII; No. 1057, *Da Silva* (2002), paragraph IV; and No. 1207, *Di Filippo* (2004), paragraph III). However, where a staff member seeks to vitiate the Respondent’s decision on the basis of prejudice, improper motive or other extraneous factors, the burden of proving such prejudice or improper motive is on the staff member, who must adduce convincing evidence. (See Judgment No. 834, *Kumar* (1997)). (See also, Judgement No. 1232, (2005), paragraph V.).

XVII. In the instant case, the Applicant confuses the Chief, Languages Service's proposal to *recommend* the extension of his contract with a *promise to extend* his contract. At no time, according to the evidence before the Tribunal, did the Organization promise, either expressly or impliedly, that his contract would be renewed. Moreover, the fact that his performance reviews revealed him as a very qualified and efficient staff member who often "frequently exceed[ed] expectations" does not change the Tribunal's conclusion in this regard, as it has held previously that "efficient or even outstanding performance" would not normally give rise to a legal expectancy of renewal". (See Judgement No. 1305 (2006), citing Judgement No. 980, Baldwin (2000)). Thus, the Tribunal finds that the Applicant had no legal expectancy to renewal of his contract.

XVIII. The Tribunal next turns its attention to whether the decision not to renew was proper or whether it was motivated by improper, extraneous factors. The Applicant's allegations in this regard are confusing. On the one hand he asserts that although he was on secondment initially, he revoked his relationship with the Russian government in August of 2005, and from that point forward he should have been considered a non-seconded staff member whose contract should have been renewed in the ordinary course of events. Alternatively, the Applicant asserts that his official relationship with his government ended in 1999, when he sought and was granted discharge from the Russian Ministry of Foreign Affairs. In support of this latter position, the Applicant alleges that there was never a tripartite secondment agreement between the Organization, his government and himself. Instead, he argues, there were only two bipartite agreements – one between the Organization and himself and the other between the Organization and his government. As such, then, he argues that since there was not a valid secondment, it was improper for the Organization to deny him the extension of his contract on a non-seconded basis. A close examination of the record, however, reveals the flawed rationale of the Applicant's latter contentions. Based on the record, it would appear that the Applicant was still in the service of his government in 2005. If not, why would he have had to resign in August of 2005, when he learned that neither his secondment nor his contract would be continued if, in fact, he had had no relationship with the government since 1999. It is clear to the Tribunal that indeed a valid secondment did exist. (See, Staff Rule 104.12(b)(iii)). The Tribunal notes that the Applicant's contracts—each and every one of them – expressly were made subject to his secondment from the Russian government. In each Letter of Appointment, that condition was specifically noted, in a separate paragraph titled "Special Conditions", and the Applicant signed all such letters, indicating his acknowledgement of same. Furthermore, as a seconded staff member, the Applicant enjoyed certain advantages over other staff members who were, unlike him, for example, subject to constraints such as geographical distribution limits and competitive selection. Knowing full well that there was a secondment in place, the Tribunal finds disingenuous the Applicant's assertions – after the fact—that no such relationship existed. As the Tribunal finds there was a valid secondment arrangement among the parties, including the Applicant, "any subsequent change in the terms of the secondment initially agreed on, for example its extension, obviously require[d] the agreement of the three parties involved." (See Judgement

No. 192, *Levcik* (1974)). (See also Judgement No. 763, *Stepanenko* (1996) and Judgement No. 333, *Yakimetz* (1984)). As the Applicant had been employed solely on a secondment basis, the Russian government did not agree to extend the secondment, and the contract was made conditional upon that secondment, it was reasonable and not improper for the Organization to consider the views of the Russian government and to make a decision not to renew the Applicant's fixed term contract. (See *Levcik* (ibid.)).

XIX. Moreover, the Applicant has failed to adduce sufficient evidence that the Organization's decision not to renew his contract was motivated by extraneous and improper factors. The Applicant alleges first that the Director/General engaged in a long pattern and practice of harassing him, personally and professionally, in an effort to discredit and humiliate him, and with an eye to removing him from his position as Chief, and that this was the reason his contract was not renewed. He also submits evidence of a case of alleged mismanagement brought unfairly against him, which was re-invigorated by the Director/General and which, according to the Applicant, provides further proof of the Director/General's campaign to discredit and harass him. However, the Applicant's evidence in support of his position falls short of convincing the Tribunal that the Organization's decision not to renew his contract was based on anything other than the refusal of the Russian Government to extend the Applicant's secondment. While the Tribunal is not unmindful of the complex and pervasive political considerations at work in this matter, the Tribunal can only address the legal issues before it. Therefore, the Tribunal concludes that the Applicant has not discharged his burden of proof, and his claim in this regard is denied.

XX. Next, the Tribunal considers the Applicant's claim that when he applied for his previous post, in response to the advertised VA, he was not fully and fairly considered for the position. According to the VA, any qualified candidate had to have passed the United Nations Competitive Examination for Russian Translators. Although the Applicant had held the position and fulfilled its duties in a fully satisfactory way for five years, he had never passed the requisite Competitive Exam. As such, he could not satisfy the stated minimum requirements of the job, and therefore, could not be considered for the position. (See Judgement No. 1122, *Lopes Braga* (2003)). In this regard, the Tribunal notes the broad powers accorded to the Organization in the recruitment of its staff. (See Judgments No. 834, *Kumar* (1997) and No. 1245, (2005)).

XXI. Finally, the Applicant alleges that as he had been a staff member for five years, he was entitled to be considered for a career position in accordance with Staff Rule 104.12(b)(iii), which provided:

“... upon completion of five years continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2 and who is under the age of fifty-three years will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.”

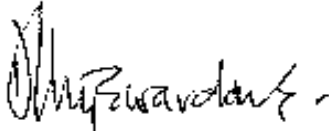
However, the Tribunal finds this rule inapposite to the instant matter, as at the time when the Applicant had completed five years of service under his fixed-term contracts, he was already beyond the age of fifty-three. Thus, the Tribunal rejects this claim by the Applicant.

XXII. In light of the foregoing, the Tribunal rejects the Application in its entirety.

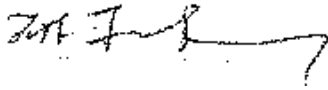
(Signatures)



Jacqueline R. **Scott**
First Vice-President



Dayendra Sena **Wijewardane**
Second Vice-President



Goh Joon Seng
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary