



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 626

Case No. 676: SELVADURAI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Ioan Voicu; Mr. Francis Spain;

Whereas at the request of Timothy Selvadurai, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 7 December 1990, 7 September and 31 December 1991, 1 April and 30 June 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 22 June 1992, the Applicant filed an application requesting, inter alia, the Tribunal:

"...to instruct the Secretary-General and the Executive Secretary of UNEP to:

(a) Pay in a lump sum to the Applicant the thirty percent loss of pension, from the date of separation of the Applicant to the Applicant's 60th birthday;

(b) ... authorize damages to the Applicant and his family for economic, financial and physical stress;

(c) ... pay in lump sum to the Applicant an appropriate amount that the Applicant would have received from his 60th birthday to a life expectancy up to 80 years of age;

(d) ... pay to the Applicant all cost of living allowances for the loss of monies he would have received from the date of separation;

(e) ... pay in a lump sum to the Applicant all monies that would have been paid for health insurance, life insurance, dental insurance and hospital insurance from the date of his termination to his 60th birthday for himself, his wife and dependent children."

Whereas the Respondent filed his answer on 20 November 1992;
Whereas the Applicant filed written observations on 30 March 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 May 1967, as an Administrative Officer for a UNESCO/UNDP project in Sri Lanka. From 15 August 1969, he worked as a Research and Programme Officer for UNDP, until his transfer, on 25 July 1974 to UNEP in Nairobi, on a fixed-term appointment of two years at the P-2, step IV level, as Special Assistant to the Assistant Executive Director. He served on a further two year fixed-term appointment and was promoted to the P-3 level, with effect from 1 April 1977.

The Applicant was reassigned to the Regional and Liaison Offices Unit with effect from 1 January 1978, as Administrative Officer. On 1 March 1979, he was appointed Chief, Regional Offices Co-ordination Unit. He served on a succession of further fixed-term appointments through 31 December 1986. He was promoted to the P-4 level, with effect from 1 April 1983.

On 1 January 1985, the Applicant was reassigned to the Office of the Environment Fund and Administration, Fund Management Branch, as Fund Management Officer (FMO). In a memorandum dated 20 January 1986, the Assistant Executive Director, Office of Environment Fund and Administration, informed the Applicant that "the Executive Director was completely dissatisfied with the presentation of ... fact sheets as submitted..." and concluded by stating: "It is the

Executive Director's position that if your performance does not improve, contractual consequences might result".

The Applicant's performance during the period 1 January 1985 through 28 February 1986, was evaluated in a performance evaluation report (the first report) in which the First Reporting Officer, the Chief, Fund Programme Management Branch, gave him five C ratings, eight B ratings and one A rating. The Deputy Assistant Executive Director, Fund and Management, as Second Reporting Officer, noted: "Overall [the Applicant's] performance falls somewhere between good and very good. The [Applicant] was posted into the Fund about one year ago against his wishes. He has worked hard but has found the work difficult. Overall, it seems unlikely that [the Applicant] will ever make an outstanding FMO and his talents would be better used elsewhere in the house." On 22 April 1986, the Applicant signed the report stating his intention to rebut it. He did so on 16 May 1986, in accordance with administrative instruction ST/AI/240/Rev.2. The Applicant's appointment was extended for a further fixed-term period of one year, through 31 December 1987.

The Applicant's performance from 1 March 1986 to 31 March 1987, was evaluated in a performance evaluation report (the second report), in which the Chief, Fund Programme Management Branch, gave him nine C ratings and four B ratings. His overall performance was rated as a "good performance". On 10 June 1987, the Applicant signed the report, stating his intention to rebut it. He did so, in accordance with administrative instruction ST/AI/240/Rev.2, on 7 July 1987.

On the same date, the Assistant Executive Director, Fund and Administration, informed the Applicant that the Executive Director had decided not to extend his fixed-term appointment beyond 31 December 1987. He stated:

"In reaching this decision however, note was taken of the fact that the outcome of the rebuttal procedure for your two most recent Performance Evaluation Reports is not yet known. The above decision is therefore communicated to you without

prejudice to a review of the decision once the results of the rebuttal procedure are known.

Please treat this letter therefore as confirmation of the indication I gave to you verbally on 3 June 1987, that your appointment may not be extended beyond its expiry date. This confirmation is given at this time in accordance with the Executive Director's policy of advising staff of non-extension well in advance so that they may make their plans accordingly."

The Panel constituted to evaluate the rebuttal of the first report concluded, on 10 August 1987, as follows:

"15. ... Programme officers who dealt with [the Applicant] in a professional capacity, ... were all unanimous in their praise of his work and his co-operative spirit. Although he had started slowly, after familiarizing himself with his job, he was - in their collective opinion - an efficient and hard-working officer.

16. ... from the evidence it had at its disposal, the Panel is not able to make a recommendation as to the correctness of the ratings ... The Panel does see, however, a strong case for mitigating circumstances arising from the following facts:

(a) the sudden transfer of the [Applicant] to Fund Management for which he had no particular experience, a fact warranting a less rigorous assessment during the first evaluation;

(b) keeping the [Applicant] under the supervision of a first reporting officer whose previous evaluation of the [Applicant] had been strongly challenged by a second reporting officer;

(c) the management of the AGFUND projects, on which a great deal of the low ratings in the evaluation of the [Applicant] seems based, cannot be blamed entirely on him alone as the supervisors themselves had certain responsibilities which were apparently not discharged.

17. The Panel recommends that the Performance Evaluation report should not be used as a basis for the assessment of [the Applicant's] performance and

extension of contract, without due consideration of the Panel's observations in paragraph 16 above. At least, greater weight should be given to subsequent evaluations."

The Executive Director, in his appraisal of the report communicated to the Applicant on 9 October 1987, concluded:

- "(a) that there should be no specific change in the text of the report;
- (b) the report should be read in conjunction with paragraph 16 of the report of the Rebuttal Panel attached;
- (c) that greater weight should be given to subsequent evaluations in assessing performance."

In its report dated 9 October 1987, the Panel constituted to investigate the rebuttal to the second report, concluded that:

"The recommendations of the panel would bring the [Applicant's] ratings to 8B and 5C. This will elevate his overall rating marginally closer to B, 'Very good'.

...given the experience of the last yeras, [the Applicant's] continued encumberment of an FMO post may be untenable both from a substantive and personal point of view, particularly if daily contact with the FRO [First Reporting Officer] is to be maintained. The long standing strained relationship may preclude such an option. Reassignment elsewhere could, of course, open up opportunities for the continued use of [the Applicant's] services."

On 25 November 1987, the Chief, Personnel Section, transmitted to the Applicant a copy of the Executive Director's decision of 20 November 1987, on the changes to be made in the second report, pursuant to the recommendations of the rebuttal Panel, including his decision to change the Applicant's overall rating to "Very Good".

In the interim, the Applicant had lodged an appeal with the Panel on Discrimination and Other Grievances (the Panel on Discrimination) whose Coordinator, on 10 December 1987, wrote to the Executive Director, asking that the Applicant's appointment be extended for two months, through 29 February 1988, to enable the Panel to complete its work. The Applicant's appointment was extended through 31 December 1987 and subsequently, by monthly extensions to 1 March 1988, when he separated from the service of UNEP.

On 22 January 1988, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment.

On 18 February 1988, the Coordinator of the Panel on Discrimination transmitted to the Executive Director the Panel's report on the Applicant's case and its recommendations:

"...

The Panel has noted, through the documentation available to it, that the [Applicant] has served for 20 years with the United Nations, 13 of these years in UNEP in unbroken service. That during this period, the [Applicant] has been evaluated as much as 9 times in 11 years (before joining the Fund) by 7 officers in 5 different jobs. All PERS [Performance Evaluation Reports] have received 'Very Good' to near 'Outstanding' evaluations. It is perfectly clear to this Panel therefore, that [the Applicant] has demonstrated both mobility and capability during his career with the UN. The Panel has also noted that [the Applicant] has only another 5 years of active service before reaching the maximum retirement age of 60 years.

Recommendations

In view of the foregoing, the majority of the Panel members (one member dissenting) would recommend an appeal to the Executive Director to exercise his discretion in implementing the Guidelines for extension of fixed-term appointments with regard to 'C ratings in specially important areas' and further review the [Applicant's] contract, considering that the [Applicant's] ratings and overall rating have

been upgraded to 'Very Good'. The Panel would recommend the reassignment of the [Applicant] to another office where, as has been demonstrated in his career over the past years, the Organization itself can benefit from his long service and experience."

In a letter dated 29 February 1988, the Chief, Administrative Service, informed the Applicant as follows:

"The Executive Director has again carefully reviewed the decision not to extend your Fixed-Term Appointment with UNEP which decision was first conveyed to you in June 1987 and reiterated in my letter to you of 10 December 1987. In doing so, he has also taken into consideration the report of the Panel on Discrimination and Other Grievances addressed to him dated 18 February 1988. I am sure you will realize this was not a decision lightly taken given your length of service with UNEP, but I regret that the decision communicated to you has been maintained by the Executive Director in the interest of the Organization given the present financial constraints which permit him to retain only those staff who are turning in a high all-round standard of performance in accordance with the established criteria in this connexion.

Your last day of work will, therefore, be today Monday, 29 February 1988 C.O.B. [Close of Business]. Two extra days in lieu of travel time (i.e. 1 and 2 March 1988) will be added to your final payment.

In the meantime, I must convey to you the Executive Director's sincere appreciation for the service rendered to UNEP in earlier years and good wishes for whatever endeavour you and your family undertake in the future."

Having received no reply from the Secretary-General to his request for administrative review, on 27 April 1988, the Applicant lodged an appeal with the Nairobi Joint Appeals Board (JAB). The Board adopted its report on 21 March 1990. Its conclusions read as follows:

"29. The Panel concluded that the basis for non-renewal of the fixed-term contract was the purely discretionary application of internal UNEP

guidelines. It follows that their application in this case could have equally been in favour of the appellant's expectation to have his contract renewed. The Panel further concluded that the non-extension of the appellant's contract appears not justified on budgetary grounds but was brought about by a negative assessment of his performance. The Panel recognized the authority of UNEP's management to take decisions in the interest of the Organization which are intended to keep up the high performance level of its professional staff.

30. The Panel is also of the opinion that the circumstances of the appellant's transfer to a post for which he did not consider himself qualified, and his placement after transfer under the same supervisor against whom he had alleged a personal bias, should have warranted extreme caution in applying the guidelines against the interests of the appellant. As he did not possess the required qualifications for the new assignment, he should have been given extensive training by his supervisor, and been allowed reasonable time to perform the new duties at the expected level. Under these circumstances, the Panel found it questionable to carry out a PER after little more than one year in the new position, and nine months before the expiry of his final FTA [Fixed-Term Appointment]. In addition, the Panel noted that no PER was done at the expiry of his final contract.

31. As the separation of the appellant from UNEP was based solely on his last two PERs, it, therefore, appears reasonable to the Panel that all the factors mentioned above mitigated [sic] against the appellant receiving a performance rating acceptable to UNEP management which would have allowed the appellant to continue his employment with UNEP. In fact, it is the feeling of the Panel that his supervisors should have expected a performance on the part of the appellant in certain key areas of the PER which would not be at par with his colleagues performing the same duties (all of which have between 6 to 8 years experience on the post) and, therefore, his supervisors should have given the appellant sufficient time to perform reasonably well on his post before evaluating him. This opportunity, in the view of the Panel, was denied the appellant and, therefore, the Panel feels that the appellant is due some form of compensation to redress his grievances.

32. On the other hand, as there is no certainty that the appellant's performance would have improved had he been given more time to perform at a level acceptable to his supervisors, the Panel refrains from recommending the reinstatement of the appellant. In the opinion of the Panel, therefore, and taking into account all of the observations noted in the preceding paragraphs, the most suitable form of compensation would be a payment by the Organization in the form of full contribution to the Pension Fund (employer's and beneficiary's shares) for the period of five years, so as to enable the appellant to receive full retirement benefits when he reaches the age of 60."

On 16 April 1990, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and noted that you were serving on a one-year fixed-term appointment under staff rules 109.7(a) and 104.12(b) which expired automatically and did not carry any expectancy of renewal or of conversion to any other type of appointment, as provided for in your Letters of Appointment. The Executive Director of UNEP decided within his prerogative not to renew your fixed-term appointment in accordance with the internal UNEP guidelines, based on the evaluation of your work performance, and you were notified accordingly. The Secretary-General has therefore decided to maintain the contested decision.

Notwithstanding the above, the Secretary-General has decided, taking into account the entire circumstances and that you were granted a final two-month extension to allow the Nairobi Grievance Panel to complete the review of your case, to grant you an ex-gratia payment in the amount of three months net base salary, in final settlement of the matter.

..."

On 22 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The decision not to renew the Applicant's contract was arbitrary and imputable to "several personal disagreements" with the First Reporting Officer.

Whereas the Respondent's principal contentions are:

1. The Respondent had the discretionary authority not to renew the Applicant's appointment.

2. The Applicant had no reasonable expectancy of the renewal of his fixed-term appointment.

3. The Respondent fulfilled his obligation to give the Applicant every reasonable consideration for a career appointment, pursuant to the applicable General Assembly resolution.

4. The Respondent properly exercised his discretion in reaching a decision on the JAB recommendation.

The Tribunal, having deliberated from 28 October to 12 November 1993, now pronounces the following judgement:

I. The Applicant had a long period of service with the United Nations. It began in 1967 and lasted for 20 years. During this time, he was given many fixed-term appointments and awarded several promotions. His career culminated with his appointment as Fund Management Officer with UNEP but it came to an unhappy end in 1987, when his contract was not renewed.

II. The Applicant's record, since 1967, is of significance in considering the non-renewal of his contract. His repeated fixed-term contracts and his promotions attest to the fact that, during the period leading up to his final years, he was, at the very least, considered to be an efficient and capable worker.

III. The Applicant's troubles began with his assignment to the post of Fund Management Officer in January 1985. He was transferred to a job for which he had no training and experience. An added

difficulty, according to the Applicant, was that he had to serve under a First Reporting Officer with whom he had had problems previously. According to the Applicant, there was friction between himself and this officer because, on the instructions of the Deputy Executive Secretary, the Applicant reported directly to the latter, bypassing the First Reporting Officer.

IV. This brings the Tribunal to the central aspect of the case, namely that the Applicant was transferred to a new post, for which he had no experience and no training, a fact which has not been disputed; that while he was working in the new post, the First Reporting Officer prepared two performance evaluation reports which were rebutted by the Applicant. On the basis of these reports, after they were rebutted by the Applicant and indeed, some of the ratings upgraded, the Applicant's fixed-term contract was not renewed, under the guidelines established by the UNEP Executive Director.

V. The Tribunal has considered the various reports and, in particular, the performance evaluation reports dealing with the periods, 1 January 1985 - 28 February 1986 and 1 March 1986 - 31 March 1987. It has also considered the documents related to the performance evaluation reports and noted the adverse criticism, some of it severe, by the First Reporting Officer. However, despite such criticism, the Tribunal is of the view, that the performance evaluation reports in themselves, do not provide evidence of a bias on the Reporting Officer's part against the Applicant. In general, they indicate that the Applicant had substantial ability in many areas.

VI. Nevertheless, the performance evaluation reports did provide the Administration with the basis on which to dispense with the Applicant's services. For this purpose, the following UNEP guidelines were brought into play:

"Staff in the Professional and above categories and General Service category of the G-6 and above levels who, although rated 'very good' need to improve their performances. If there is a 'C' or 'D' in the area which is marked 'specially important' in the performance evaluation report form, the extension may not be granted."

The Applicant was awarded 'C' in at least one area marked specially important and, so, on the basis of the strict application of the Executive Director's guidelines, his contract was not renewed, even after the rebuttal and upgrading.

VII. There is disagreement between the Applicant and the Respondent as to whether the job he held prior to his appointment as Fund Management Officer was abolished. Wherever the truth lies, the Applicant ended up in this new job, for which he was unprepared. The Tribunal feels that it is reasonable to conclude that the Applicant's perceived inability to cope with the job and of remaining unsuited to it must have resulted from his not having been given sufficient preparation and training. The Applicant's ability to carry out his work under all his previous contracts indicates that if he had been given adequate time and sufficient training in this new post, the probability is that he would have overcome the difficulties. This, in the Tribunal's view, was the background against which the contract was not renewed.

VIII. The Respondent's case is that the Applicant did not have any expectancy of renewal of his fixed-term appointment. The Respondent refers to staff rule 104.12(b):

"the fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including persons temporarily seconded by national Governments on institutions for service with the United Nations. The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

IX. The Applicant had worked for the United Nations for many years. While a fixed-term contract does not, in itself, carry an expectancy of renewal, the Applicant was, surely, entitled to every reasonable consideration for further appointment. The Tribunal notes that some consideration was accorded to the Applicant in relation to certain other posts. However, it does not view these efforts as sufficient, under the circumstances of this case. The lack of further consideration was all the more significant, in the view of the Tribunal, because the Administration brought about the situation which gave rise to his difficulties by appointing him to the post in question and then failing to support him. Indeed, the difficulties were rendered even greater because of the unsatisfactory relationship between the Applicant and the First Reporting Officer

X. Further, the Administration did not exercise sufficient care in assigning the Applicant to a position without, first of all, ensuring, in so far as it could, that he was reasonably suited to the post and in supporting him in the initial stages. It is to be noted from the report of the Panel which investigated the PERs for the period 1 March 1986-31 March 1987, that the Panel was, on the one hand, given statements that the Applicant was unsuited to the post, while some of his peers, on the other hand, said that he was "at a par with his peers". However, the Panel, in its report, describes the assessment it received, that the Applicant was unsuited, as almost unanimous. The Tribunal agrees.

XI. The Tribunal is of the view that the Administration, by employing more care in assigning the Applicant to his new post, and by helping him become adjusted to the work, could have ameliorated the situation to the point where, in all probability, the Applicant would have successfully adapted to the work.

XII. In the light of the foregoing, the Tribunal finds in favour of the Applicant. Because of losses accruing to the Applicant as a

result of the non-renewal of his appointment, including loss of pension and other benefits to which he was entitled, the Tribunal orders the Respondent to pay to the Applicant an amount equivalent to one year's net base salary at the rate in effect on the date of his separation from service.

(Signatures)

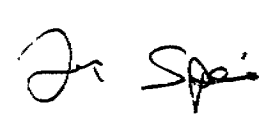


Luis de POSADAS MONTERO
Vice-President, presiding


Ioan VOICU
Member



Francis SPAIN
Member



New York, 12 November 1993



R. Maria VICIEN-MILBURN
Executive Secretary