



**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1026

Case No. 1130: STURDZA

Against: The Secretary-General  
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, First Vice-President, presiding; Mr. Kevin Haugh,  
Second Vice-President; Mr. Spyridon Flogaitis;

Whereas at the request of Marina Sturdza, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 March 2000, the Applicant filed an Application containing pleas which read as follows:

**"II. Pleas**

7. With respect to ... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules;

8. On the merits, the Applicant respectfully requests the Tribunal:
- (a) *to rescind* the decision of the Secretary-General insofar as he rejected the unanimous findings and recommendations of the Joint Appeals Board and as to the reduction in the amount of compensation to be paid the Applicant to one month's net base salary for delays in completing her PERs [performance evaluation reports];
  - (b) *to sustain* the Joint Appeals Board's findings that the Applicant was denied fair treatment and due process by the manner in which her performance was reviewed and the extension of her appointment was decided.
  - (c) *to find and rule* that the Secretary-General's decision occasioned a failure of justice in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under the Staff [Regulations and Rules];
  - (d) *to order* that the Applicant be reinstated with effect from 1 March 1997 and afforded consideration for a permanent appointment;
  - (e) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant including the damage to her professional reputation and for the lack of due process afforded her and the duress to which she was subjected as a result of the Respondent's actions or lack thereof;
  - (f) *to 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 three year's net base pay in view of the special circumstances of the case;
  - (g) *to award* the Applicant as cost, the sum of \$10,000.00 in legal fees and \$500.00 in expenses and disbursements."

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 30 September 2000 and periodically thereafter until 31 March 2001;

Whereas the Respondent filed his Answer on 14 March 2001;

Whereas the Applicant filed Written Observations on 30 July 2001;

Whereas, on 6 November 2001, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF as Chief, Marketing/Sales, Greeting Card Operation (GCO), Geneva, on a two-year, 21-day fixed-term appointment, at the P-5 level, on 8 February 1992. Her appointment was successively extended for further fixed-term periods of different duration, the last appointment expiring on 28 February 1997.

On 4 February 1994, the Applicant received her first PER, giving her ratings ranging from "good" to "outstanding". Her second PER, covering the period 1 May 1993 to 30 April 1994, was received by the Applicant in September 1995 and showed a decline in some of her ratings. The Applicant did not submit a formal rebuttal but did submit her comments on the PER to Mr. R. Freiberg, the then Director, GCO, and the Deputy Director, GCO, in a memorandum dated 3 October 1995.

On 27 December 1995, the Deputy Director, GCO, the Applicant's direct supervisor, responded to the 3 October memorandum. On the same date, she wrote to Mr. J. Williams, Acting Director, GCO, and the Personnel Officer for GCO, informing them, that based on the Applicant's performance, she could not recommend the conversion of the Applicant's appointment from fixed-term to permanent. Instead, she recommended a two-year extension of the Applicant's fixed-term contract.

The Applicant received her third PER, covering the period 1 May 1994 to 30 April 1995, on 18 January 1996. The Applicant agreed with the ratings only to "some extent" and, on 8 February 1996, submitted a formal rebuttal, covering both her second and third PERs.

On 2 April 1996, the Applicant wrote to the Deputy Executive Director, Operations, UNICEF. She stated that she and her supervisor had agreed that they "could together resolve outstanding issues and agree on their future collaboration" and requested that the formal rebuttal procedure be stopped "on the understanding that her supervisor had "recommended [her] contract renewal". The Applicant further requested that her written response to the PER ratings and comments be considered statements of explanation and that they be attached to her PER records.

On 7 May 1996, the Applicant's supervisor wrote to Mr. Mr. Williams, the then Director, GCO, informing him that, since the Applicant had not been recommended for conversion to permanent status, the Department for Human Resources (DHR) had advised her that she could only recommend a one-year extension of the Applicant's contract. In a letter dated

15 November 1996, the Deputy Director, DHR, informed the Applicant that, in view of her somewhat specialized background and experience and because of organizational changes within UNICEF, it would be very difficult to place her in another post at her level and encouraged her to seek other employment opportunities, including outside the Organization. He added that UNICEF was prepared to put her on special leave with full pay (SLWFP) until the expiration of her contract, at the end of February 1997, to facilitate her "job search". The Applicant replied to this letter in a memorandum dated 28 November 1996, stating, *inter alia*, her willingness to work at UNICEF offices away from Headquarters, and rejecting the option of SLWFP.

On 31 January 1997, Mr. R. Deutekom, the then Director, GCO, advised DHR that he did not recommend conversion of the Applicant appointment to permanent, nor any further extension on a fixed-term basis.

On 12 February 1997, the Applicant submitted her statement of explanation regarding her fourth PER.

On 19 February 1997, the Appointment and Promotion Committee (APC) met and concurred with the recommendation not to convert or renew the Applicant's contract. On 25 February 1997, the Executive Director, UNICEF, informed the Applicant that she had approved the recommendation of the APC, and that her contract would expire on 28 February 1997. On an exceptional basis she was paid an additional month salary to facilitate her transition, thus providing her with "one month notice period".

On 1 April 1997, the Ombudspersons submitted their report to the Director, GCO, and the Director, Geneva Regional Office. They concluded that "there had been confusion and time-consuming administrative problems for both the staff member and the organization, many of which could probably have been avoided".

On 24 April 1997, the Applicant requested the Secretary-General to review this administrative decision and on 2 July 1997, the Director, DHR responded, informing her that UNICEF saw no justification for reversing the original decision.

On 9 September 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 6 April 1999. Its considerations, conclusions and recommendations read as follows:

**"Considerations**

...

27. The Panel found that there were serious deficiencies in the manner with which UNICEF dealt with Appellant's PER's:

...

- Appellant's first PER was completed ... nine months after the end of the reporting period.

- Appellant's second PER was completed ... sixteen months after the end of the reporting period.

- Appellant's third PER was completed ... over eight months after the end of the reporting period.

In the view of the Panel, the lack of timeliness in these reports, *inter alia*, deprived Appellant of the possibility of responding - not only in rebuttals, but in her work performance - to any legitimate criticism of her performance.

28. The Panel also found deficiencies and lack of fairness in procedures leading up to Appellant's separation ...

...

The Panel notes that the APC may recommend (...) that [a] fixed-term appointment be extended for a fifth year to allow more time to determine whether the staff member meets the requirements for career appointment. Clearly, the fifth year served by Appellant ... cannot be seen as an equivalent of the fifth year ... which, recommended by the APC and approved by the Executive Director, is essentially designed for probationary purposes.

29. The Panel ... could only conclude from its term that the decision to allow Appellant's contract to expire had already been made. It then turned its attention to the recommendation by Mr. Deutekom (...) that [the] Appellant's appointment be neither converted nor extended. It was evident to the Panel ... that [Mr. Deutekom]] had not had the opportunity to make an independent judgement of Appellant's qualifications, but had based his decision on her PER's ...

30. ...[T]he Panel decided that the 'contractual review by the full APC ... smacked more of 'going through the motions' than it did of the 'reasonable procedure that was free of defect' ...

***Conclusions and Recommendations***

31. The Panel concludes that Appellant was denied fair treatment and due process.
32. The Panel recommends that:
  - (a) Appellant be paid compensation equivalent to four months salary and allowances, and
  - (b) All PERs, with the exception of the first, be removed from her Official Status file.
33. The Panel makes no other recommendation with respect to this appeal."

On 19 August 1999, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"...

The Secretary-General agrees that the delays in the preparation of your PERs constituted a procedural deficiency for which you should be compensated. However, he does not share the Board's view that those delays deprived you of the possibility to, e.g., rebut your PERs, as this is not supported by the record which clearly shows that it was your choice not to rebut those PERs. The Secretary-General will not, therefore, accept the Board's recommendation concerning the removal of all your PERs, with the exception of the first, from your Official Status file. Similarly, the Secretary-General can find no support for the Board's finding of deficiencies in the procedures leading up to your separation. In this connection, the Secretary-General also observes that the Board erred when it assumed that you had a right to a fifth year of probationary appointment, as pursuant to the applicable UNICEF administrative instruction, this is contingent upon the recommendation of the APC and the APC made no such recommendation in your case. In addition, there is no basis, nor has any been identified by the Board, for the finding that the APC's review of your case was perfunctory. In light of the above considerations, the Secretary-General cannot accept the amount of compensation recommended by the Board and has decided instead to compensate you in the amount of 1 month net base salary for the delays in completing our PERs.

..."

On 30 March 2000, the Applicant filed the above-reference Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew her fixed-term appointment or to convert it to permanent was tainted by procedural irregularities, violation of due process rights, prejudice and other extraneous considerations.
2. The Applicant had a right to fair and due consideration for extension of her fixed-term appointment or for conversion of her fixed-term appointment to a permanent appointment.
3. The Applicant had a legitimate expectation for continued employment, which can be adduced from the circumstances surrounding her appointment.
4. UNICEF breached its obligation to provide a fair and impartial assessment of the Applicant's work.
5. The Secretary-General's decision to pay her one month net base salary fails to adequately compensate the Applicant.
6. The Applicant was subjected to harassment and the victim of discrimination.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to or legal expectancy of continued employment with the Organization, as she served on a fixed-term appointment.
2. The decision not to convert or to renew her fixed-term appointment was not vitiated by bias or other extraneous factors.
3. The Applicant's allegations of general harassment are without any basis in fact.
4. The decision not to convert or to renew the Applicant's fixed-term contract was not vitiated by procedural irregularities.
5. The delays in submitting the Applicant's PERs, as well as in the convening of the APC, had no impact on the final decision and, furthermore, the Applicant was compensated for these procedural delays.

The Tribunal, having deliberated from 6 to 21 November 2001, now pronounces the following Judgement:

I. The Applicant joined UNICEF on 8 February 1992, at the P-5 level, as Chief, Marketing/Sales Section, GCO, Geneva. She served with UNICEF for five years: in fact she was offered two two-year contracts, two three-month contracts and one six-month contract.

During her employment she was evaluated four times:

(i) The first PER covered the period 1 May 1992 to 30 April 1993. On 4 February 1994, the Applicant signed it "mostly" agreeing with the ratings and comments. With 5 being the highest rating, she was given various ratings from 3 to 5.

(ii) The second PER covered the period 1 May 1993 to 30 April 1994. The Applicant received it was only in September 1996. This time the ratings were dropped drastically, mostly to 3. The Applicant submitted comments on those ratings on 3 October 1995. However, she decided not to submit a formal rebuttal, and therefore, those ratings remained valid.

(iii) The third PER covered the period 1 May 1994 to 30 April 1995. It was submitted only on 18 January 1996. With new performance ratings with a ceiling of 6 rather than 5, the Applicant's ratings of mostly 3 and 2 dropped even lower. On 8 February 1996, the Applicant submitted formal rebuttals to her 1993-1994 and 1994-1995 PERs.

(iv) The fourth PER covered the period 1 May 1995 to 30 April 1996. With the new ceiling of rate 6, she was given 3 for every single category, and on 16 December 1996, she declared that she "mostly" agreed with these ratings. The second reporting officer who only joined GCO in September 1996 submitted his ratings at a later time, i.e. on 14 January 1997. The Applicant signed on 11 February 1997. She did not submit a formal rebuttal, however, she submitted a statement of explanation.

II. On 27 December 1995, the Applicant's supervisor, the Deputy Director, GCO, informed the competent authorities that she would not recommend a conversion of her contract, "on the basis of her performance" and her "lack of job satisfaction". She recommended instead, a two-year extension of her appointment.

On 20 February 1996, the Director, GCO, the Applicant's second reporting officer, took the necessary action for the rebuttal process to proceed. In fact, the Applicant's former second reporting officer had retired without having signed her PERs. On this occasion, the Director,



GCO, expressed the opinion that given the situation he would not agree with the recommendation to extend the Applicant's contract for two years. He thought that, "the background needs to be resolved before any decisions can be made" and decided to give her a three-month extension in order to enable the process to unfold. A copy of this letter was sent to the Applicant.

On 2 April 1996, the Applicant, in a letter submitted to the Deputy Executive Director, Operations, UNICEF, took the initiative to withdraw her formal rebuttal. She did that "after considerable discussion with [her] supervisor", where they had "agreed that [they] can together resolve outstanding issues and agree on [their] future collaboration", also on the understanding that the supervisor had recommended her contract renewal. According to the Applicant, "everyone concerned [would] agree [that] this [was] a constructive solution".

The Deputy Director, DHR, sent, on 15 November 1996, a letter to the Applicant, stating that GCO, earlier that year, had not recommended the conversion of her contract to permanent "due to [her] overall performance". However, in order to give her the opportunity to explore other career possibilities, both within and outside of UNICEF, her contract was extended until the end of February 1997. He also offered her the option of special leave with pay, which should give her more possibilities in her job search.

By memorandum of 31 January 1997, the Director, GCO, advised DHR that he had concerns regarding the Applicant's ability and potential to make greater contribution to the Organization and added "... as evidenced in her two most recent performance reports, I do not recommend her appointment to be converted to permanent, nor any further extension on a fixed-term basis".

The APC formally met on 19 February 1997 and decided that the Applicant had not demonstrated the level of performance, which would warrant the granting of a permanent appointment, and agreed to the above recommendation. The Executive Director approved the recommendation and granted the Applicant one month's salary on an exceptional basis to facilitate her transition to another employment. The Applicant was informed accordingly, on 25 February 1997.

The Applicant, after consulting with the Ombudsperson and having gone through an administrative review, lodged an appeal with the JAB.

III. The JAB submitted its report on 6 April 1999. In the first place, the Panel found that fixed-term contracts expire automatically and that therefore the Applicant's contract was not terminated and the requirements of due process were guaranteed in that respect.

However, the JAB further found:

"In the view of the Panel, the lack of timeliness in these reports, *inter alia*, deprived the [Applicant] of the possibility of responding – not only in rebuttals, but in her work performance – to any legitimate criticism of her performance.

The Panel also found deficiencies and lack of fairness in procedures leading up to [the Applicant]'s separation ... The Panel, having carefully read [the Deputy Director, DHR's] letter, could only conclude from its term that the decision to allow [the Applicant]'s contract to expire had already been made ... It was evident to the Panel, and confirmed by [the Director, GCO's] response to its questions, that he had not had the opportunity to make an independent judgement of [the Applicant]'s qualifications, but had based his decision on her PERs ... In the light of the above considerations, the Panel decided that the contractual review by the full APC ... smacked more of 'going through the motions' than it did of the 'reasonable procedure that was free of defect' of Respondent's contentions."

The JAB concluded that the Applicant was denied fair treatment and due process and recommended that she be paid compensation equivalent to four months salary and allowances, and that all PERs with the exception of the first, be removed from her Official Status file.

By letter dated 19 August 1999, the Under-Secretary-General for Management advised the Applicant that the Secretary-General agreed only that the delays in the preparation of her PERs constituted a procedural deficiency for which she should be compensated, in the amount of one month net base salary.

Against that decision the Applicant filed an Application with the Administrative Tribunal on 30 March 2000.

IV. The Tribunal notes, that the JAB was right in finding that the lack of timeliness in the PERs, *inter alia*, deprived the Applicant of the possibility of responding, not only in rebuttals but, most essentially, in her work performance, to any legitimate criticism of her performance, and that those deficiencies constituted a lack of fairness in procedures leading up to the Applicant's separation. After all, the Applicant's decision of 2 April 1996 to withdraw her formal

rebuttals was based on her understanding that her supervisor had recommended her contract renewal for a further period of two years, as she stated in that same letter. However, the Applicant's supervisor then changed her mind and recommended an extension for only one year.

The Tribunal on the other hand, finds that the Applicant's contract was not terminated but, as a fixed-term appointment, had expired. It also does not support the recommendation of the JAB that all PERs, but the first, be removed from her Official Status file, as there is no indication that their content is in breach of any substantial legal rule

V. In view of the foregoing, the Tribunal orders:

- (i) The Respondent to pay the Applicant compensation in the amount of four months net base salary, at the rate in effect at the date of her separation from service, less the one month she already received; and,
- (ii) Rejects all other claims.

(Signatures)

Julio BARBOZA  
First Vice-President, presiding

Kevin HAUGH  
Second Vice-President

Spyridon FLOGAITIS  
Member

New York, 21 November 2001

Maritza STRUYVENBERG  
Executive Secretary