



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1081

Case No. 1195: ZAKHAROV

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Omer Yousif Bireedo; Ms. Brigitte
Stern;

Whereas, on 2 May 2000, Alexandre Zakharov, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 31 May 2001, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"Section II: Pleas

5. (1) ...
- (2) [T]o find that the Applicant was treated in an arbitrary and discriminatory manner;
- (3) [T]o order the [R]espondent to pay the Applicant damages in the amount of two years net base salary, for discrimination;
- (4) [T]o find that the arbitrary and discriminatory treatment caused the Applicant to receive a smaller pension than he would otherwise have received;
- (5) [T]o order as remedy to the inequity of his pension that:
- (a) [T]he Administration should pay both the Applicant's monthly contribution and the Administration's contribution [for the two-year nine-month period] June 1998 to February 2001;
- (b) [T]he Administration should permit the Applicant to pay into [the United Nations Joint Staff Pension Fund (UNJSPF)] [an] amount equal to monthly contributions [for the two-year nine-month period];
- (c) [T]he penalty of reduced pension because the Applicant had not reached age 60 should be rescinded;
- (d) [T]he Applicant should be paid the amount of difference between the lower pension and the higher pension, retroactively to the time he started receiving pension payments."

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 31 October 2001 and periodically thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 12 March 2002;

Whereas the Applicant filed Written Observations on 28 August 2002;

Whereas the facts in the case are as follows:

Following a five-year break in service, the Applicant rejoined the Organization as a Human Settlements Officer, on a two-year fixed-term contract, at the P-4 level, with the Human Settlements Section, Economic Commission for Africa, Addis Ababa, Ethiopia (ECA), on 28 September 1990. The Applicant served thereafter for seven-and-a-half years with ECA on a

series of fixed-term contracts for periods varying from two months to two years, the final one running through 31 May 1998. During his service with ECA, the Applicant received four performance evaluation reports each with an overall rating of "very good".

From 18 October 1994 to 31 December 1996, the Applicant served as Officer-in-Charge of the Human Settlements Section, ECA, and was granted a special post allowance (SPA) to the P-5 level for that period.

Effective 1 January 1997, due to a restructuring of ECA, the Human Settlements Section, including the Applicant's post, was integrated into the newly established Food Security and Sustainable Development Division of ECA (FSSDD).

On 1 March 1997, the Applicant was promoted to the P-5 level, and his functional title was changed to Chief, Human Settlements Section.

On 14 April 1997, the Applicant was designated to serve as an Alternate Member on the local Appointment and Promotion Committee (APC).

On 13 December 1997, during a meeting with the Executive Secretary, ECA, the new Chief, FSSDD, requested that the Applicant's contract be extended for three months, until 31 March 1998. Apparently, "due to the work planning she [had] difficulties to provide [the Applicant] with relevant tasks". On 31 January 1998, the Applicant was informed that his contract would not be renewed beyond 31 March.

On 5 March, the Applicant requested an administrative review of the decision not to extend his appointment. On 9 March, the Applicant filed a request for suspension of action on that contested decision. On 24 March, the Joint Appeals Board (JAB) recommended that the request for suspension of action be approved until the merits of the case had been determined.

In a memorandum dated 27 March 1998 to the Chief, Human Resources Systems Management Division (HRSMD), ECA, the Chief, FSSDD, set out the reasons why she had recommended against the extension of the Applicant's contract. Documentation supporting her recommendation was attached to this memorandum. Also on 27 March, the Chief, HRSMD, advised the Assistant Secretary-General, Office of Human Resources Management (OHRM), that ECA concurred with the proposal to extend the Applicant's contract for two months to allow the Panel on Discrimination and Other Grievances to review a complaint the Applicant had filed.

On 30 March 1998, the Under-Secretary-General for Management advised the Applicant that he had "just been informed by ECA that ECA ha[d] agreed to extend [his] appointment for

another two months, i.e. until the end of May 1998", and that, in the light of this development, his request for suspension of action had been rendered moot.

On 14 May 1998, the Assistant Secretary-General, OHRM, advised the Executive Secretary, ECA, inter alia that, since there was no record of poor performance on the part of the Applicant and his post was not being abolished, they "would be hard pressed to justify the non-renewal of [his contract]". Bearing in mind that ECA still had a large number of unencumbered posts, she urged him to consider re-assigning the Applicant to another function at ECA. However, on 18 May 1998, the Applicant was informed that he was due to separate from the Organization on 31 May.

On 31 May 1998, the Applicant's fixed-term appointment expired.

On 3 June 1998, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 12 June 2000. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

36. ... [T]he Panel unanimously agreed that the ECA Administration had frustrated the reasonable expectancy of continued employment in the mind of the Appellant which had arisen out of the special circumstances of the present case, without valid and good-faith justification, for which the Appellant should be compensated.

37. The Panel also unanimously agreed that the ECA Administration had failed to demonstrate good-faith efforts in placing the Appellant elsewhere within ECA, for which the Appellant should be compensated.

38. As a warning to the ECA Administration to treat its staff with greater care and circumspection and in view of the fact that the Appellant can not be realistically reintegrated into the system due to his advanced age, the Panel unanimously recommends that he be paid two years' net base salary.

..."

On 15 September 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General has decided to accept the Board's findings, but considers that the remedial action recommended is not proportionate to the injury sustained, especially in view of the fact that, when your appointment expired, you were 9 months

away from retirement. He has therefore decided that you be compensated in the amount of 9 months net base salary."

On 27 September 2000, the Applicant informed the Under-Secretary-General for Management that he was two years and nine months away from retirement. He requested that the Secretary-General amend his decision accordingly. On 30 October, the Under-Secretary-General for Management advised the Applicant that his letter provided no justification for amending the Secretary-General's decision. In this regard, he informed the Applicant as follows:

"... I wish to emphasize that, while the Secretary-General's letter of decision contained a technical error concerning your actual age of retirement, the reference to your retirement served merely as a cut-off point and was not a criterion for the compensation that was awarded to you, as no one has a right to serve until retirement age. It is the Secretary-General's prerogative to decide on the appropriate amount of compensation, and he decided that nine months net base salary was appropriate for the circumstances of your case."

On 31 May 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The ECA Administration discriminated against the Applicant in the manner in which his contract was not renewed.
2. The Respondent did not pay the full compensation recommended by the JAB so the financial consequences of the discrimination against the Applicant were not adequately corrected.
3. As the discrimination resulted in a significantly reduced pension for the Applicant, the Tribunal should rectify this situation, which was not addressed by the JAB.

Whereas the Respondent's principal contentions are:

1. The Applicant was fully compensated with the award of nine months net base salary for the Administration's decision not to renew his fixed-term appointment.
2. There is no evidence of prejudice or other extraneous considerations in the Administration's decision not to renew the Applicant's appointment.

The Tribunal, having deliberated from 6 to 20 November 2002, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 15 September 2000, not to accept the JAB's unanimous recommendation to pay the Applicant two years net base salary. The Applicant claims that he had a "legal expectancy" of renewal of his fixed-term appointment, based on the JAB's finding that special circumstances in this case created such an expectancy, and requests that he be paid the full two years net base salary as recommended by the JAB. He further claims that the non-renewal of his fixed-term appointment was prejudicial, arbitrary and fell short of the requirement of full and fair consideration.

II. Following a five-year break in service, the Applicant rejoined the Organization on 28 September 1990, on a two-year fixed-term appointment at the P-4 level with the Human Settlements Section, ECA. He was granted an SPA to the P-5 level for the period October 1994 through December 1996. Effective 1 March 1997, he was promoted to the P-5 level with a change in his functional title to Chief, Human Settlements Section, ECA. The Applicant separated from ECA on 31 May 1998.

III. The Tribunal must first consider the question whether there was an expectancy of renewal, implicit or explicit. The Tribunal has held as a general rule that fixed-term appointments do not carry a right of renewal. However, the Tribunal has consistently held that this rule is not absolute and that a legal expectancy may be inferred from the surrounding circumstances:

"The Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances."
(Judgement No. 95, *Sikand* (1965), para. III).

In the view of the Tribunal, the Applicant has presented several arguments in support of an expectation of renewal: his recent promotion; his designation to serve on the local APC; seven years of uninterrupted service; and his consistently good PERs. Additionally, the Tribunal notes

that both the Secretary-General, in his decision of 15 September 2000, and the JAB accepted that, based on the special circumstances of the Applicant's case, he had a "valid expectancy" that his fixed-term appointment would be extended. Thus, the Tribunal finds that the surrounding facts and circumstances created an expectancy of renewal.

IV. The next issue in this case is whether the Applicant was fully compensated by the Secretary-General when he awarded the Applicant nine months net base salary for the Administration's decision not to renew his fixed-term appointment. The Applicant contends that, based on the damages he suffered as a result of the Administration's failure to renew his appointment, he should be paid the full amount recommended by the JAB, that is, two years net base salary. According to the Applicant, the JAB's recommendation took into account that, on the date of his separation from service, he was two years and nine months away from retirement: the Respondent's award of nine months "in view of the fact that, when [his] appointment expired, [he was] 9 months away from retirement" failed to acknowledge his actual date of retirement, and thus did not correspond to the harm done.

The Respondent claims that the Applicant was fully compensated with the award of nine months net base salary. When the Respondent learned that the Applicant was two years and nine months away from retirement, he advised the Applicant that "those reasons did not provide any justification for amending the Secretary-General's decision" and that his "rights were not violated by awarding him an amount of compensation lower than compensation based on the actual number of years he would have served to reach the age of 62". In the view of the Respondent, the Applicant did not have a permanent appointment and therefore was not entitled to serve until the mandatory retirement age.

The Tribunal notes in this regard that the Secretary-General himself had cogently explained to the General Assembly the legal principles involved in expectations of continued employment as set forth in the Report of the Secretary-General on Human Resources Management [A/C.5/51/34 of 22 November 1996]:

"While reaffirming that the fixed-term appointment, by its terms, does not create an expectancy of renewal, the Tribunal examines all the surrounding circumstances to determine whether an expectancy of renewal was created in the particular case - for example through a verbal or written commitment, albeit informal, made to the staff

member by the programme manager that the appointment would be renewed. In addition, staff members who have served on fixed-term appointments for an extended period (usually five years or more) are recognized by the Tribunal as having the right to receive every reasonable consideration for further employment. Even though this does not amount to a legal expectancy of continued employment, which would be contrary to the specific terms of a fixed term appointment, a finding that the Organization failed to give every reasonable consideration for further employment will result in the award of damages which may be substantial."

Although the Respondent accepted the JAB's findings that there were special circumstances that created a valid expectancy for the Applicant's renewal of appointment, the Respondent agreed to pay only nine months. The Applicant was two years and nine months away from retirement at the time of the JAB findings and could not realistically expect to be reintegrated into the system.

V. The Applicant claims that he was treated in an arbitrary and discriminatory manner. He argues that the ECA Administration had not produced valid or good-faith justification in support of its decision not to renew his appointment and that the JAB found that

"the ECA Administration ... had failed to make good-faith efforts to help deploy the Appellant within the ECA, who had more than seven years of uninterrupted service. The Panel noted that, following the restructuring, 'ECA still has a large number of unencumbered posts'... one of which could have been used to accommodate the Appellant."

The Respondent argues that the decision not to renew the Applicant's contract was not tainted by any prejudice or other improper motive.

The Tribunal has consistently held that "the burden of proving prejudice or improper motivation rests with the applicant". (See Judgements No. 93, *Cooperman*, (1965), para. XII; No. 470, *Kumar* (1989) para. IV; No. 875, *Thacker* (1998).) The Tribunal is satisfied that, in the instant case, the Applicant did meet this burden, and therefore, that he had a reasonable expectancy of continued employment, which had arisen out of the special circumstances. The Administration violated the Applicant's rights by not extending his fixed-term appointment and, thereafter, aggravated that wrong by not paying the Applicant the full two years of compensation recommended by the JAB. Finally, the Respondent did not present any valid or good faith justification explaining his decision not to renew the Applicant's appointment. Based on the

foregoing, the Tribunal finds that the Applicant was treated in an arbitrary and discriminatory manner, warranting further compensation.

VI. In conclusion, the Tribunal finds that the special circumstances surrounding the Applicant's employment did create a legal expectancy of renewal. The Respondent failed to justify the decision not to renew the Applicant's fixed-term appointment and made no good faith efforts in placing the Applicant elsewhere within ECA. Finally, the non-renewal was arbitrary, discriminatory, and prejudicial.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant additional compensation in the amount of fifteen months net base salary at the rate in effect on the date of his separation from service, and rejects all other pleas.

VIII. All other pleas are rejected.

(Signatures)

Mayer GABAY
President

Omer Yousif BIREEDO
Member

Brigitte STERN
Member

New York, 20 November 2002

Maritza STRUYVENBERG
Executive Secretary