



ADMINISTRATIVE TRIBUNAL

Judgement No. 1084

Case No. 1179: SABBATINI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President; Ms.
Marsha Echols;

Whereas, on 15 February 2001, Paolo Sabbatini, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an Application containing pleas which read as follows:

"II: PLEAS

...

- 5) That the Tribunal ... grant, inter alia, the following relief to the [Applicant]:
- (i) He be honourably reinstated in his career and be given a permanent appointment ... with a P-4 position at the Division of Human Resources equivalent to the post of Recruitment Officer which had been promised to him;
 - (ii) He be compensated for moral, physical and psychological damages in the amount of three years' salary ...

- (iii) The Applicant's official records at UNICEF be amended on the basis [of] a fair appraisal of his performance, moral stand and professional skills;
- (iv) All adverse material ... for which no opportunity of defense and rebuttal ... was provided, be removed from the [Applicant's] file;

..."

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 August 2001 and periodically thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 31 March 2002;

Whereas the Applicant filed Written Observations on 20 May 2002;

Whereas, on 12 July 2002, the Respondent submitted comments on the Applicant's Written Observations and, on 26 August 2002, the Applicant responded thereto;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on 1 March 1993 on a two-year fixed-term appointment as an Operations Officer at the P-4 level in Islamabad, Pakistan. His appointment was subsequently extended until 28 February 1997, when he separated from service.

The Applicant's performance evaluation reports (PERs) had consistently high ratings: in 1993, 1994 and 1995 he received ratings of "5" ("outstanding") and, on one occasion, "6" ("in every instance, continuously and substantially exceeds expectations").

In early 1996, UNICEF commenced a restructuring exercise of its Pakistan Office, which involved the abolition of some posts and the creation of others. On 16 May, the Representative issued a memorandum to all staff of UNICEF, Pakistan, informing them that the responsibility for Operations Functions, which had been the responsibility of the Applicant, would now be shared with two additional staff members, all of whom would report directly to the Representative.

On 10 June 1996, the Applicant addressed a "strictly confidential" letter to the Director, Division of Human Resources (DHR), UNICEF, stating that the Representative's attitude towards him had been one of manipulation, harassment and "trying to create a case" against him.

On 2 July 1996, the Representative signed the Applicant's PER for the period 1 January to 30 June 1996, giving the Applicant ratings of "3" ("met most expectations, however there is room for improvement") and "2" ("frequently did not meet expectations"). The Applicant noted his total disagreement with the ratings and commented that his performance had not changed since his previous PER, when it was highly rated; the change was the office situation and the need to express his concern for the way in which the "office right-sizing process" had been carried out. The Applicant's second reporting officer agreed with the Representative's evaluation, adding that the Applicant should never have been recruited to that post, as he lacked the necessary qualifications.

On 12 August 1996, the Officer-in-Charge, DHR, wrote to the Applicant confirming an agreement reached whereby the latter would be on annual leave until 15 August 1996, to be followed by special leave with full pay (SLWFP) until the expiration of his contract on 28 February 1997. During that time, DHR would actively try to identify suitable posts for the Applicant, with the understanding that he would seek opportunities outside of UNICEF. If no suitable post was identified, the Applicant's contract would expire on 28 February.

On 28 February 1997, the Applicant wrote to the new Representative complaining of "intolerable and continued abuse" and "unacceptable discrimination". On 2 April, the Representative sent the Applicant his original PER for the period 1 January to 30 June 1996, for signature.

On 18 April 1997 the Applicant requested administrative review of the decision not to extend his fixed-term appointment and not to convert it to a career appointment.

On 30 July 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB completed its report on 12 September 2000. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

25. A main focus of the Panel's discussion was the PER prepared by [the Representative] on 2 July 1996 covering the period 1 January to 30 June 1996 and the events leading up to it. ...

...

27. The Panel considered ... a ... comparison ... of [the Applicant's] PER for calendar year 1995 and the PER for the first-half of 1996, particularly since both were prepared by the same first and second reporting officers ...

28. ... Even if it were possible to accept at its face value the position stated by the Deputy Executive Director ... that there was no "biased attitude" of [the Applicant's] supervisors and that comparison with previous PER's were not "relevant," the Panel would have reason to question UNICEF's reaction to the 1996 PER, which covered a six month period. With eight months remaining on [the Applicant's] fixed-term appointment, one would have expected a responsible administration to look into the reasons for such a remarkable decline in performance or to look into ways of remedying the situation in a constructive manner.

29. ... The Panel found no indication that any effort was expended "to identify suitable posts" for [the Applicant] in UNICEF.

30. Finally, the Deputy Executive Director did acknowledge that proper ... procedures were not followed, though not without seeking to shift some of the blame to [the Applicant]. In the view of the Panel, however, she ignored the most important failure on the part of UNICEF. [The Applicant's second reporting officer] signed the 1996 report on 30 July 1996, seven months before the expiration date of [the Applicant's] appointment; [the Applicant] did not get the PER until six weeks after his separation, thus denying him the possibility of filing an effective rebuttal.

Conclusions and Recommendations

31. The Panel concluded that UNICEF had failed in its obligation to deal with [the Applicant] in good faith:

- (a) in the preparation of the 1996 PER and in denying him the opportunity for effective rebuttal,
- (b) in the belated preparation of [his] letter of recommendation,
- (c) in failing to seek "actively" other placement, and
- (d) in the manner in which he was relieved of his duties as Operations Officer.

In assessing an appropriate indemnity, the Panel took into consideration the fact that a fixed-term appointment carries no expectancy of renewal. The Panel recommended that [the Applicant] be paid three months' net base salary in indemnity.

32. The Panel makes no other recommendation with respect to this appeal."

On 29 September 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to

accept the JAB's conclusions and, in accordance with its unanimous recommendation, to pay the Applicant three months' net base salary at the rate in effect at the expiration of his contract.

On 15 February 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB did not properly consider the Applicant's requests for relief. The relief granted is meager when weighed against the extent of the Applicant's injury.
2. Sufficient expectations were created by UNICEF, leading the Applicant to believe that his employment with UNICEF would be long and continuous and therefore to relinquishing a career with the Italian Ministry of Foreign Affairs. Moreover, employment under the 100 series of the Staff Rules, unlike the 200 or 300 series, itself creates legal expectancy of continued employment.
3. The Respondent abused his discretion and authority when terminating the Applicant's employment without the process of either disciplinary measures or the process of review by the APC on renewal or otherwise of his fixed-term appointment.
4. The Applicant suffered prejudice and discrimination and his rights of due process were violated.

Whereas the Respondent's principal contentions are:

1. The Applicant has been adequately compensated for the cited irregularities.
2. The Applicant was employed pursuant to a fixed-term appointment, which carried neither the right nor the legal expectancy of continued employment with the Organization. The decision not to renew the Applicant's appointment did not violate his rights.
3. The decision not to renew the Applicant's fixed-term contract was not improperly motivated.

The Tribunal, having deliberated from 11 to 25 November 2002, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision accepting the JAB's recommendation to pay the Applicant three months' net base salary for UNICEF's failure to deal with him in good faith. The Applicant submits that the JAB erred when it failed to consider his request for relief. He further claims that he had a legal expectancy of continued employment, and that the non-renewal of his appointment and his non-conversion to a permanent position were improperly motivated, procedurally flawed, and a violation of his rights.

II. The Applicant was recruited by UNICEF on 1 March 1993, on a two-year fixed-term appointment at the P-4 level as Operations Officer in Islamabad, Pakistan. His appointment was subsequently extended until 28 February 1997, when he separated from service upon the expiration of his contract.

In October 1995, the Applicant and the UNICEF Representative in Pakistan (the Representative) began vocalizing their differences regarding the restructuring of the UNICEF Pakistan Office, leading to a breakdown of effective communication channels between them. On 2 July 1996, the Representative signed the Applicant's PER for the period 1 January to 30 June 1996 (the 1996 PER), giving him low ratings.

On 12 August 1996, the Officer-in-Charge, DHR, sent the Applicant a letter, confirming discussions which the Applicant had held with the Director, Human Resources, UNICEF, New York, regarding his future with UNICEF. The letter stated, inter alia, that the Applicant would be on special leave with full pay (SLWFP) until the expiration of his contract and that UNICEF would make efforts to identify a suitable post for him, with the understanding that if a post was not identified, the Applicant's contract would expire on 28 February 1997. On 2 April 1997, the 1996 PER was sent to the Applicant for signature and return.

The Applicant requested administrative review of the decision not to extend his contract, and subsequently lodged an appeal with the JAB. The Secretary-General accepted the JAB's recommendation to compensate the Applicant with three months' net base salary. The Applicant is appealing that decision.

III. The primary issue in this case is whether the Secretary-General has adequately compensated the Applicant in awarding three months' net base salary for procedural irregularities and for failing in his obligation to deal with the Applicant in good faith. The Applicant argues

that the relief recommended by the JAB did not take into consideration the totality of the injury suffered by him. The Applicant further claims that he had an expectancy of continued employment with the Organization, and that the non-renewal of his appointment, and his non-conversion to a permanent appointment, were improperly motivated. The Applicant also contends that he was treated in a discriminatory manner. He maintains that he is entitled to additional compensation, since the non-renewal of his appointment was improperly motivated by his supervisor's bias against him. The Applicant bases this claim on the clashes between him and the Representative, particularly on the restructuring issue, which were reflected in the substantially lower ratings he received on his last PER, when compared with his previous PERs.

IV. The Respondent claims that the Applicant was adequately compensated for the Organization's failures and procedural irregularities. Furthermore, the Applicant was employed pursuant to a fixed-term appointment, which carried neither the right nor the legal expectancy of continued employment with the Organization. Neither the non-conversion nor the non-renewal of the Applicant's appointment violated his rights. The Respondent additionally argues that, although the JAB found that differences of opinion existed on the restructuring process, it did not find any evidence of a biased attitude on the part of the Applicant's supervisor. The decision not to renew the Applicant's contract was not tainted by any prejudice, improper motive, or other extraneous factors, and the Applicant is not entitled to additional damages in this respect.

V. As an employee on a fixed-term contract, the Applicant's appointment was governed by staff rule 104.12 (b) (ii) which stipulates "[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". Additionally, by signing the letters of appointment, which included a provision of non-expectancy of renewal or conversion, the Applicant subjugated himself to those terms.

The Tribunal has consistently held that employment with the Organization ceases on the expiration date of fixed-term appointments and that a legal expectancy of renewal is not created by efficient or even by outstanding performance. (See Judgments No. 173, *Papaleontiou* (1973); No. 205, *El-Naggar* (1975); No. 422, *Sawheny*; No. 427, *Raj* (1988); No. 440, *Shankar* (1989); and, No. 700, *Benthin* (1995).)

However, the Tribunal has also consistently held that this rule is not absolute and that a legal expectancy may be inferred from the surrounding circumstances. The Tribunal does not find a factual basis to support such an inference in the Applicant's case. The fact that the Applicant chose to leave the Italian Foreign Service and accept a fixed-term appointment with UNICEF does not, in and of itself, imply that a commitment to eventually grant the Applicant permanent employment with UNICEF was ever made. Nor can this conclusion be deduced from the 12 August 1996 summary of the meeting held with the Director, Human Resources, UNICEF, New York, which specifically indicated that UNICEF would make efforts to find the Applicant other placement, with the understanding that the Applicant himself would seek opportunities outside UNICEF, and failing which his employment with UNICEF would end on 28 February 1997. Furthermore, the Tribunal believes that, in fact, the circumstances prior to the Applicant's SLWFP should have indicated to the Applicant that his contract might not be extended. These included the professional differences between the Applicant and his supervisor, the Representative, and the downsizing efforts of UNICEF at the time.

In view of the above, the Tribunal finds that the Applicant had neither the right nor the legal expectancy of continued employment with the Organization after the expiration of his fixed-term appointment.

VI. The Tribunal has consistently held that "[t]he burden of proving prejudice or improper motivation rests with the Applicant". (See Judgments No. 95, *Cooperman*, (1965); No. 553, *Abrah* (1992); and, No. 554, *Fagan* (1992).) Although the differences of opinion between the Applicant and his supervisor might have been a factor; and although the dramatic decline in the Applicant's ratings on his PER from the calendar year 1995 to his final PER raises some questions, these do not constitute improper motivation in deciding on the non-extension of the Applicant's contract. The Applicant did not present sufficient evidence to meet his burden of proving bias and improper motive. Based on the foregoing, the Tribunal finds that the decision not to renew the Applicant's fixed-term appointment was not tainted by discrimination nor was it improperly motivated.

VII. On the issue of the adequacy of the compensation, however, the Tribunal agrees with the Applicant's contention. The Tribunal believes that the manner in which UNICEF dealt with the Applicant, as partially described below, warrants additional compensation.

The dramatic decline in the Applicant's ratings on his last PER, which followed excellent ratings on his PER for the preceding year, at the very least raises questions as to UNICEF's attempts at looking into the reasons for this deteriorating performance and finding ways to remedy it, bearing in mind that the main objective of the appraisal system is to improve the staff members' performance and that there was plenty of time left on the Applicant's fixed-term appointment to allow for improvement. Additionally, as acknowledged by the Deputy Executive Director, UNICEF, procedures were not followed in completing the 1996 PER, resulting in the Applicant receiving that PER for his final signature on 2 April 1997, approximately one month after his separation from service. Consequently, the Applicant was denied the opportunity of effectively rebutting the said PER.

Moreover, the Tribunal accepts and concurs with the JAB's findings regarding the undue delay in preparation of a letter of recommendation for the Applicant and as regards the Administration's failure to make sincere and active efforts to find the Applicant alternative placement. Furthermore, the manner in which the Representative chose to relieve the Applicant of most of his responsibilities adds to the overall lack of good faith that the Administration demonstrated in the Applicant's case.

VIII. In conclusion, the Tribunal holds that the Applicant did not have legal expectancy of continued employment with the Organization and that the non-renewal of his fixed-term appointment did not violate his rights. The Tribunal further holds that the Applicant has not been adequately compensated for the procedural irregularities and for the Administration's failure to deal with him in good faith.

IX. For the foregoing reasons, the Tribunal:

1. Orders that the Applicant be paid three months' net base salary at the rate in effect on the date of his separation from service, as compensation, in addition to the compensation he already received; and

2. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Marsha ECHOLS
Member

New York, 25 November 2002

Maritza STRUYVENBERG
Executive Secretary