

Judgment

1. The application lodged by the Applicant is rejected.

The issues

2. By application, registered on 9 August 2008 by the Geneva Joint Appeals Board (JAB) and transferred to this Tribunal under UNDT/GVA/2009/9 as of 1 July 2009, the Applicant contests the decision not to renew her temporary appointment beyond 30 April 2008.

Facts

3. The Applicant entered the service of the International Trade Center (hereinafter ITC) as Program Advisor at the L-3 level on 1 November 2003, on a fixed-term appointment (FTA) (200 series) of one year. She was assigned to the Coordination Unit of the Joint Integrated Technical Assistance Programme (hereinafter JITAP)¹. On 1 November 2004, her

30 April 2008 and that no further extensions would be possible unless there was a significant injection of new external funds before the end of April 2008.

11. By letter dated 27 February 2008 from the Chief, HRS, ITC, the Applicant was informed that her appointment would not be renewed beyond 30 April 2008. The remaining three other staff members, whose contracts were still funded by JITAP, were also informed of the same decision. The Applicant's contract was then extended for one month as of 1 April 2008, this time as an Adviser in DTCC/OA (Office for Africa).
12. On 14 March 2008, the Applicant wrote to the Chief, HRS, ITC, expressing her astonishment about the separation letter dated 27 February 2008 and her hope that the necessary arrangements would be made "to continue to use her services [...]". In April 2008, s

On 9 August 2008, the Applicant submitted a statement of appeal to the Geneva JAB.

16. The Applicant's contract, which was due to expire on 30 April 2008, was extended several times until the exhaust of her sick leave entitlements on 17 October 2008. She was then separated from service.
17. The hearing of this case took place on 27 August 2009. The Applicant and her counsel attended to the hearing as well as the Respondent.

Contentions of the parties

The Applicant's principal contentions are:

18. The non-renewal of her appointment was a de facto "retaliation" for having reported misconduct and harassment pursuant to ST/SGB/2005/21 and ST/SGB/2008/5. Since she confirmed the harassment, ITC Management took a bundle of decisions substantially retaliating against her culminating in the decision not to renew her appointment. This decision was the ultimate result of the failure by the ITC Management to undertake the necessary actions to address correctly a case of harassment and abuse of authority.
19. The ITC Management actively retaliated against her by moving her from the position of Program Advisor in the JITAP Coordination Unit to a series of short-term assignments with no career prospects.
20. The Applicant's interview report constituted a formal complaint of harassment and abuse of power fulfilling the formal requirements described in ST/SGB/2005/21, ST/SGB/2008/5 and ITC/AI/2003/06. Since there was an internal investigation ongoing "it was not appropriate and logical to raise a formal complaint till the outcome of the investigation was made known to the applicant and the aggrieved individuals". Moreover, neither the Staff Coordinating Council (SCC) nor the Ombudsman suggested to her that it would be an option to raise a formal complaint pending the outcome of the investigation.

21. The outcome of the investigation was only made public during the JAB hearing -in the course of the suspension of action- contrary to paragraph 5.18 of ST/SGB/2008/5 and despite her repeated attempts to know it. Furthermore, according with the UNAT's jurisprudence, she had to be timely informed of the outcome of the investigation so as to exercise her right of appeal. Therefore, not only her due process was not respected but she was also deprived of her right of appeal.
22. Since ITC Management deliberately concluded the internal investigation by finding that there was "no harassment case but difficult working relations", they acted on the assumption that the blame had to be equally shared. She argued that the extension of her contract on temporary positions was associated to the extension of the JITAP Coordinator in order not to show unfair treatment. In particular, the Applicant noted the Respondent's argument that "if [the Coordinator] was extended, the Applicant contract would also be extended for the same period". She asserted that this statement is an open confession by the ITC management confirming her submissions of retaliation and mismanagement.
23. The extension of her contract since January 2008 using JITAP funds while she was working on other projects was done on purpose to prepare the ground for her separation. She pointed out that, at the beginning of 2008, ITC Management decided to remove her from a temporary post in DTCC/OAPLAC section, which she occupied after having been selected in an internal competition, to return her finally to the JITAP budget. She stressed that it was done in coincidence with the decision of closing the JITAP Coordination Unit where she had started working and from which she had been removed for more than 2 years.
24. At the time of her separation, she was working on "Technical Related

the JITAP Coordinating Unit took place on 30 April 2008, their formal closure only occurred on 29 September 2008 as acknowledged by himself. Hence, ITC management could have used the remaining JITAP resources to extend her contract at least until 29 September 2008 date in which financial closure was formally adopted. Alternatively, she could have been reassigned to other functions as it occurred to all other colleagues.

25. Contrary to what is alleged by the Respondent, no “all other staff members of the JITAP team including Ms. [R. F.] and some former staff like Mrs. [R. G.]” were separated on 30 April 2008 but they continue to be employed by ITC at the time of the appeal. Hence, the Applicant was discriminated in her career development by the ITC Management while the JITAP Coordinator continued “undisturbed” in his post, the remaining JITAP’ staff continued to work in ITC and another person was recruited to cover her tasks and duties.
26. She had a legitimate expectation of extension of her appointment as JITAP continued to be a “living program” She refers to an e-mail dated 21 April 2008 from Mr. [F. G.] to Mr. [M. F.] where the latter is informed that he would be the Focal Point for the successor of JITAP.
27. ITC management has abused its power by repeatedly failing to act in gooGYScST

3) to order ITC to formally release the internal investigation report to the applicant and other members of the JITAP Coordination or at least to formally notify the outcome of the internal investigation to them thereby allowing them a possible appeal.

The Respondent requests

to reject the appeal as unfounded on the merits. He asks the Tribunal to conclude that the non-renewal of the Applicant's contract was in accordance with established rules and procedures and the purview of management.

The Respondent's principal contentions are:

28. The Applicant held an appointment under the 200 series of the Staff Rules, which are applicable to the technical assistance project personnel. According with Staff Rule 204.3, a temporary appointment expires without prior notice on the date specified in the respective letter of appointment and does not carry any expectancy of renewal. He recalled UNAT's jurisprudence and stated that the rules permit the separation of a staff member appointed under 200 Series from a post without regard to either the quality of the services that the staff member rendered or the staff member's personal attributes. He explained that the appointments under the 200 series are entirely dependent on contingencies such as the request of Governments and the availability of funds.
29. The reason for the non-extension of the Applicant's contract was that there was no further funding available. He explained that the funding for all posts under the umbrella of the JITAP ceased on 30 April 2008. He recalled that on 27 February 2008, "all JITAP related staff were sent a letter from Chief, HR, informing them that their last day of service with ITC would be 30 April 2008".
30. The JITAP Coordination Unit was closed on 30 April

34. ITC Management followed the advice of the Ombudsman taking measures to ensure the extension of the Applicant's appointment when there were no finds in JITAP and it appeared that the programme might close. According to the Respondent, the Ombudsman advised that "irrespective of funding or other programmatic issues, it would be essential in the context of non-retaliation to ensure that if [the Programme Coordinator's] contract was extended, the Applicant's contract would also have been extended for the same period". This statement was not an "open confession", as considered by the Applicant, but rather a summary of the advice given by the Ombudsman, whose assistance was requested by the Applicant and followed by the Respondent.
35. Following the removal of the JITAP funding, senior management at ITC, tried to find a vacancy that matched the Applicant's experience and competencies but no suitable opportunities were found. In addition, the

Common Trust Fund², it cannot make decisions on whether and how to use such funds. The funds are operated under the general guidance of a Steering Group of the Joint Programme.

Considerations

38. Having found the application receivable *ratione temporis* and *ratione materiae*, the merits of the case are examined in light of the applicable rules and jurisprudence.
39. According to the former Staff Rule 204.3 -which was in force at the time that the contested decision came up and hence is applicable to the present case- project personnel shall be granted temporary appointments, which shall be for a fixed term and do not carry any expectancy of renewal. This rule is in line with Staff Rule 4.13 (c), applicable as of 1 July 2009, which states that FTAs do not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. In addition,

Case No. UNDT/GVA/2009/9

Judgment No. UNDT/2009/019

“a claim to renewal, to be valid, must be based not on mere verbal assertions unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case.” (Judgment No. 440, Shankar, (1989)).

In support of her claim the Applicant relies on an e-mail dated 21 April 2008 where Mr. [M. F.] was informed that he would be the Focal Point for the “JITAP’s successor arrangement”. Based on this information, she argues that the JITAP programme continued to be a “living programme”. However, in the wording of this e-mail there is no expressed or even implied promise of the Administration with respect to the Applicant. The circumstances of the case do not reveal a firm commitment to renewal. The Applicant’s claim in this regard is no more than a speculation of a successor program of JITAP but is not circumstantiated by reliable facts. Even in the case that another program would be created, it would not have implied the renewal of her appointment.

46. Third, concerning the alleged failure of ITC Management to disclose the outcome of the investigation to the Applicant, the evidence reveals that the Applicant did not submit a formal complaint of harassment, hence ITC Management was not bound to disclose the outcome of the preliminary investigation to her. Section 3.1 of Administrative Instruction ITC/AI/2003/06 on procedures for dealing with sexual harassment, which is also applicable for all forms of discrimination and harassment, states that:

“in circumstances where informal resolution is not appropriate or has been unsuccessful, the individual may make a written complaint to the Chief of ITC’s Human Resources Section”.

47. Section 3.5 of ITC/AI/2003/06 states that after completion of the preliminary investigation,

“the alleged harasser and the aggrieved individual shall be informed promptly, by the Chief of ITC’s HRS, of the course of action decided upon”.

48. According with the report of the preliminary investigation into working relations and possible cases of harassment in the JITAP Coordination Unit, neither the Applicant nor any of the staff members of this Unit submitted a formal complaint of harassment. The record shows that HRS decided to

formal complaint, did not deprive the Applicant of her right to submit a formal complaint separately.

Conclusion

For the reasons stated above

It is DECIDED that

The application lodged by the Applicant is rejected.

(Signed)

Judge Thomas Laker

Dated this 17th day of September 2009

Entered in the Register on this 17th day of September 2009

(Signed)

Víctor Rodríguez, Registrar, Geneva