



Case No.: UNDT/NBI/2009/039

Judgment No.: UNDT/2010/089

7 May 2010

Before:

Registry:

Registrar:

Jean-P

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT REMANDING CASE FOR
INSTITUTION OF CORRECT
PROCEDURE**

Counsel for Applicant:

Tony Bautista
Hugh McCairley

Counsel for Respondent:

Stephen Dietrich, ALS/OHRM, UN Secretariat

1. Employment History

1.1 The Applicant joined the Organization on 4 May 1997 on a contract of limited duration as a translator/interpreter in the Department of Peacekeeping Operations. On 9 June 1998, the Applicant joined the United Nations Observer

July 2004 to March 2006. On 1 February 2006, the Respondent approved the recommendations of the ABCC.

2.3 On 22 June 2006, the ABCC considered the Applicant's case for the second time. Based on additional medical documentation, the ABCC determined that the Applicant sustained,

“a twenty (20) per cent permanent loss of function of the whole person and that [...] seventy-five (75) per cent of the permanent loss of function [could] be considered as related to the performance of her official duties on behalf of the United Nations.”

2.4 Accordingly, the ABCC recommended that the Applicant:

(i) should be awarded compensation in the amount of US\$ 35,167.20, which was the equivalent of a fifteen (15) per cent permanent loss of function of the whole person, under Article 11.3 (c) of Appendix D to the Staff Rules;

(ii) that all the medical expenses that were certified by the Medical Director as being directly related to the service-incurred injury and that were reasonable for the treatments/services provided, should be reimbursed at 75% of cost; and

(iii) that additional special sick leave should be granted to the Applicant for the period from 3 to 26 January 2004, as being directly related to her service-incurred injury, under the provisions of Article 18 (a) of Appendix D to the Staff Rules.

2.5 On 5 July 2006, the Respondent approved the above-mentioned recommendations of the ABCC. On 26 September 2006, the Applicant was reportedly informed that the Director of the UN Medical Services Division (“MSD”) had determined that she was fit to work provided that her functions would not entail frequent or constant use of a keyboard. Following this determination, the

ICTR requested that the Applicant report to work. The Director, MSD certified additional sick leave for the Applicant through 17 November 2006.

2.6 On 4 October 2006, the Applicant was informed that ICTR was not in a position to provide work alternatives or tasks other than translation and that it had no control over the medical facilities available in Arusha. The Applicant was asked to advise whether she would agree to resume her duties in Arusha or whether she would prefer not to return under those circumstances. On 2 November 2006, ICTR informed the Office of Human Resources Management (OHRM) in New York that arrangements had been made to enable the Applicant to resume her duties as a translator without having to use a keyboard. The Applicant thereupon filed another claim with the ABCC for compensation under Appendix D to the Staff Rules and requested that a Medical Board be convened to review her fitness to return to work under the same arrangements.

2.7 On 3 November 2006, the ABCC considered the Applicant's case for the third time. In its report dated 21 November 2006, the ABCC, based on the additional information provided by the ICTR administration and the additional medical reports provided by the Applicant and by the Director, MSD, determined that there was no change in the degree of permanent loss of function nor was there a change in the amount of special sick leave credit that had previously been granted to the Applicant under Article 18 (a) of Appendix D. On the grounds that a Medical Board could not address an administrative issue such as a change in entitlements, the ABCC recommended denying the Applicant's request for convening a Medical Board. On 24 November 2006, the Respondent approved the ABCC's recommendations.

2.8 On 4 December 2006, ICTR informed the Applicant that in light of the decision of 24 November 2006, she was expected to report to work immediately. The Applicant was advised that her contract would be extended through 31 December 2006 and that should she fail to report to work, it would not be extended any further and that her absence would be charged to any accrued annual leave

would be extended until 6 March 2007. The Applicant was informed: that she would be placed on annual leave effective 18 November 2006; that she would remain on annual leave until either her annual leave was exhausted or she returned

3.2 On 18 September 2007, the Applicant filed a request for review to the Secretary-General and on 24 September 2007, she submitted an Addendum to that request. On 28 January 2008, the Applicant submitted a complete Statement of Appeal. On 23 June 2008, the Respondent filed his Reply. Between August 2008 and 26 March 2009 the Applicant and Respondent exchanged further submissions.

3.3 The JAB Panel convened on 23 March 2009 to consider the appeal. The Panel completed its deliberations and adopted its report at that meeting. Its conclusions and recommendations read as follows:

“Conclusions and Recommendations

50. In light of the foregoing considerations, the Panel unanimously concludes that:

(a) the Applicant had no legal expectancy for the renewal of her fixed-term appointment; and that she has not substantiated her allegations that the non-renewal of her appointment was tainted by prejudice, bias, or other improper considerations;

(b) the Applicant has not demonstrated that she had a right to be transferred to the ICTR’s sub-unit in the Hague and that the Respondent’s decision to deny her request for transfer was arbitrary, taken in bad faith, or discriminatory.

51. It therefore unanimously decides to make no recommendation with regard to this appeal.”

3.5 On 13 May 2009, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined her case in the light of the JAB’s conclusions and recommendations, as well as the entire record and the totality of the circumstances and that the Secretary-General agreed with the JAB’s conclusion.

3.6 On 24 August 2009, the Applicant filed a “Motion for Extension of the Time Limit to file an Application on the Merits” with the Nairobi UNDT”. The Tribunal granted the motion on 27 August 2009. On 18 September 2009, the Applicant filed the present Application with the Nairobi UNDT. The Respondent’s Reply was filed on 18 September 2009. On 23 September 2009, the Applicant filed comments on

the Respondent's Reply. The Tribunal held a Hearing on 14 January 2010. The Parties filed their closing statements on 19 January 2010.

4. *Applicant's Submissions*

4.1 The Applicant's principal contentions are:

(i) That, contrary to the Report of the Joint Appeals Board which states that the main issues raised are: (a) whether the Respondent's decision not to renew her fixed term appointment for health reasons was unfair, arbitrary or discriminatory; and (b) whether the Respondent violated her staff rights by denying her request for transfer to the ICTR's sub-unit in the Hague, Netherlands, her case is not and has at no time been stated in these terms and that the central issues in her appeal are the Applicant's request, inter alia, for,

“Indemnity for non-renewal of contract for reasons of health under Staff Regulations, Rules and Appendix D.”

(ii) That the reason the Applicant has had to appeal against the decision not to renew her fixed-term appointment is that the decision completely falsifies the circumstances surrounding her separation from service and, in so doing, effectively denies her the termination indemnity and compensation to which she is entitled under Staff Regulations and Appendix D to the Staff Rules.

(iii) That the separation from service is artificially made to coincide with the date of expiry of her fixed-term appointment in order to create the misleading impression that this is a case of non-renewal of a fixed-term contract and nothing more.

(iv) That her employment

(v) That in a decision not to renew a fixed-term appointment, it is not necessary to refer to any reasons for th

under article 11.2 (d); and financial assistance for vocational rehabilitation under article 11.4 (b) in addition to the lump sum she has already received for her permanent loss of function, under article 11.3 (c) of Appendix D to the Staff Rules.

(xiii) That the Organization disregarded her needs as a disabled person by refusing to consider the possibility of a lateral re-assignment to another duty

- a. The Deputy Secretary-General's decision of May 13, 2009 and the

(ii) That the JAB correctly found that there was no evidence that the non-renewal of the Applicant's contract was improperly motivated or based upon extraneous considerations and that, therefore, the non-renewal of the Applicant's appointment did not violate her rights.

(iii) That the Tribunal's role in this case is to review the decision of the Secretary-General and not to consider the matter afresh.

(iv) That the Applicant has failed to demonstrate a manifest abuse of the proceedings to justify the grant of costs.

(v) That the Organization has given the Applicant every consideration in trying to accommodate her medical needs in the workplace to allow her to perform her functions to the extent possible.

(vi) That Staff rule 104.12(b) (II) provides that fixed term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment and that the Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances the contract terminates automatically, and without prior notice, on the expiration date specified in the letter of appointment, according to staff rule 109.7, (Judgement No 496, *Mr. B.* (1990); reic0.4913 Tw[(58.)Tj2 306fo 0.0i10i0.6824 08.naccordin(Da Ic0.0441 0.004b230.0

5.2 In light of the foregoing, the Respondent requests the Tribunal:

“... to uphold the Secretary-General's decision and find that the Respondent observed due process and acted in good faith at all times. The Respondent thus invites the Tribunal to reject the Applicant's pleas in their entirety.”

6 *Legal Issues*

6.1 The Tribunal considers the following to be the legal issues arising out of this application:

- (i) Whether the administrative decision of the Under-Secretary-General for Management (“USG/DM”), dated 31 July 2007, not to renew the Applicant’s fixed-term appointment due to the Applicant’s inability to resume her professional activities with ICTR in Arusha was informed by improper motive.
- (ii) Whether the USG/DM abused her discretionary authority in her decision not to renew the Applicant’s fixed-term appointment.
- (iii) Whether or not the Applicant had any expectancy of renewal of her appointment under the terms of her appointment.
- (iv) Whether or not the Applicant’s appointment was terminated.
- (v) Whether the proper legal procedures for dealing with the Applicant’s service-incurred disability were complied with.
- (vi) Whether the Applicant was entitled to have been placed on continuous special leave with pay during the period 28 March 2007 to 31 July 2007.
- (vii) Whether the Applicant was adequately compensated for her loss of employment occasioned by her service-incurred injury.

7. *Applicable Law*

7.1 Former Staff Rule 109.7 provided that,

“(a) A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

(b) Separation as a result of the expiration of any such appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules.”

7.2 Former Staff Rule 109.1(b) defined “termination” as,

“... a separation from service initiated by the Secretary-General, other than retirement at the age of sixty years or more or summary dismissal for serious misconduct ...”

7.3 ST/AI/1999/16 – “Termination of appointment for reasons of health.”

7.4 Article 20 of the UNDT Rules of Procedure.

“Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Tribunal may, with the concurrence of the Secretary-General, remand the case for the institution or correction of the required procedure, which, in any case, should not take longer than three months. In such cases, the Dispute Tribunal may order the payment of compensation to the applicant for such loss as may have been caused by the procedural delay. The compensation is not to exceed the equivalent of three months’ net base salary.”

8. *Considerations*

8.1 *Jurisdiction of the Tribunal*

8.1.1 The Respondent in his Reply at paragraph 14, submits that the Tribunal should limit its enquiry in the present Application to considering if the decision of the Secretary-General was reasonable and justified on the face of the record at the time it was made. In

response to this submission, the Tribunal recalls its pronouncement in the cases of *Sanwidi*¹ and reiterates that,

“[a]s the first tier of the formal component of the internal justice system of the United Nations, the Tribunal is competent to entertain applications as provided for by the Statute creating it. In entertaining such an application, the Tribunal as a judicial body shall receive evidence that is relevant and evaluate such evidence for a just determination of the case or application. Nothing and no-one shall constrain or limit the Tribunal’s power in its judicial functions to grant full equality to the parties in a fair and public hearing, to be independent and impartial in the determination of rights and obligations of any party as required by the most basic of the UN’s instruments- the Universal Declaration of Human Rights.”

8.2 Nature of the Applicant’s separation from service

8.2.1 It is the Respondent’s argument that since the Applicant’s fixed-appointment “was allowed to run until the end of the term and was not renewed on medical grounds,” that the present situation does not amount to a termination of contract but instead falls under the ambit of former Staff Rule 109.7 and hence the Applicant does not have any legal right to compensation under Chapter IX and Annex III of the Staff Rules. The Tribunal is not convinced by this argument. Having considered all the evidence before it, the Tribunal is of the opinion that the Applicant’s fixed term-appointment came to an end as a result of her service-incurred injury. Apart from the said injury, there is nothing before the Tribunal to show that the Applicant’s fixed-term appointment would not have been renewed beyond its expiration date. Rather than abide by the Organization’s procedures for dealing with staff members who find themselves in such a predicament, the Respondent opted to “allow” the Applicant’s fixed-term appointment to run out to avoid his legal obligations.

8.3 Former Staff Rule 109.1(b) defined “termination” as,

“... a separation from service initiated by the Secretary-General, other than retirement at the age of sixty years or more or summary dismissal for serious misconduct ...”(Emphasis added).

¹ UNDT Judgment No. 49 (2010).

computer keyboard has become impossible, as it has been mentioned in the reports we were able to review.”

8.7 In the email dated 27 June 2007 (see paragraph 2.12 above), the Director, MSD summarized the Applicant’s situation and concluded that while the Applicant was capable of performing work which did not require the use of a keyboard and that she could “perform those elements of the duties of a translator that can be achieved via job modifications that eliminate the need to use a keyboard”, she required ongoing specialist treatment that was not available within a reasonable distance of her duty station and was therefore “not fit to return to that duty station”. The Tribunal does not agree with the Director, MSD’s summary of the Medical Board’s Report and finds that the Board concluded that the Applicant was incapable of further service as defined by section 1 of ST/AI/1999/16.

8.8 Having found that the Applicant was incapable of further service to the organization, section 2 of ST/AI/1999/16 becomes operable and the Administration should then have submitted a request to the United Nations Staff Pension Committee (“the Committee”) for the determination of whether the Applicant should be awarded a disability benefit pursuant to section 3.4 of ST/AI/1999/16. It is only when the Committee has decided to award a disability benefit that a recommendation for the termination of a staff member’s appointment under staff regulation 9.1 (a) or (b) can be made for approval by the Assistant Secretary-General for Human Resources Management on behalf of the Secretary-General².

8.9 The Applicant argues that she was not paid a salary from 28 March 2007 to 31 July 2007 and that no sick leave was approved beyond 17 November 2009 despite the fact that a Medical Board overturned the initial decision of the Medical Services Director. Section 4 of ST/AI/1999/16 requires that:

“If the staff member’s sick leave entitlement (at both full pay and half pay) and annual leave entitlement are exhausted because of delay in the medical determination of incapacity or in the Committee’s decision, the staff member shall be placed on special leave with half pay in

² Section 3.5, ST/AI/1999/16.

accordance with section 8.2 of ST/AI/1999/12 on family leave, sick leave and maternity leave, until the date of the Committee's decision.”

The Tribunal finds that the Applicant was entitled to be placed on special leave with half pay for the period from 28 March 2007 to 31 July 2007.

9. Findings

9.1 In light of the foregoing, the Tribunal makes the following findings:

(i) The Applicant's fixed term-appointment came to an end as a result of her service-incurred injury.

(ii) The Applicant's fixed-term appointment was in fact terminated and it is disingenuous for the Respondent to argue that “it was allowed to run until the end of the term and was not renewed on medical grounds.”

(iii) The administrative decision not to renew the Applicant's fixed-term appointment due to the Applicant's inability to resume her professional activities with ICTR in Arusha was informed by improper motive.

(iii) The applicable procedural rules that should have been followed by the Respondent in this case are contained in ST/AI/1999/16 and were not complied with.

(iv) The Applicant was entitled to be placed on special leave with half pay for the period from 28 March 2007 to 31 July 2007.

10. Judgment

10.1 This is a case which, if the Managers responsible for taking decision on behalf of the Respondent had exhibited sufficient honesty and humaneness, would never have found its way to the Tribunal. It is the attribute of a good manager to honestly appraise situations and in fact to make concessions where these are called for rather than to

embarrass the Organization by engaging in unnecessary disputes. In accordance with Article 20 of the UNDT Rules of Procedure, I hereby enter judgment as follows:

- (i) The Applicant's case is hereby remanded to the Administration for concurrence on the institution of the correct procedure required under ST/AI/1999/16;
- (ii) The Respondent shall, within 14 days of the publication of this judgment, that is, by or before 24 May 2010, inform the Tribunal of the progress made towards such concurrence;
- (iii) If the Administration concurs, the correct procedure shall be instituted within three months of the publication of this judgment, that is, by or before 10 August 2010, and the Administration shall notify the Tribunal of the outcome by that date;
- (iv) Following the notification to the Tribunal of the outcome at paragraph (iii) above, or if the Administration does not concur on the institution of the correct procedure required under ST/AI/1999/16 as required under paragraph (ii) above, the Tribunal shall publish a separate judgment on the merits of the case; and
- (v) The Administration is ordered to pay the Applicant compensation equivalent to three months' net base salary for the delay in complying with the procedures required under ST/AI/1999/16.

