



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

BALESTRIERI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Stefano Inama

Counsel for Respondent:

Eva K. Murray, ITC

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 contract was extended for another year.
4. In June 2005, the Department of Human Resources of ITC launched an internal investigation into the situation of working relationships within JITAP. In the framework of this investigation, personal interviews were carried out with all staff members working at that time for JITAP, with a number of former staff members of that Unit and other persons who have had regular contacts with the JITAP' staff.
5. On 1 November 2005, the Applicant's appointment was extended for another year. The preliminary investigation conducted by ITC Human Resources concluded in December 2005. Based on the outcome report, the Executive Director of ITC considered that there was not sufficient evidence to pursue the matter by initiation of formal disciplinary procedures. However, in January 2006, a coach was hired to assist the

¹ JITAP was an inter-agency trade-related capacity building programme jointly implemented by WTO, UNCTAD and ITC.

JITAP Coordinator in improving his communication style and people management skills.

6. On 11 May 2006, the Applicant was temporarily assigned from JITAP to the Division of Technical Cooperation Coordination, Office for Asia-Pacific, Latin America and the Caribbean (hereinafter DTCC/OAPLAC), in order to replace a staff member who was on maternity leave. Since the Applicant's contract was going to expire on 31 October 2006, she requested advice from the Ombudsman and the Staff Coordinating Council on how to handle a situation of possible retaliation in the event that she returned to the JITAP Coordination Unit.
7. On 28 September 2006, the Applicant and the remaining JITAP team sent a letter to the then Chief, Human Resources Section (HRS), ITC, requesting to be informed on the outcome of the investigation into the "harassment case". They expressed their concern that following the investigation, several of them had been moved to other Sections and Divisions to fill temporary vacancies or had left to work elsewhere. They expressed concern over the fact that their career prospects were "jeopardized" by that situation.
8. On 1 November 2006, the Applicant's contract was extended for seven months and she was transferred to the Office of the Director (hereinafter DTCC/OD). Her contract was further extended twice, for one month each, until 31 July 2007.
9. On 1 August 2007, the Applicant was reassigned as Advisor to DTCC/OAPLAC, upon her selection to a temporary position to which she had applied (replacement of another staff member). She was offered a contract of five months. On 1 January 2008, the source of funding of her post changed, i.e. it reverted to the JITAP funding while her contract was extended until 31 March 2008.
10. On 31 January 2008, the Human Resources Section, ITC, was informed that funding for all posts under the umbrella of the JITAP would cease on

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, several telephone conversations took place between the Chief, HRS, ITC and the Applicant. She was then offered support, i.e. an outplacement consultant, but refused this assistance.
13. By letter dated 24 April 2008 addressed to the Secretary-General, the Applicant submitted a request for review of the decision not to renew her contract. On 28 April 2008, she submitted a request for suspension of action to the Secretary of the Joint Appeals Board (JAB). The Deputy Secretary-General, after having considered the JAB report, decided to reject the suspension of action.
14. On 13 May 2008, the Applicant lodged a complaint for retaliation to the Ethics Office. In her letter, she reported "*retaliation for having previously reported misconduct or cooperated with a duly authorized investigation*".
15. By letter dated 1 July 2008, the Officer-in-Charge, Administrative Law Unit, OHRM, replied to the Applicant's request of review. The letter states *inter alia* that "*the decision not to extend [her] appointment was taken in accordance with the staff regulations, rules and administrative issues*".

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 technical assistance programs of new generation*", which are the kind of program where donors express their keen interest to use the remaining JITAP funds (around 1.7\$ million). Hence, her contract could have been renewed. While the respondent asserted that the closure of JITAP II and

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 good faith when dealing with the Applicant case since it did *de facto* retaliate against her.

The Applicant seeks redress by requesting:

1) her reinstatement and/or renewal of her appointment for a period of no less than 2 years or, exceeding this, for a period to be determined by the Secretary-General or equivalent monetary compensation for the injury and the wrongs the applicant suffered;

2) to award her 10,000 \$ for the cost of the legal case and 500 \$ for the expenses and disbursements and

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 2008 and the contracts of other professional staff members under JITAP funding were

equally not extended. Ms. [R. F.], after having been separated from JITAP, had been working in ITC on a different project and funding and Ms. [R. G.], who was employed by ITC at the time of this application, was not working for the JITAP Coordination Unit by the time it was closed.

31. The Respondent rejected the Applicant's allegation that the non-renewal of her appointment was a *de facto* "retaliation" for having reported misconduct and harassment. He underlined that in the course of the preliminary investigation conducted by HRS, the Applicant participated in the interviews as a witness but never filed a formal complaint. A formal harassment procedure was not initiated nor did any staff member connected with the JITAP Coordination Unit, submitted a written complaint of harassment.
32. The interview report that the Applicant signed in the course of the preliminary investigation, did not constitute a formal written complaint as defined by section 3.1 of the Administrative Instruction ITC/AI/2003/06 on "*Procedures for dealing with sexual harassment*". The decision not to bring a written complaint, was the Applicant's own "inaction". He emphasized that only the alleged harasser and the aggrieved individual should be informed of the course of action decided upon. It was sufficient for JITAP staff to know that appropriate administrative action was taken (i.e. internal investigation, external coach). The Respondent highlighted that due process was respected in the preliminary investigation and that ITC was under no obligation to disclose the outcome of the investigation to the Applicant.
33. The Respondent rejected the contention that ITC did not respect the Applicant's due process during the preliminary investigation. He underlines that the investigation was conducted according to the Information Circular ST/IC/2003/17 on "*Our core values prohibit discrimination and harassment*" that was the applicable policy at that time.

34. ITC Management followed the advice of the Ombudsman taking measures to ensure the extension of the Applicant's appointment when there were no funds 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 Chief, HRS, ITC, offered to the Applicant the personal services of an outplacement consultant who would be able to assist her in finding a new position but she declined the assistance.
36. In respect of the Applicant's allegation that ITC arbitrary decided to change the funding of her post, the Respondent asserted that the change of funding is due to ITC's *"concerns to secure funds for further employment of the Applicant"*. ITC management followed the advice of the Ombudsman by taking measures to ensure the extension of the Applicant's contract in parallel to the duration of the JITAP's Coordinator, when there were no funds available.
37. Concerning the Applicant's alleged expectancy of renewal, the Respondent held that while "it is true that Mr. [M. F.] was designated as the Focal Point within Office of Africa for the successor arrangement of JITAP, it was not his sole responsibility, but only an additional assignment to [his] existing duties". Furthermore, in relation to the JITAP's funds, the Respondent pointed out that although ITC is the trust fund manager of 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, the United Nations Administrative Tribunal in its jurisprudence has previously recognized that since 200 series appointments are

“entirely dependent on contingencies such as the request of Governments and the availability of funds... [t]he 200 series system simply could not function as intended, if staff members appointed under the 200 series had the same guarantees concerning employment and career development as staff members appointed under the 100 series ” (Judgment No. 885, *Handelsman* (1998)). “Thus, generally, the rules of the 200 series do not provide for career appointments, like the rules of the 100 series do, but merely provide for the granting of temporary appointments” (Judgment No. 1163, *Seaforth* (2004)).

² “The Common Trust Fund for the Joint Integrated Technical Assistance Programme of WTO, UNCTAD and ITC in Selected Least Developed and Other African Countries”.

The Dispute Tribunal as part of the new system of administration of justice presently has no reason to change this view.

40. Pursuant to Staff Rule 209.2 (c), “*a separation as a result of expiration of a fixed term appointment shall take place automatically and without prior notice on the expiration date specified in the letter of appointment*”. Staff members who –like the Applicant- are serving under a FTA do not have a right to renewal, unless there are countervailing circumstances. According to the jurisprudence of the United Nations Administrative Tribunal

“countervailing circumstances may include (1) abuse of discretion in not extending the appointment, (2) an express promise by the administration that gives the staff member expectancy that his or her appointment will be extended. The Respondent’s exercise of his discretionary power in not extending a 200 series contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision”.
(Judgment No. 885, *Handelsman* (1998)).

41. In application of the above-mentioned criteria which -although they do not bind the new Tribunal- may be used for a transitional period (cf. UNDT/GVA/2009/003; UNDT/NBI/2009/017), no countervailing circumstances may be established.
42. First, the Tribunal deems that it cannot be stated that the decision of non-renewal was an improper exercise of discretion. The evidence shows that the Applicant’s appointment was not renewed because there was no further funding available. The Applicant was hired to serve in the JITAP Coordination Unit, which was closed in April 2008 -unless the JITAP, in itself, was closed after having adopted the financial statements only in September 2008. All contracts of professional staff members under JITAP funding, including the Applicant, expired in April 2008.

43. Concerning the Applicant's claim that the decision not to renew her appointment is a *de facto* retaliation for having reported misconduct and harassment, the Tribunal deems that there is no evidence supporting this contention. There is no ground to consider that the decision of non-renewal, which took place in April 2008, was linked to the events which occurred in 2005. While it is true that following the preliminary investigation, the Applicant was moved to different positions, it is not possible, at this stage, to determine whether there was a direct link between the transfers and the outcome of the investigation. It should be noted that each transfer, in itself, was an administrative decision which was not contested by the Applicant at that time and is not the subject of the present application. The record shows that ITC Management followed the advice of the Ombudsman and made several funding arrangements in order to renew the Applicant's contract until the closure of the JITAP Coordination Unit in April 2008.
44. Regarding the Applicant's contention that the decision to extend her contract in January 2008 using JITAP funds, while she was working on other projects, was done in order to prepare the ground for her separation, the Tribunal considers that there is no evidence supporting this claim. Even if the decision to change the funding of her last appointment would be unlawful, this would not modify the temporary nature of her position in DTCC/OAPLAC. The Applicant actually replaced a staff member on Special Leave Without Pay (SLWOP) who was coming back to the post in April 2008. Hence, there is no evidence to show that her functions were going to continue beyond March 2008. Even at that point, it is arguable that ITC Management renewed her appointment under the JITAP funds in April 2008 while she was no longer working there and her appointment in DTCC/OAPLAC had expired in March 2008.
45. Second, the Tribunal considers that the Applicant did not have a legitimate expectancy of having her contract renewed. The UN Administrative Tribunal has affirmed that

“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 conduct a preliminary investigation after *“discussions that a Senior HR Assistant in HRS had with staff working in JITAP during which they had raised the difficult working conditions which they experienced”*. The difficulties appeared to result from the inter-personal relations between the JITAP Coordinator and his staff.
49. In application of the above-mentioned rules, the Respondent was not compelled to disclose the outcome of the investigation to the Applicant because she never submitted a written complaint of harassment. These rules are intended to respect the confidentiality of the evidence gathered during the investigation vis-à-vis third parties. This is in accordance with higher hierarchical rules of the UN system, such as the ST/SGB/2008/5 on “prohibition of discrimination, harassment, including sexual harassment, and abuse of authority” and there is no reason to believe that these criteria should be applied in a different way. Taking part in an investigation as a witness -like the Applicant did- does not mean to get into the position of a person who takes the risk of an official complaint and deserves, therefore, the privilege of being promptly informed about the outcome of the complaint.
50. Finally, the Tribunal deems important to clarify that there is no evidence which allows to conclude that the Applicant could have been deprived of her right to file a formal complaint irrespective of the preliminary investigation conducted by ITC Management. In other words, the fact that ITC Management decided to conduct a preliminary investigation without a

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