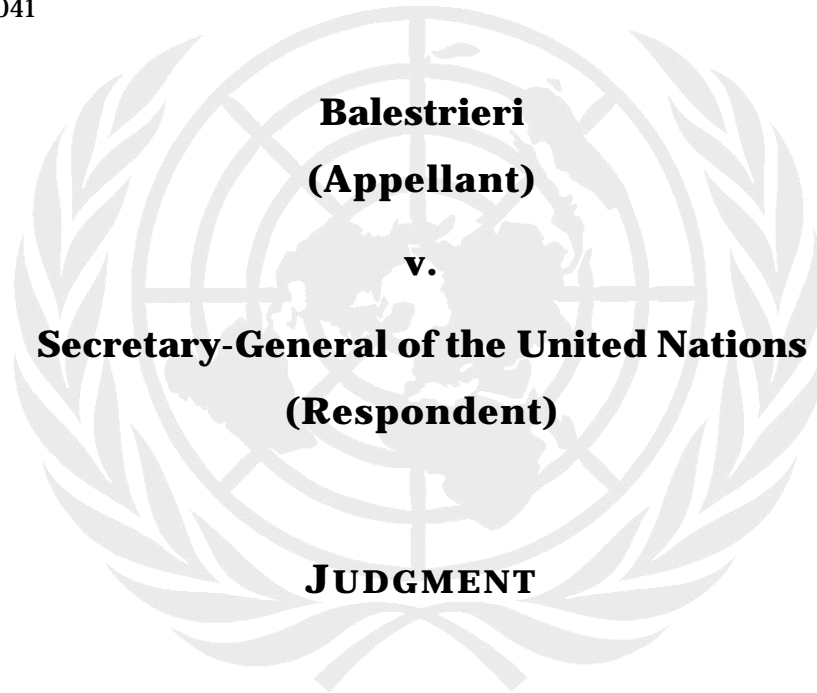




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-041



Before:	Judge Rose Boyko, Presiding Judge Kamaljit Singh Garewal Judge Luis María Simón
Judgment No.:	2010-UNAT-041
Date:	1 July 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Stefano Inama

Counsel for Respondent: John Stompor

JUDGE ROSE BOYKO, Presiding.

Synopsis

1. The fixed-term appointment (FTA) of Emanuela Balestrieri (Balestrieri) was terminated due to a lack of funding. Months prior to her termination, she had alleged poor working relations while in this position. She cooperated in the investigation that ensued and eventually received some temporary postings elsewhere, during which time her appointment was always extended. She returned to her original posting and together with all remaining colleagues, was terminated due to a lack of programme funding. She became concerned that her complaints about her working conditions might have caused some retaliation by the Administration which returned her to her original post not too long before the funding was cut, with a view to causing her separation. She requested a copy of the preliminary investigation report which was denied to her since she herself had not pursued a formal complaint of harassment.

2. The Appeals Tribunal agrees that on these facts there was no reversible error by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal). Accordingly, the appeal is dismissed.

Facts and Procedure

3. Balestrieri was a staff member of the International Trade Centre (ITC). She joined the ITC on 1 November 2003 as a Program Advisor at the L-3 level with the Coordination Unit of the Joint Integrated Technical Assistance Programme (JITAP). Balestrieri's appointment was a FTA of one year under the then existing 200 series Staff Rules applicable to technical assistance project personnel. On 1 November 2004, her appointment was extended for another year.

4. In June 2005, the ITC Human Resources Section (HRS) launched a preliminary investigation into working relations and possible cases of harassment in the Coordination Unit of JITAP. During the investigation, a number of staff members were interviewed, including Balestrieri. On 1 November 2005, Balestrieri's appointment was extended for another year. The preliminary investigation was concluded in December 2005. The Executive Director of ITC considered that there was insufficient evidence to pursue formal

disciplinary action. However, in January 2006, a coach was hired to assist the JITAP Coordinator to improve his communication style and people management skills.

5. On 11 May 2006, Balestrieri was temporarily assigned from JITAP to the Division of Technical Cooperation Coordination, Office for Asia-Pacific, Latin America and the Caribbean (DTCC/OAPLAC) to replace a staff member on leave. Before the expiry of her appointment on 31 October 2006, Balestrieri sought advice from the Ombudsman and the Staff Coordinating Council on how to address possible retaliation in the event of her return to the Coordination Unit of JITAP.

6. On 28 September 2006, Balestrieri and the remaining JITAP team sent a letter to the then Chief of the HRS of the ITC requesting that they be informed of the outcome of the investigation. They expressed concerns that, following the investigation, several of them had been moved to other sections and departments to fill temporary vacancies or had left to work elsewhere. Further, they expressed concern that their career prospects were “jeopardized” by that situation.

7. On 1 November 2006, Balestrieri’s appointment was extended for seven months to 31 May 2007 and she was transferred to the Office of the Director (DTCC/OD). Her appointment was further extended until 31 July 2007. On 1 August 2007, Balestrieri was reassigned as Advisor to DTCC/OAPLAC after applying and being selected for a temporary position to replace a staff member who was on leave. She was offered an appointment of five months, to 31 December 2007. Balestrieri’s appointment was then extended until 31 March 2008, however the source of funding for the appointment reverted to JITAP funding.

8. On 31 January 2008, the HRS, ITC, was informed that funding for all posts under the umbrella of the JITAP would cease on 30 April 2008, and that no further extension would be possible unless there was a significant injection of external funds before the end of April 2008. By letter from the Chief, HRS, ITC, dated 27 February 2008, Balestrieri was informed that her appointment would not be renewed beyond 30 April 2008. The other three remaining staff members whose contracts were funded by JITAP were informed of the same decision. Balestrieri’s appointment was extended for one month from 1 April 2008 as

an Advisor in the Office for Africa of the Division of Technical Cooperation Coordination (DTCC/OA).

9. On 14 March 2008, Balestrieri wrote to the Chief, HRS, ITC expressing 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, Balestrieri was offered support through an outplacement consultant. She did not take up the offer of assistance.

10. By letter dated 24 April 2008 to the Secretary-General, Balestrieri submitted a request for a review of the decision not to renew her appointment. On 28 April 2008, Balestrieri submitted a request for suspension of action to the Secretary of the Joint Appeals Board (JAB). The Deputy Secretary-General, after considering the report of the JAB, decided to reject the request for suspension of action.

11. On 13 May 2008, Balestrieri lodged a complaint for retaliation with the Ethics Office, in which she reported “retaliation for having previously reported misconduct or cooperated with a duly authorized investigation”.

12. By letter dated 1 July 2008, the Officer-in-Charge of the Administrative Law Unit of the Office of Human Resources Management (OHRM) replied to Balestrieri’s request for a review and stated, *inter alia*, that “the decision not to extend [her] appointment was taken in accordance with the staff regulations, rules and administrative issues”.

13. On 9 August 2008, Balestrieri submitted a statement of appeal to the JAB. Balestrieri’s appointment was extended until the exhaustion of her sick leave entitlements on 17 October 2008. She was then separated from service.

14. The appeal was transferred to the UNDT following the introduction of the new system of administration of justice, which came into effect on 1 July 2009.

15. On 17 September 2009, the UNDT rendered Judgment No. UNDT/2009/019, rejecting Balestrieri’s application. Pointing to jurisprudence of the former Administrative Tribunal, the UNDT stated that staff members serving under a FTA under the then 200 series Staff Rules do not have a right to renewal of their appointment, unless there are

countervailing circumstances. In this case, no countervailing circumstances were established. The UNDT found that the decision not to renew the appointment of Balestrieri was not an improper exercise of discretion. The evidence showed that her appointment was not renewed because there was no further funding available. In addition, there was no evidence to support Balestrieri's claim that the decision not to renew her appointment was a de facto retaliation for having reported misconduct and harassment. Further, there was no evidence to support the contention that the decision to extend Balestrieri's appointment 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 UNDT found that Balestrieri did not have a legitimate expectancy of having her contract renewed, as there was no firm commitment to renewal revealed by the circumstances of the case.

16. The UNDT also found that the ITC was not bound to disclose the outcome of the preliminary investigation to Balestrieri under the applicable Administrative Instruction (ITC/AI/2003/06), as Balestrieri did not submit a formal complaint of harassment. The UNDT also found that there was no evidence that Balestrieri was deprived of her right to file a formal complaint under the applicable Administrative Instruction.

17. On 22 January 2010, Balestrieri filed an appeal against the UNDT Judgment No. UNDT/2009/019. The Secretary-General filed an answer to the appeal on 22 March 2010.

Submissions

Balestrieri's Appeal

18. Balestrieri submits that the UNDT erred in fact and law in finding that there were no countervailing circumstances which existed so as to provide her with a right of renewal of her FTA. She contends that the UNDT erred in finding that the decision of non-renewal was not an improper exercise of discretion. Balestrieri also contends that the UNDT erred by not finding that she had a legitimate expectancy of renewal of her appointment to the temporary post in DTCC/OAPLAC.

19. Furthermore, Balestrieri alleges that the UNDT erred in finding that she did not submit a formal complaint of harassment and, hence, ITC was not bound to disclose to her the outcome of the preliminary investigation into working relations and possible cases of

harassment in the Coordination Unit of JITAP. Finally, Balestrieri contends that the UNDT erred in finding that she was not deprived of her right to submit a formal complaint of harassment.

20. Balestrieri requests that the Appeals Tribunal reverse the findings of the UNDT in Judgment No. 2009/019, order the rescission of the termination of her appointment, and order the payment of compensation equivalent to two years of her salary.

Secretary-General's Answer

21. The Secretary-General submits that the UNDT correctly concluded that “no countervailing circumstances may be established” in this case by finding that “(a) the decision not to renew [Balestrieri’s] appointment was a proper exercise of discretion; (b) [Balestrieri] did not have a legitimate expectancy of having her appointment renewed; (c) the [Secretary-General] was not bound to disclose the outcome of the investigation into working relations and possible harassment in the JITAP Coordination Unit; and (d) there is no evidence that [Balestrieri] was deprived of her right to file a formal complaint”. The Secretary-General submits that Balestrieri has not identified any errors that warrant a reversal of the aforementioned findings.

22. The Secretary-General requests the Appeals Tribunal to find that Balestrieri has not identified any errors that warrant a reversal of the UNDT’s findings, to affirm the UNDT’s rejection of Balestrieri’s application, and to dismiss the appeal in its entirety.

Considerations

23. Balestrieri’s FTA was terminated due to a lack of funding. Months prior to her termination, Balestrieri had alleged poor working relations while in this position. She became concerned that her complaints about her working conditions might have caused some retaliation by the Administration which reassigned her to her original post not too long before the funding was cut, with a view to causing her separation. She requested a copy of the preliminary investigation report, but the UNDT held that she was not entitled to receive it because she had not pursued a formal complaint of harassment in the matter. This is unchallenged evidence of her disentitlement to see the report in question.

24. Balestrieri's appointment was terminated due to a lack of funding; several of her colleagues also had their FTAs terminated for the same reason at the same time. The fact that Balestrieri may have complained about her working conditions or cooperated in any subsequent preliminary investigation into possible harassment did not on its face expose her to termination. Apparently she was placed elsewhere both during the investigation and for a period after it was concluded. She received several extensions of her FTA during these temporary placements. This is independent, extraneous evidence, inconsistent with any pattern of constructive dismissal; in other words this is evidence of the Administration assisting her, not marching her to the door.

25. The Appeals Tribunal agrees that on these facts there was no reversible error by the UNDT. Accordingly, the appeal is dismissed.

Judgment

26. For the reasons given above, the UNDT Judgment is upheld and the appeal is dismissed in its entirety.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Boyko, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Simón

Entered in the Register on this 16th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal