
ADMINISTRATIVE TRIBUNAL

Judgement No. 372

Case No. 383: KAYIGAMBA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Herbert Reis, Vice-President, presiding;
Mr. Endre Ustor; Mr. Ahmed Osman;

Whereas, on 7 November 1985, Theobald Kayigamba, a staff member of the United Nations, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 31 March 1986, the Applicant, after making the necessary corrections, filed a corrected application in which he requested:

"a) That the Tribunal take these new documents into account:

- i) Applicant's letter dated 15 February 1982 and addressed to the Coordinator, Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat, New York (...);
- ii) Reply of Ms. Janet Fough [Member, Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat] dated 15 April 1982 to the Applicant (...);
- iii) Ms. Janet Fough's confidential letter to Mr. Ali B. Tall, Chief, Administration and Conference Services, United Nations Economic Commission for Africa (ECA) dated 15 April 1982 (...);
- iv) Ms. Janet Fough's letter to Mr. Ghansah, Chief, Personnel Section, ECA, Addis Ababa, dated 15 April 1982 (...);

v)Letter dated 5 May 1982 from Mr. James Mwase,
Officer-in-Charge, Personnel Section, ECA, Addis
Ababa, to Ms. Janet Fough (...);

vi)Applicant's letter dated 14 May 1982, to Ms. Janet Fough
(...);

b) i)That the Tribunal rescind the conclusion contained in the
report of the United Nations Joint Appeals Board
to the Secretary-General, Confidential Report
No. 510, Case No. 84-30 of 26 June 1985 to the
effect that 'the delay in initiating appeals
procedure was the result of a choice on his part
for financial gain and that the non-compliance
with the time-limits prescribed in the staff
rule 111.3 (a) and (b), in effect at that time,
was therefore the responsibility of the appellant.
Consequently the Panel concludes that there were
no exceptional circumstances beyond the control of
the appellant, which would warrant a waiver of the
time-limits under staff rule 111.3 (d), in effect
at that time, and that the application was
therefore not receivable.'

ii)That the Tribunal rescind the Decision contained in the
report of the United Nations Joint Appeals Board
to the Secretary-General, Confidential Report
No. 510, Case No. 84-30 of 26 June 1985 to the
effect that 'Accordingly, the Panel declares that
the appeal is not receivable by the Joint Appeals
Board because the appellant failed deliberately to
observe the time-limits prescribed in staff
rule 111.3 (a) and (b), in effect at the time he
received notification of the contested decisions.
Consequently, the Panel decides unanimously not
to entertain the appeal.'

c)The compensation claimed is the special post allowance for the
period: 1 February 1973 to 30 November 1977.

d)Any other equitable relief;"

and that

"the Tribunal ... rule that since [the Applicant] qualified
for promotion to the Professional grade prior to the
introduction of the examination system in 1979, he
should be deemed to have been so qualified by
experience and excellent performance for promotion to
P.1."

Whereas the Respondent filed his answer on 19 June 1986;

Whereas the Applicant filed written observations on 4 September 1986;

Whereas on 1 October 1986 the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Economic Commission for Africa, hereinafter referred to as ECA, on 24 February 1966. He was initially offered a two year fixed-term appointment as a Bilingual Clerk/Typist at the GS-7, step III level.

His appointment was successively extended for further fixed-term periods. On 24 March 1968 it was converted to a probationary appointment, and on 1 January 1969, to a regular appointment. On 1 June 1972 the Applicant was promoted to the GS-8 level.

On 1 July 1972 the Applicant was detailed to the ECA Sub-Regional Office in Kinshasa, Zaire as an Administrative Clerk for a period of two years. The detail was successively extended until 31 October 1977, when the Sub-Regional Office in Kinshasa was closed down. The record of the case shows that from January 1973 until 31 October 1977, the Applicant acted as Officer-in-charge of the ECA Sub-Regional Office in Kinshasa.

Thereafter, the Applicant was detailed to the Multinational Programming and Operational Centre (MULPOC) in Gisenyi, Rwanda, as an Administrative Clerk, for an initial period of one year, in order to assist the Administrative Assistant to establish the new office.

The Applicant's detail to the MULPOC commenced on 1 December 1977, and was successively extended for further one year periods until 30 November 1980.

The Applicant was promoted to the GS-9 level, effective 1 April 1980 and his functional title was changed to Senior Administrative Assistant.

In a cable dated 21 November 1980, the Chief, Personnel Section, ECA informed the Director of the MULPOC that "IN VIEW [KAYIGAMBA'S] EXTENDED ASSIGNMENTS AWAY FROM ADDIS ABABA FROM 1/7/72 IT HAS BEEN DECIDED TO EXTEND HIS DETAIL TO GISENYI FROM 1/12/80 TO 31 JANUARY 1981 ONLY, AFTER WHICH HE MUST RETURN TO DUTY AT ADDIS ABABA AS SENIOR ADMINISTRATIVE ASSISTANT EFFECTIVE 1 FEBRUARY 1981".

Effective 4 March 1981, the Applicant returned to the Headquarters of the ECA as a Senior Administrative Assistant. In a letter dated 11 March 1981, the Applicant requested the Chief, Personnel Section, ECA, for payment of a special post allowance for the year 1980 during which he had discharged the functions of Administrative Officer at the L-1 level at the MULPOC in Gisenyi. There ensued an exchange of inter-office memoranda within ECA concerning the merits of the Applicant's request. On 15 February 1982, the Applicant instituted a recourse procedure before the Panel to Investigate Allegations of Discriminatory Treatment within the Secretariat. On the basis of a favourable recommendation by the Panel dated 23 August 1983, and its approval by the Director, Division of Personnel Administration, the Applicant was retroactively granted a special post allowance to the P-1 level for the period 1 January 1980 to 31 January 1981, that is, for a part of the period of his service in Rwanda.

On 14 July 1983, the Applicant requested the Secretary-General for payment of a special post allowance for the period during which he discharged the functions of Acting Director of the ECA Sub-Regional Office in Kinshasa, as well as a promotion from the General Service to the Professional category under the promotion procedure that existed prior to the establishment by the General Assembly of the system of competitive examinations in its resolution 33/143 of 20 December 1978. This letter was treated as a request for review of an administrative decision.

On 27 June 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 26 June 1985. Its conclusion and decision read as follows:

"CONCLUSION

37. In view of the considerations set out above, the Panel finds unanimously that the appellant had shown that the delay in initiating the appeals procedure was the result of a choice on his part for financial gain and that the non-compliance with the time-limits prescribed in staff rule 111.3(a) and (b), in effect at that time, was therefore the responsibility of the appellant. Consequently, the Panel concludes that there were no exceptional circumstances beyond the control of the appellant, which would warrant a waiver of the time-limits under staff rule 111.3(d), in effect at that time, and that the appeal was therefore not receivable.

DECISION

38. Accordingly, the Panel declares that the appeal is not receivable by the Joint Appeals Board because the appellant failed deliberately to observe the time-limits prescribed in staff rule 111.3(a) and (b), in effect at the time he received notification of the contested decisions. Consequently, the Panel decides unanimously not to entertain the appeal."

On 3 September 1985, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had

"taken note of the Board's unanimous decision not to entertain the appeal on the ground that it was not receivable for non-observance of the time-limits laid down in staff rule 111.3(a) and (b), in effect at the time [he] received notification of the contested decisions."

On 31 March 1986 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's rights have been violated because he was not granted a special post allowance between the period January 1973 to November 1977.

2. The Applicant had the right to be promoted from the General Service to the Professional category under the promotion system existing before the introduction of the competitive examination.

3. Had certain documents been available to the JAB when it considered the appeal, the JAB would have decided that the delay in submission of his appeal was not attributable to the Applicant but resulted from consistent deeds and omissions by the Respondent. The Applicant is thus entitled to a waiver of the provisions of staff rule 111.2(e).

Whereas the Respondent's principal contention is:

The Applicant has not proved that there exists sufficient cause to rescind the conclusion and the decision of the JAB as to the non-receivability of the application as time-barred.

The Tribunal, having deliberated from 13 October 1986 to 28 October 1986, now pronounces the following judgement:

I. The Applicant instituted proceedings before the Joint Appeals Board (JAB) in which he claimed, first, additional remuneration in the form of a special post allowance, and, second, promotion to the Professional category without passing a competitive examination. Both parties agreed in the proceeding before the JAB that the Board should consider only the issue of the receivability of the appeal in the context of time-limits for appeals laid down by the Staff Rules. That was, as a consequence, the single issue considered by the JAB, which recommended, unanimously, that the appeal be treated as time-barred. The Applicant now brings his case to this Tribunal.

II. Timeliness of an appeal against an adverse administrative decision was at that time governed by staff rule 111.3. In order for an appeal to be receivable by the JAB, the staff member was required to address to the Secretary-General a written request for review of the adverse administrative decision within one month of that decision. If the Secretary-General responded in the negative, the staff member concerned had to appeal to the JAB one month after receiving notification in writing of the negative decision; if the Secretary-General did not reply, the staff member was required to appeal one month after having sent his appeal to the Secretary-General. Sub-paragraph(d) of staff rule 111.3 stated, in the clearest terms, that:

"An appeal shall not be receivable by the Joint Appeals Board, unless the above time-limits have been met, provided that the Board may waive the time-limits in exceptional circumstances."

The rule stated clearly that the Board's authority to waive these time-limits was discretionary. If the Board were to waive, it had to find that the delay of the staff member in bringing the appeal was due to "exceptional circumstances." The factors that the Board might consider relevant in determining the existence or absence of

"exceptional circumstances" are circumscribed. As the Board correctly observed in this proceeding:

"... only circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review and filing an appeal in time, may be deemed to constitute 'exceptional circumstances' and warrant a waiver of the prescribed time-limits in accordance with the consistent jurisprudence of the Administrative Tribunal." (Report No. 510, para. 33)

III. The introduction to this judgement sets forth the facts which, in view of the temporal character of the case, relate largely to dates. To recapitulate briefly, on 14 July 1983 the Applicant made an explicit request to higher authority for a special post allowance for his 1973-77 service in Kinshasa. Since the discretionary grant of such an allowance may be made for a period of twelve months only, and must be renewed annually if it is to continue, a staff member who appeals the denial of such an allowance will have to convince the JAB or the Tribunal that "exceptional circumstances" beyond his control or responsibility occasioned his failure to appeal the withholding of such an allowance, at the latest, within a narrow period of months immediately following the relevant year of service. In this case the staff member's 1983 written request for a special post allowance was made more than five years after the last year of his Kinshasa service. On the face of it, this is a delay of an extraordinary length, and it would not be easy to present convincing reasons that such a delay had been due to "exceptional circumstances" beyond the control of the staff member concerned.

IV. In his pleadings the Applicant seeks repeatedly to advance documentation in support of his contention that he had requested the grant of a special post allowance far earlier than 1983. For example, his Written Observations draw attention to a memorandum he wrote on 10 September 1976, during the penultimate year of his Kinshasa service. But a reading of that memorandum reveals only his observation in passing that his responsibilities merited a more senior post than that of GS-8 and the hope that a solution would be found. It is impossible to consider this memorandum as a timely and

explicit request for a special post allowance within the meaning of the then applicable staff rule 111.3(a).

V. Indeed, the Applicant's actions confirm beyond doubt his lack of promptitude in making an appeal for a special post allowance for his Kinshasa service. For in February 1982 he appealed successfully for precisely such an allowance with respect to two years of post-Kinshasa service in Rwanda by invoking the Secretariat Panel to Investigate Allegations of Discriminatory Treatment. In that 1982 appeal he said nothing whatever of any appeal for a special post allowance for his earlier years of service. The Tribunal interprets his silence in this regard as evidence that as long after the fact as 1982 he did not consider any such appeal to be pending.

VI. In its opinion, the JAB speculated that the reason for the extraordinary dilatoriness of the staff member in pursuing a claim for his Kinshasa service was his fear that the granting of a special post allowance would jeopardize his continued receipt of a mission allowance while still on site at the Kinshasa post. The Tribunal finds nothing improper in the Board's consideration of a communication to this effect written by the staff member in 1982 in the course of pursuing his claim for an allowance for the Rwanda service. The fact is that the Applicant made no claim on departure from Kinshasa at the end of 1977; as noted, he advanced this claim only in July 1983.

VII. In addition to the claim for special post allowance, the application in the current case appeals to the JAB against an administrative decision refusing to promote the Applicant from the General Service to the Professional category without passing a written examination. The Applicant initiated the request for promotion without examination on 14 July 1983, the same date on which he first advanced his request for a special post allowance for his Kinshasa service. By that time he had already taken the competitive examination and failed it. His appeal, coming more than three years after the competitive examination system was established by the General Assembly in 1979, is likewise plainly time-barred by

then staff rule 111.3. In common with the JAB, the Tribunal cannot find any "exceptional circumstances" to excuse a delay of more than three years in the making of this appeal.

VIII. Finally, the Applicant asserts that the Tribunal is entitled to address the substance of the questions raised by his appeal and not to confine itself to a review of the determination of lack of timeliness found by the JAB. He cites the case of Vassiliou, No. 275 (1981) as supporting this contention. That case is inapposite for there the Joint Appeals Board had dealt with the merits, and the substantive issues in that case thus had been placed before the Tribunal. That is not the case here where, for reasons which the Tribunal finds no basis for overruling, the Board refused to consider the merits on the ground that the appeal was time-barred.

IX. All pleas advanced in the application are accordingly rejected.

(Signatures)

Herbert REIS
Vice-President, presiding

Endre USTOR
Member

Ahmed OSMAN
Member

New York, 28 October 1986

R. Maria VICIEN-MILBURN
Executive Secretary