

ADMINISTRATIVE TRIBUNAL

Judgement No. 428

Case No. 431: KUMAR

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Arnold Kean, Vice-President, presiding;  
Mr. Francisco A. Forteza; Mr. Ioan Voicu;

Whereas, on 27 November 1985 and 27 February 1986, Devendra Kumar, a staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant and with the agreement of the Respondent, the President of the Tribunal successively extended the time-limit in which to file an application until 30 September 1986, 31 December 1986, 31 March 1987, 30 April 1987 and 30 June 1987;

Whereas, on 5 May 1987, the Applicant filed a corrected application, the pleas of which read as follows:

"... RELIEF SOUGHT

1. Promotion of the Appellant to the post of National Officer (Level ND-X) UNDP, New Delhi, effective 7 June 1981.
2. Appointment/promotion of the Appellant as Administrative/Finance Officer.
3. Salary of ND-X at the appropriate level from the date of the loss of the grade up to the time Appellant's promotion is made.
4. Financial compensation for the loss of health, mental torture suffered and loss of prestige among colleagues and outsiders with whom the Appellant had official dealings."

Whereas the Respondent filed his answer on 31 August 1987;  
Whereas the Applicant filed written observations on  
28 September 1988;

Whereas, on 23 September 1988, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 10 October 1988 and 19 October 1988, the Applicant made a further request for oral hearings, and for a postponement of the case, requests that were rejected by the Tribunal on 11 October 1988 and 25 October 1988;

Whereas the facts in the case are as follows:

Devendra Kumar entered the service of UNDP on 22 March 1957, as a locally recruited Clerk/Typist at the New Delhi office. He was initially offered an indefinite appointment at the ND-3, step I level. On 1 January 1959, he was promoted to the ND-4 level and effective 1 April 1964, to the ND-5 level. On 1 May 1968, his functional title was changed from Programme Assistant to Accountant and effective 28 September 1971, to Deputy Finance Officer. On 1 May 1972, he was promoted to the ND-6 level and effective 1 November 1972, he was granted a permanent appointment. On 1 March 1977, the Applicant was promoted to the ND-7 level as Senior Finance Assistant, a function which the Applicant continues to perform.

In early 1981, the then Resident Representative decided to consolidate the functions formerly assigned to both a National Administrative Officer and a National Finance Officer by creating a new post. The incumbent would supervise the Administrative and Finance Sections of the New Delhi Office. Accordingly, the Resident Representative issued an internal vacancy notice No. UNDP/81/3 to announce the post of "Administrative/Finance Officer" at the ND-X level. All interested staff members could apply for the post.

On 28 April 1981, a group of six staff members at the ND-7 level met, at their request, with the Resident Representative to enquire about the reorganization of the office; to find out why a vacancy announcement had been issued; why promotion bodies would not be permitted to select the staff by themselves and whether the Resident Representative had someone in mind to fill the post. According to the Resident Representative, he informed the staff that

a vacancy notice had been issued in accordance with normal practice because "... this was a new post, with different job requirements than any one of the existing posts ..." and the selection of a suitable candidate was "... not a matter similar to the annual APP [Appointment and Promotion Panel] review of promotions". He added that he "... did have someone in mind for the job but the vacancy notice was precisely to ensure that nobody would be overlooked who could be equally well or better qualified ...".

On 27 May 1981, the local APP met to review the candidatures of all eligible internal candidates for the vacancy of Administrative/Finance Officer. According to the minutes of the meeting, the Panel:

"... thoroughly reviewed the candidatures of as many as eleven staff members at level ND-7 and fourteen at level ND-6, pursuant to the procedure outlined in the APP guidelines requiring consideration of all eligible internal candidates. ...

This review resulted in a short-list of six candidates. Further analytical consideration of their bio-data vis-à-vis the requirements of the post narrowed down the choice to two candidates. Weighing their merit-cum-seniority, the Panel came to the unanimous decision to recommend Mr. V.K. Hemrajani for appointment to the subject post."

At the beginning of June 1981, Mr. Ram Narain, a Finance Officer, in charge of the Finance Section, was reassigned overseas.

On 6 July 1981, the Resident Representative announced to the staff of the UNDP Office that, upon the departure of Mr. Ram Narain and until the Administrative/Finance Officer took up his duties, the Applicant would be "charged with overall responsibility for the operation of the Finance Section."

On 6 August 1981, the Resident Representative a.i., UNDP, New Delhi, announced to all staff of the UNDP New Delhi Office in an office circular No. 640, that upon the "recommendation of the Appointment and Promotion Panel, endorsed by the former Resident Representative and approved by the Division of Personnel, UNDP Headquarters, Mr. V.K. Hemrajani arrived in New Delhi to take up his assignment as UNDP Administrative/Finance Officer with effect from 6 August 1981." Mr. Hemrajani, who had been locally recruited in India on 18 January 1976, worked at the UNDP Sub-Office in Bombay as

Senior Customs and Transport Assistant at the ND-7 level.

On 26 August 1981, the Applicant wrote to the Secretary of the APP asking the APP to "revoke the decision" to designate Mr. Hemrajani as Administrative/Finance Officer. He asserted that since September 1971, he had been officially designated Deputy Finance Officer, to "act as the Officer-in-Charge in the absence of the Finance Officer", an arrangement that had henceforth worked satisfactorily. He felt that the decision to merge the posts of Finance Officer and Administrative Officer had been taken to deny him the post and that it was an "injustice" and "unfair on the part of the APP and the Administration" to recommend for the post a person whose responsibilities in Bombay did not, in the Applicant's view, qualify him for the post of Administrative/Finance Officer.

In a reply dated 11 September 1981, the Secretary, APP, UNDP, New Delhi, informed the Applicant that the APP had indeed considered his application for the new post but had recommended the appointment of Mr. Hemrajani instead. The newly appointed Administrative/Finance Officer would not replace the former Senior Finance Officer exclusively; he would occupy a new post with much broader responsibilities in both the administrative and finance fields, to act on behalf of the Assistant Resident Representative (Administration), in all day-to-day activities of the various units.

He also advised the Applicant that the creation of the post of Administrative/Finance Officer did "not reflect on the performance or potential of any staff member in the Administrative Section;" and that it was "neither possible nor desirable for a recommendation made by the Panel, approved by the Resident Representative and endorsed by UNDP Headquarters, to be revoked."

On 14 October 1981, the Applicant wrote again to the Secretary of the APP seeking clarification of certain criteria for appointment and promotion, the reasons for the internal reorganization of the UNDP/New Delhi Office, and the procedure followed by the APP in the case. In a reply dated 20 October 1981, the Secretary of the APP, explained that seniority within grade, although not an "overriding" consideration for appointment and promotion, had assumed a very important role in the deliberations of past Panels; merit, experience and the other qualities reported on in the performance reports were other important factors. The

Finance Unit had never been an independent unit but was an integral part of the Administrative and Finance Section; it had not been "downgraded" in any way and still had a vital role to play in the office.

On 12 November 1981, the Applicant wrote again to the Secretary, APP, UNDP, New Delhi, and requested him to "re-open" his case before the APP and to "take necessary steps to redress [his] grievances." In essence, the Applicant contested the procedure followed by the APP, on the grounds that the Resident Representative had decided in advance who should occupy the post. The Panel had then endorsed the former Resident Representative's decision, rendering the promotion process "unconvincing". On 18 November 1981, the Secretary, APP, UNDP, informed the Applicant that, as already pointed out in his memorandum of 11 September 1981, the Administration was not prepared to reopen the case before the APP.

On 8 December 1981, the Applicant wrote to the Administration requesting review of the administrative decision not to appoint him to the post of Administrative/Finance Officer.

In a reply dated 13 January 1982, the Director, Division of Personnel, UNDP at Headquarters, stated that UNDP was satisfied that the local APP had properly exercised its functions in reviewing the candidates and recommending one staff member, Mr. Hemrajani, to the Resident Representative, UNDP, New Delhi, for the particular post. He emphasized that the Administrator of UNDP had delegated to the Resident Representative the authority to organize the Field Office in the manner which he considered to "be most effective for the needs of the Programme." He stated that although he could understand the Applicant's disappointment, the decision by the Resident Representative, on the recommendation of the APP, did not in any way "detract from [the Applicant's] excellent service record." On 2 February 1982, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 28 June 1985. Its conclusions and recommendations read as follows:

#### "Conclusions and Recommendations"

40. The Panel finds that the administrative decision of the Resident Representative, UNDP, New Delhi, on the unanimous recommendation of the local Appointment and Promotion Panel (APP) to appoint a staff member other than the appellant to

the post of Administrative/Finance Officer, was made in accordance with the Guidelines for UNDP Field Office Appointment and Promotion Panels set out in circular UNDP/ADM/PER/169 and with the requirement of due process. The Panel therefore rejects the appellant's contention of violation of the established UNDP procedure and lack of due process as unfounded and not valid.

41. The Panel finds that unless the appellant proves by concrete evidence that the local Appointment and Promotion Panel (APP) was improperly motivated when submitting its recommendation, it is beyond the mandate of the Joint Appeals Board to consider the substantive question of efficiency of the staff and the interpretation of the applied promotion criteria, including qualifications and relevant professional experience, in accordance with staff rule 111.2(k). The Panel finds that the appellant did not meet the burden of proof to substantiate by concrete evidence that the local APP was improperly motivated when submitting its recommendation nor that the Resident Representative, UNDP, New Delhi, was prejudiced against him when taking the contested decision. The Panel therefore rejects the appellant's contention as unfounded and not valid.
42. The Panel finds finally that the decision to appoint a staff member other than the appellant to the above post was made properly in accordance with the principles contained in staff regulations 4.2, 4.3 and 4.4 and there was no concrete evidence available which would substantiate the appellant's contention that the decision was made in violation of the above principles of the Charter. The Panel therefore rejects the above contention as unfounded and not valid.
43. Accordingly, the Panel decides unanimously to make no recommendation in support of the appeal."

On 2 August 1985, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had taken note of the Board's report and had decided to maintain the contested decision.

On 5 May 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The recommendation by the APP was tainted by the influence and improper measures of the Resident Representative who had earlier on decided who would be the person to be appointed to the new post.
2. The Respondent denied the Applicant his entitlement to

be duly considered for promotion by resorting to the fiction of joining two separate and distinct functions into a single post of Administrative/Finance Officer.

3. Every staff member has the right to have his candidature for a vacant post examined on the basis of the conditions set forth in Article 101 of the Charter and in staff regulation 4.2.

4. Promotions and appointments may not be arbitrary or purely discretionary and they are subject to guidelines and reviews intended to assure fairness and equity.

Whereas the Respondent's principal contentions are:

1. Staff members have no right to promotion or appointment to a particular post.

2. There was no violation of due process in the appointment of a staff member other than the Applicant to the post.

The Tribunal, having deliberated from 11 to 28 October 1988, now pronounces the following judgement:

I. The Tribunal has before it an application in which the Applicant requests the Tribunal to decide and direct his promotion to the post of National Officer (Level ND-X) UNDP, New Delhi, effective 7 June 1981. The Tribunal is also requested to decide on the appointment/promotion of the Applicant as Administrative/Finance Officer. The application further includes the request for a decision that the Applicant's salary should correspond to that of a staff member at the appropriate level of ND-X from the date of the loss of the grade up to the time the Applicant's promotion is effected. Finally, the Applicant requests financial compensation for the loss of health, mental torture suffered and loss of prestige among colleagues and outsiders with whom the Applicant had official dealings.

In substance, the Tribunal has to deal with one comprehensive plea deriving from the decision of the Administration to promote another staff member to the post for which the Applicant applied.

II. The Applicant has, in fact, merely made use of several contentions to substantiate his main claim, that his failure to be

promoted to the post in question is due to the fact that the APP recommendation of another person to that post was tainted by the influence and improper measures of the Resident Representative. In the Applicant's opinion, that led to prejudice and discrimination against him.

III. Since this is the essential issue before it, the Tribunal must once again state its position in that regard. In Judgement No. 134, Fürst (1969), paragraph III, the Tribunal stated the following:

"... Appointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same. ..."

In the present case, the Tribunal cannot find any binding commitment on the part of the Respondent for promotion of the Applicant to the post of National Officer at the ND-X level, UNDP, New Delhi.

IV. Moreover, in Judgement No. 312, Roberts (1983), paragraph II, the Tribunal considered again that:

"... as far as promotions are concerned, the general rule is that they are subject to the discretion of the Secretary-General (see article IV of the Staff Regulations and chapter IV of the Staff Rules; see also Judgement No. 134: Fürst) and that, consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy."

In the same judgement the Tribunal added that:

"Such being the general rule, it follows that decisions on promotions cannot be challenged on the ground of inadequate consideration of performance or length of service or on any other similar ground." (para. III)

V. In the case before it, the Tribunal notes that in one of his performance reports the Applicant is described as "very conscientious and hard working". His records show that his work was very positively appreciated. However, the power of appointment and



promotion rests with the Secretary-General whose decision cannot be challenged "... on the ground of inadequate consideration of performance or length of service ...". In the case of staff members serving with UNDP, the power of appointment and promotion rests with the Administrator who, with regard to locally recruited staff, has delegated such authority to the Resident Representative at each UNDP Field Office. In a similar way, the assignment of staff members falls within the discretionary authority of the Secretary-General under staff regulation 1.2. Consequently, the Tribunal finds that the Applicant had no right to be appointed to the post in question and cannot challenge on that ground the decision of the Administrator, irrespective of his expectations of succeeding to that post.

VI. Nevertheless, the Tribunal is of the opinion that a discretionary decision of the Secretary-General may be challenged on the ground that extraneous factors were taken into consideration.

VII. However, the Tribunal finds that in the present case, consideration of the evidence gives no indication that the APP was improperly influenced or considered extraneous factors in making its recommendation. The fact that the successful candidate had not been working in the particular section nor in the same duty station where the post was established, had no effect on his eligibility as an internal candidate under the "Guidelines for the Appointment and Promotion Bodies" set forth in Circular UNDP/ADM/PER/169 which reads, in part, as follows:

"The Resident Representative shall advise the Panel of the names of all staff members who have applied for the specific vacancy and, if he/she considers that outside recruitment is necessary in the interest of UNDP, the Panel will be advised of the reasons in order to determine the necessity of such outside recruitment. Before recommending such action, the Panel shall review the qualifications of staff already in UNDP service and in the overall UN system in the country..." (Chap. II, para. 5(a)).

VIII. The Tribunal concurs with the JAB finding that the successful candidate, recommended by the APP, endorsed by the Resident Representative, UNDP, New Delhi, and approved by UNDP Headquarters,

was a permanent locally-recruited UNDP staff member in India and therefore an eligible internal candidate for appointment to the new post. Consequently, the Tribunal finds that the Applicant's assertion that outside recruitment had been utilized in violation of established guidelines is unsustainable.

IX. Furthermore, as to the Applicant's claim that he was denied due process in the appointment to the post of a staff member other than the Applicant, the Tribunal concurs with the JAB findings that the established procedures and guidelines and the requirement of due process were complied with. The Tribunal notes on the basis of the evidence that the Applicant's candidacy for the post was submitted to the local APP for its review and recommendation, and was duly considered by the APP, which decided to recommend another candidate.

X. In this respect, the Tribunal concurs with the JAB conclusion that the Applicant did not meet the burden of proof to substantiate by concrete evidence that the local APP was improperly motivated when submitting its recommendations, nor that the Resident Representative, UNDP, New Delhi, was prejudiced against him when making the contested decision. Accordingly, the Tribunal finds the Applicant's contention unfounded.

XI. In view of the foregoing, the Tribunal considers that the Applicant had no right to be appointed to a higher level post and that there was no violation of due process with respect to the Applicant's consideration for promotion to the post he desired.

XII. For these reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Arnold KEAN  
Vice-President, presiding

Francisco A. FORTEZA  
Member

Ioan VOICU  
Member

New York, 28 October 1988

R. Maria VICIEN-MILBURN  
Executive Secretary