
ADMINISTRATIVE TRIBUNAL

Judgement No. 446

Case No. 463: SAN JOSE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Arnold Kean, President; Mr. Samar Sen;

Mr. Ioan Voicu;

Whereas at the request of Evelina T. San José, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1987, 31 March and 18 April 1988 the time-limit for the filing of an application to the Tribunal;

Whereas, on 20 April 1988, the Applicant filed an application in the pleas of which she requested the Tribunal:

"...

6. To order the Secretary-General

(a) To rescind his decision of 22 July 1987 ... to maintain the contested administrative decision of 22 April 1986 taken by the then ASG [Assistant Secretary-General] for OGS [Office of General Services] not to accept the conclusions and recommendations of the Rebuttal Panel, except on one item ...

(b) To accept, in good faith, the observations, conclusions and recommendations made by the Rebuttal Panel in its report dated 17 March 1986 submitted to OGS ..., pursuant to paragraph 14 of ST/AI/240/Rev.2 of 28 November 1984 and to fully implement the recommendations of the Rebuttal Panel in the cause of equity of justice.

- (c) To accept, in good faith, the observations, conclusions and recommendations made by the Discrimination Panel in its report dated 6 December 1985 submitted to OPS [Office of Personnel Services], pursuant to ST/AI/308/Rev.1 of 25 November 1983 and to fully implement the recommendations of the Discrimination Panel in the cause of equity and justice, particularly in light of the jurisprudence established by the Administrative Tribunal in Judgement No. 401 of 12 November 1987 (Upadhya vs. The Secretary-General of the United Nations) on the question of the Respondent's failure to implement the recommendations of the Discrimination Panel.
- (d) To give prompt consideration to the Applicant's promotion and to the classification of her post to G-6 level, 22 years' of loyal and devoted service in the United Nations as well as with her demonstrated satisfactory performance, pursuant to the provisions of paragraph (3) of Article 101 of the Charter of the United Nations and the relevant Staff Regulations and Rules made thereunder.
- (e) To pay the Applicant, appropriate and adequate compensation for the material and moral injuries suffered by her as a direct consequence of the arbitrary, discriminatory and prejudicial treatment in the Archives Section of OGS, as well as of the three successive arbitrary, discriminatory and prejudicial PERs, covering the periods from 1 February 1979 to 5 February 1985, given to her by her newly recruited supervisors (Archivists) in the Archives Section of OGS, apparently at the instigation of the Chief of the Archives Section, which have evidently resulted in the denial of her promotion to the appropriate grade level and of classification of her post at G-6 level, thereby causing her considerable financial loss as well as immeasurable moral injuries (personal harassment, humiliation and emotional stress) during the last seven years.

7. To hold oral proceedings on the case in order to hear the Applicant and the witnesses concerned."

Whereas the Respondent filed his answer on 23 September 1988;
Whereas, on 4 November 1988, the Applicant filed written

observations in which she requested the Tribunal to remand, pursuant to article 9(2) of its Statute, the question of the implementation of the recommendations made by the Discrimination Panel, the question of the classification of her post, the question of her promotion and the question of the granting of a long-service step in her salary, to award her compensation for the material and moral injuries suffered by her and to award her 3,000 as costs;

Whereas the President of the Tribunal ruled on 30 March 1989 that no oral proceedings would be held in the case;

Whereas, on 20 April 1989 and again on 5 May 1989, the Applicant requested the President of the Tribunal, "pursuant to article 10 (3) of its Rules, to designate a member of the Tribunal or any disinterested person to take oral statements" from certain witnesses;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 February 1966 as a Clerk-Stenographer at the G-3 level under a fixed-term appointment which was converted to a probationary appointment on 28 July 1966. On 1 February 1968, she received a permanent appointment and on 1 April 1973, she was promoted to the G-4 level as a Secretary. She was successively assigned to the Centre for Industrial Development (which later became UNIDO), to the Field Operations Service (Office of General Services) and to the Registry Section of the Communications, Archives and Records Service (Office of General Services). On 5 June 1978, the Applicant was reassigned from the Registry Section to the Archival Records Unit of the Archives Section as a Senior Archives Clerk and on 6 February 1985, she was reassigned to the Reference and Sound Archives Unit.

On 29 May 1981, the Applicant submitted a rebuttal to her performance evaluation report covering the period 1 February 1979 - 31 January 1981; on 13 October 1981, the Rebuttal Panel recommended that no changes be made in the ratings and comments contested by the Applicant and on 15 October 1981, the Assistant Secretary-General

for General Services endorsed that recommendation. On 25 April 1983, the Applicant submitted a rebuttal to her performance evaluation report covering the period 31 January 1981 - 1 December 1982; on 2 September 1983, the Rebuttal Panel recommended that some ratings contested by the Applicant be upgraded and some comments revised and on 15 September 1983, the Assistant Secretary-General for General Services accepted in part that recommendation.

On 28 January 1985, the Applicant submitted to the Panel on Discrimination and Other Grievances a complaint about "discriminatory practices and deplorable conditions of service in the Archives Section of the Office of General Services." On 6 December 1985, the Panel, having found that the atmosphere in the Archives Section was antagonistic and that there was a serious problem with staff/management relations, recommended that the Applicant and another staff member "be transferred out of the Records and Buildings Services Division of OGS [Office of General Services] altogether. It appears, however, that no action was taken on this recommendation.

On 20 August 1985, the Applicant submitted a rebuttal to her performance evaluation report covering the period 1 December 1982 - 5 February 1985; she contested some ratings and most comments made by the first reporting officer. On 17 March 1986, the Rebuttal Panel, which had interviewed the two reporting officers, the Applicant and four other persons, recommended in its report that 7 out of 11 ratings or comments disputed by the Applicant be upgraded or improved; the Panel concluded that there had been "serious staff/management relation problems existing within that department which [had] hindered the objective completion of the performance evaluation report of Mrs. San José". In her appraisal, dated 22 April 1986, the Assistant Secretary-General for General Services rejected all recommendations and conclusions of the Panel except for the upgrading of one rating.

On 22 June 1986, the Applicant requested the Secretary-General to review her "history of performance reviews within the

Archives Section ... and, specifically, the most recent administrative decision taken by ... [the] Assistant Secretary-General, Office of General Services, rejecting the recommendations made by the Rebuttal Panel". On 18 August 1986, the Assistant Secretary-General for Personnel Services replied that he could find no reason to modify the contested appraisal and on 26 September 1986 the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 18 May 1987. The Board's conclusions and recommendations read as follows:

"Conclusions and Recommendations

30. The Panel finds that it is competent to consider an appraisal regarding a rebuttal of a performance evaluation report made by the head of an office who was at the same time the supervisor of the appellant.
31. The Panel finds that the appellant has not proven to the Panel's satisfaction that the contested decision had been motivated by prejudice or by other extraneous factor.
32. Accordingly, the Panel makes no recommendations in support of this appeal."

On 22 July 1987, the Applicant was informed that the Secretary-General had decided to maintain the contested decisions and on 20 April 1988, she filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The appraisal made by the head of a department or an office on a performance evaluation report on the basis of the Rebuttal Panel's report does constitute an "administrative decision" subject to appeal to the Joint Appeals Board.
2. There was a consistent pattern of arbitrary, discriminatory and prejudicial performance evaluation reports and similar administrative decisions thereon.
3. There was denial of due process of law, fair play and impartiality in the administration of justice through the Joint

Appeals Board procedures.

4. The Respondent failed to implement the Discrimination Panel's recommendations.

5. The Administration took retaliatory actions against the Applicant through denial of promotion and denial of reclassification of her post.

6. The jurisprudence established by the Tribunal in Judgement No. 401 is relevant.

7. The Respondent violated Section 29 (a) of the Convention of the Privileges and Immunities of the United Nations.

Whereas the Respondent's principal contentions are:

1. The decision by the head of the Applicant's office not to accept the recommendation of the Rebuttal Panel on the Applicant's performance evaluation report was a proper exercise of the Respondent's authority and in conformity with the relevant administrative issuances.

2. An appeal filed with the Joint Appeals Board concerning an appraisal following a rebuttal panel's report can only be reviewed on the restricted ground of whether the evaluation and the rebuttal procedure were properly carried out.

3. There is no proof that the appraisal and the related decisions by the Respondent concerning the Applicant's rebuttal proceedings were tainted by prejudice or discrimination.

4. Claims which have not been previously submitted to the Joint Appeals Board may not be presented to the Tribunal, except where the Secretary-General and the Applicant have so agreed.

The Tribunal, having deliberated from 10 to 24 May 1989, now pronounces the following judgement:

I. In a letter dated 20 April 1989, the Applicant's counsel requested the President of the Tribunal to exercise his power under article 10 (3) of the Tribunal's Rules to obtain any necessary

information in order to complete the documentation of the case and for that purpose to designate a member of the Tribunal or any other disinterested person to take oral statements from persons referred to in the letter. However, the Tribunal considers the documentation (which includes 65 annexes) to be sufficient to enable the case to be properly decided and that, in any event, the power of the President to obtain evidence under article 10 (3) can only be exercised prior to the case being placed on the list. Accordingly, the request is rejected.

II. In her pleas, the Applicant requests the Tribunal to order the Respondent, inter alia, (a) to rescind his decision of 22 July 1987 and (b) to accept the observations, conclusions and recommendations of the Rebuttal Panel's report of 17 March 1986; also to implement those recommendations.

III. The Respondent's decision of 22 July 1987 and his non-acceptance of the recommendations of the Rebuttal Panel's report constitute, in the Tribunal's opinion, administrative decisions falling within the jurisdiction of the Tribunal, as contended by the Applicant and accepted by the Joint Appeals Board.

IV. Under staff rule 111.2 (k), the Joint Appeals Board was precluded from considering the substantive question of the Applicant's efficiency, but could only consider whether the administrative decision was motivated by prejudice or by some other extraneous factor. The substantive question of the efficiency of the Applicant is therefore not an issue before the Tribunal.

V. The Tribunal, having considered all the evidence and arguments put forward by the Applicant, has reached a conclusion similar to that of the Joint Appeals Board: that although the Applicant's relations with some of those supervising her work in the Archives Section of the Office of General Services may have been

less happy than her relations with previous supervisors, the evidence does not prove that the contested decision of the Respondent was motivated by prejudice or by some other extraneous factor.

VI. In her note for the file dated 22 April 1986, the Assistant Secretary-General for General Services rejected all recommendations and conclusions of the Rebuttal Panel, apart from the upgrading of one rating. A copy of this note was sent to the Applicant among others. The content of the note may have been somewhat severe, but it is not the function of the Tribunal to substitute its own opinions for those expressed in the note. The Tribunal's duty is to consider whether, as claimed by the Applicant, the note and the consequential decision of the Respondent were vitiated by prejudice or by some other extraneous factor. The Tribunal finds no evidence to prove that this was so. Although relations between the Applicant and some of her immediate supervisors may have been less than perfect following the retirement of her former supervisor, there is no evidence that any prejudice or hostility had any influence on the decision of the Assistant Secretary-General or other senior officers. In this connection, the Tribunal observes that, in the absence of credible evidence to that effect, the Applicant gains nothing by frequent repetition that a decision of the Respondent is "arbitrary, discriminatory and prejudicial".

VII. The Tribunal has not found evidence of any procedural defect which would vitiate the decisions in question. In particular, the report of the Rebuttal Panel was thoroughly and fully considered by the Assistant Secretary-General for General Services.

VIII. Judgement No. 233, Ibañez, cited by the Applicant as a precedent to justify her request for having her report upgraded by the intervention of the Tribunal, affords no parallel. The Tribunal's decision in that case was based upon an error disclosed

by internal inconsistency in the contested performance evaluation report which, in consequence, the Tribunal considered did not

"faithfully reflect the over-all job performance of the Applicant as found by the reporting officers themselves; the report is therefore misleading." (Judgement No. 223, Ibañez, para. X).

Mr. Ibañez was employed as a refrigeration operator. The Rebuttal Panel concluded that "his performance on the technical side of his duties is considered good". The low ratings he was given referred in fact only to his ancillary duties such as painting, scraping and cleaning floors, and not to his main function as a refrigerator operator.

IX. Pleas (a) and (b) of the application are accordingly rejected.

X. Pleas (c) to (e), inclusive, of the application raise issues which were not before the Joint Appeals Board and are therefore not receivable by the Tribunal under article 7 of its Statute.

XI. In her written observations on the Respondent's answer, the Applicant makes a new request; that pursuant to article 9, paragraph 2 of its Statute the Tribunal should remand for institution or correction four specified issues. These issues were not previously before the Joint Appeals Board and in substance cover the same ground as pleas (c) and (d) referred to in the preceding paragraph. The written observations on the Respondent's answer are not an appropriate vehicle for adding new requests, but apart from that the Tribunal cannot accede to the request. Under article 9, paragraph 2, a case can only be remanded at the request of the Secretary-General - which is not forthcoming in this case - and then only if the Tribunal finds that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed - which the Tribunal has not found in this instance. The request for remand is

therefore rejected.

XII. The Applicant also presents as pleas her requests to the Tribunal to "find and rule" in respect of matters specified in the application. These appear to the Tribunal to be arguments in support of the pleas in paragraph 6, and have been fully taken into account by the Tribunal in making its decision.

XIII. The application includes arguments addressed to the improvement of the administration of justice in the United Nations. Those are not relevant to the decision of the case before the Tribunal.

XIV. The Applicant's written observations conclude with a request that she be awarded \$3,000 as costs to cover counsel's fees and other relevant expenses. This request is made without amending the Applicant's pleas and cannot be properly introduced by inclusion in the Applicant's written observations. The Tribunal rejects this request in any event, and finds no special circumstances which would justify the award of costs to an unsuccessful Applicant. Furthermore, in this case the matter has been unnecessarily complicated by the introduction of issues not before the Tribunal.

XV. For the foregoing reasons, the Applicant's pleas are rejected in their entirety.

(Signatures)

Arnold KEAN
President

Samar SEN
Member

Ioan VOICU
Member

Geneva, 16 May 1990

R. Maria VICIEN-MILBURN
Executive Secretary