
ADMINISTRATIVE TRIBUNAL

Judgement No. 492

Case No. 548: DAUCHY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman,
Vice-President; Mr. Francisco A. Forteza;

Whereas, on 27 April 1990, Jacqueline Dauchy, a staff member
of the United Nations, filed an application the pleas of which read
as follows:

"II. PLEAS

With regard to its competence and procedure, the Applicant
respectfully requests the Tribunal:

- (a) To find that it is competent to hear and pass judgement upon
the present application under article 2 of its Statute;
- (b) To consider the present application receivable under
article 7 of its Statute.

...

The Applicant requests the Tribunal:

- (1) To decide that the contested decision of the
Secretary-General was tainted with errors of law;
- (2) To decide that, in light of the moral and material
injury which the Applicant sustained as a result of the
violation of her statutory right to have her candidature duly
considered, she be awarded compensation equivalent to six
months of her net base salary as at 11 April 1989, the date
on which she filed an appeal with the Joint Appeals Board;

(3) To recommend to the Secretary-General that he take appropriate steps to ensure that the Applicant is informed of vacancies in D-2 positions for which she is qualified and in which she is interested;

(4) To recommend to the Secretary-General that he establish an appropriate joint machinery to review the Applicant's and other candidatures for future vacancies in D-2 positions."

Whereas the Respondent filed his answer on 27 July 1990;

Whereas the Applicant filed written observations on 13 August 1990;

Whereas, on 6 September 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent, to which the latter replied on 12 and 14 September 1990;

Whereas, on 11 October 1990, the Tribunal asked the Respondent for an additional document, which the latter produced on 15 October 1990, with a request to the Tribunal not to communicate it to the Applicant, since it concerned a staff member not involved in the case;

Whereas, on 31 October 1990, the Tribunal decided not to introduce into the proceedings the document produced by the Respondent on 15 October 1990, and to return it to him.

Whereas the facts in the case are as follows:

Jacqueline Dauchy, a national of France, entered the service of the United Nations on 10 August 1958. She was given a probationary appointment at the P-2, step I level, as a translator-trainee in the Department of Conference Services. On 1 August 1960, she received a permanent appointment and was promoted to the P-3 level as a translator. On 1 April 1964, she was promoted to the P-4 level as a reviser.

On 1 June 1967, the Applicant was transferred to the Codification Division of the Office of Legal Affairs. On 1 January 1974, she was promoted to the P-5 level as a senior legal officer. On 1 August 1980, she was promoted to the D-1 level as Deputy Director for Research and Studies. On 22 April 1987, her functional

title was changed to that of Deputy Director of the Codification Division.

Since 1964, the post of Director of the Codification Division has been encumbered by various nationals of the Union of Soviet Socialist Republics (USSR). At the time of the developments that gave rise to these proceedings, the Soviet national in the post, Mr. Georgiy F. Kalinkin, was due to retire on 31 January 1989.

According to the statement of facts provided by the Respondent in his answer, the "question of the selection of a successor to Mr. Kalinkin ... arose initially in Spring 1988 when the Soviet Mission sent a Note proposing three candidates, and enclosing their Personal History Forms", which was "the normal method adopted for seeking the filling of a post pursuant to paragraph 4 of Section I of resolution 35/210 [of the General Assembly]". The Chef de Cabinet of the Secretary-General then asked the Legal Counsel "whether he would be prepared to consider another Soviet national to succeed Mr. Kalinkin". The Legal Counsel replied that "in order to avoid a change of Secretary of the Sixth Committee during the 43rd Session of the Assembly, he would insist that Mr. Kalinkin be extended [beyond the age of retirement] through the end of the Sixth Committee".

The Respondent goes on to state that "after having reviewed the internal candidates [from the Office of Legal Affairs] ... the Legal Counsel rejected two candidates [submitted by the Soviet Mission]", and that after interviewing the third candidate, Mr. Vladimir S. Kotliar, "[the Legal Counsel] on 9 September 1988, informed the Chef de Cabinet and the Office of Human Resources Management that he would be prepared to recommend Mr. Kotliar for appointment to the post of Director".

At the beginning of January 1989, the Applicant was informed by the Legal Counsel - who, according to his statement to the Joint Appeals Board, was aware that she was interested in the post of Director of the Codification Division - that it had been decided to appoint Mr. Vladimir S. Kotliar, another Soviet national, to replace Mr. Kalinkin.

On 11 January 1989, the Applicant requested the Secretary-General to review his decision to appoint Mr. Kotliar. In a reply dated 6 February 1989, the Assistant Secretary-General for Human Resources Management informed the Applicant that she had "not given sufficient grounds for conducting the review" she had requested, and that "in reaching the administrative decision regarding the filling of the D-2 post" in question, "due regard [had been] paid to the Charter, the Staff Regulations and other relevant General Assembly resolutions, the decisions of the Administrative Tribunal and established recruitment procedures". On 11 April 1989, the Applicant lodged an appeal with the Joint Appeals Board, which adopted its report on 6 December 1989. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations"

44. The Panel concludes that:

- Although promotions to D-2 posts are presently outside staff rule 104.14, they are governed by the Charter, Staff Regulations, relevant General Assembly resolutions, and decisions of the Administrative Tribunal;
- The Secretary-General restricted eligibility for the post of Director of Codification Division to only nationals of the Soviet Union;
- It was improper for the Secretary-General to apply the principle of replacement in the filling of the contested post;
- The appellant, as a staff member, had a statutory right to due consideration for the post, and this right was violated;
- The appellant failed to carry the burden of proof necessary to establish that she had not been considered for the contested post due to her gender;
- The prevailing machinery of appointing and or promoting candidates to D-2 posts is unclear and unsatisfactory and should be revised.

45. Accordingly, the Panel recommends that the appellant be considered fully and fairly with other candidates for vacancies in D-2 positions for which she is found to be qualified and in which she is interested.
46. The Panel also recommends that, in view of the overall circumstances of the case, the appellant should receive compensation for the injury she sustained as a result of the Administration's refusal to consider her candidacy for the post of Director of the Codification Division. This compensation should be in the amount of two months of her net base salary as at 11 April 1989, the date upon which she filed an appeal with the JAB."

On 5 March 1990, the Acting Under-Secretary-General for Administration and Management informed the Applicant of the following:

"...

The Secretary-General has re-examined your case in the light of the Board's report and noted that you were given due consideration for the post of Director, Codification Division, Office of Legal Affairs, in accordance with staff regulations 4.2, 4.3 and 4.4. The Secretary-General recalled that the Legal Counsel had reached the conclusion, taking into account all relevant circumstances, that it was in the best interests of the Organization to make his recommendation on the filling of the post which was approved by the Secretary-General.

Accordingly, the Secretary-General has decided to maintain the contested decision and to take no further action on the matter. The Secretary-General has further decided that you will be fully and fairly considered with other candidates for any vacant D-2 post for which you are qualified and interested.

..."

On 27 April 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The policy of systematically filling posts of staff members on secondment from their Government, serving on fixed-term

contracts with candidates of the same nationality, a policy which the Applicant refers to as the "preserve policy", is incompatible with several fundamental principles of the international civil service, the principle of non-discrimination and the principle of equal treatment.

2. The application of the "preserve policy" also results in the violation of the principle stated in Article 101, paragraph 3, of the Charter and in staff regulations 4.2 and 4.4.

3. The "preserve policy" is in violation of specific instructions of the General Assembly.

4. The Applicant was not given due consideration for the post in question.

Whereas the Respondent's principal contentions are:

1. The Applicant is entitled to consideration for promotion to D-2 posts for which she may reasonably be regarded as qualified.

2. The Applicant was considered for promotion to the position of Director of the Codification Division of the Office of Legal Affairs.

3. The mere fact that one Soviet national (Mr. Kotliar) succeeded another Soviet national (Mr. Kalinkin) cannot be deemed to be improper, as such replacements are specifically authorized by the General Assembly, which has full authority to regulate the recruitment of staff.

The Tribunal, having deliberated from 10 October to 2 November 1990, now pronounces the following judgement:

I. The Applicant has been in the service of the United Nations since 1958. In 1967, she was assigned to the Codification Division of the Office of Legal Affairs. In 1980, she was promoted in that Division to the position of Deputy Director for Research and Studies (at the D-1 level). In 1987, her title was changed to that of Deputy Director of the Codification Division. As the Director of the Division, Mr. Kalinkin, was due to retire on 31 January 1989,

the Applicant made known her interest in the position (at the D-2 level).

II. However, on 31 October 1988, the position was offered to a national of the Union of Soviet Socialist Republics (USSR), Mr. Vladimir S. Kotliar, and he was appointed on 1 February 1989.

III. In her pleas to the Tribunal, the Applicant contends that her statutory right to due consideration for the post was violated. She requests reparation for the moral and material injury thus sustained. She assesses compensation at the equivalent of six months of her net base salary as at 11 April 1989.

IV. The Applicant also invites the Tribunal to make two recommendations to the Secretary-General:

(a) That he should inform her of vacancies in D-2 positions for which she is qualified and in which she is interested;

(b) That he should establish an appropriate joint machinery to review candidatures for future vacancies in D-2 positions.

V. It goes without saying that the Tribunal has no competence to make regulatory recommendations concerning the establishment of a joint machinery to review candidatures. Its sole function, in the event of disagreement on how candidatures are reviewed, is to verify that the principles laid down in the Charter and General Assembly resolutions, and the necessary guarantees of due process, impartiality and equity in the appointment and promotion of international civil servants, are duly respected.

VI. The Tribunal notes that with regard to the first recommendation which the Applicant would like the Tribunal to make, the Secretary-General, according to the very terms of the contested decision, has undertaken to consider the Applicant "fully and fairly" for any vacant D-2 post for which she is qualified.

Accordingly, the Applicant will necessarily have to be informed of such vacancies.

VII. The Tribunal will therefore turn to a question on which the parties are not in agreement. In this case, was the Applicant considered "fully and fairly"? Those were the terms used by the Secretary-General, and the Tribunal cannot but express its complete approval of the formulation.

VIII. The Tribunal notes that until recently, certain Member States did not permit their nationals to accept permanent appointments with the United Nations except on very rare occasions, authorizing them to hold fixed-term appointments only. With some reluctance, the General Assembly acquiesced in the continuation of a long-standing practice by the Secretary-General, in order to prevent a situation which would undermine the principle of equitable geographical distribution of posts (Article 101, paragraph 3, of the Charter), to the detriment of those States. Thus in section I, paragraph 4, of resolution 35/210 of 17 December 1980, the General Assembly requests the Secretary-General:

"To continue to permit replacement by candidates of the same nationality within a reasonable time-frame in respect of posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected."

IX. It is in these circumstances that the post of Director of the Codification Division of the Office of Legal Affairs has been encumbered by Soviet nationals since 1964.

According to information supplied to the Tribunal by the Respondent in his answer, as supplemented on 12 and 14 September 1990, there were 152 Soviet nationals in the Professional and higher categories as at 31 December 1988, of whom only one had a permanent contract, the desirable range for the USSR of posts subject to geographical distribution being 140 to 189.

The Tribunal considers that the Secretary-General, under the terms of resolution 35/210, was justified in designating a Soviet national to fill the post of Director of the Codification Division, although he was not bound to do so.

X. The Tribunal notes that the Secretary-General carefully considered the candidates nominated by the Soviet Mission. On the advice of the Legal Counsel, the Secretary-General rejected two of the candidates and selected a third, Mr. Vladimir S. Kotliar.

XI. The promotion of the Applicant to the post to which she could legitimately aspire was necessarily ruled out by the very selection process described by the Tribunal. Only in the very unlikely event of the failure by all the candidates nominated by the Soviet Mission to meet the highest standards of efficiency, competence and integrity required of international civil servants, could the consideration of the Applicant's candidacy have led anywhere.

XII. The Tribunal believes that the Applicant could have expected to complete what was generally acknowledged to be a brilliant career by becoming titular head of the Codification Division. The Tribunal believes that such a promotion would have been all the more desirable as only very few women reach D-2 positions as directors of United Nations services.

XIII. On the other hand, the Tribunal does not question the Legal Counsel's statement that he was not unaware of the Applicant's interest in being appointed Director of the Codification Division, and that he had duly considered the possibility of appointing her.

XIV. The Tribunal has also found that in accordance with the practice followed since 1964, as confirmed by General Assembly resolution 35/210 of 17 December 1980, a Soviet national was to be appointed to the post of Director of the Division. The Legal

Counsel concluded that such an appointment was in the interest of the United Nations. The Tribunal does not contest his conclusion.

XV. But, the Tribunal is forced to conclude that in the very particular circumstances of this case, even the most serious consideration of the Applicant given in all good faith, could not have had any effect. It could not have led anywhere. The entire exercise therefore proceeded as if the Applicant had not been considered.

XVI. Accordingly, the Tribunal decides to apply to this particular case its established judicial practice in this area (cf. Judgements No. 310, Estabial (1983); No. 362, Williamson (1986) and No. 447, Abbas (1989)). The question therefore arises of the responsibility of the Administration.

XVII. The Tribunal takes note of the Secretary-General's decision that the Applicant "will be fully and fairly considered with other candidates for any vacant D-2 post for which [she is] qualified and in which she is interested".

XVIII. In this connection, the Tribunal notes the Applicant's latest performance evaluation report, prepared by the then Director of the Division, Mr. Kalinkin, dated 27 January 1989. All the ratings were "Excellent". Under item 16, there was the following comment:

"During the period under review, Ms. Dauchy has added to her previous functions those of Deputy Secretary of the International Law Commission. Her contribution to the efficient organization and smooth conduct of the yearly three-month sessions of this extremely specialized body has been of the highest order both at the administrative and substantive levels."

In commenting on the Applicant's excellent performance, Mr. Kalinkin stated:

"During the period under review, Ms. Dauchy has broadened her field of responsibility and confirmed her ability of organization and management. She has continued to display all the qualities highlighted in her previous report, which are widely acknowledged by the membership of the legal bodies serviced by the Division. In the present report, I would like to re-iterate with special emphasis my assessment of Ms. Dauchy as a staff member exceptionally devoted to the ideals of the United Nations and embodying the highest standards of efficiency, competence and integrity."

XIX. The Tribunal considers that what the Applicant sustained was essentially a moral injury for which at least partial reparation has been provided by the fact that this judgement notes and places on record her excellent performance. In addition, so as to provide full reparation for the injury sustained by the Applicant, the Tribunal decides to award her compensation in the amount of US\$5,000.

XX. Taking into account the Secretary-General's decision to consider the Applicant "fully and fairly ... with other candidates for any vacant D-2 post for which [she is] qualified and in which she is interested", the Tribunal expresses the hope that the Secretary-General will carry out this decision at the earliest opportunity.

XXI. For the foregoing reasons, the Tribunal makes the following ruling:

1. The Tribunal is competent to hear the application, which is receivable.
2. This judgement, whose contents provide appropriate partial reparation, shall be included in the Applicant's official status file.
3. The Respondent is ordered to pay to the Applicant the sum of US\$5,000 in damages.

XXII. All the Applicant's other pleas are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 2 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary