
ADMINISTRATIVE TRIBUNAL

Judgement No. 498

Case No. 504: ZINNA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, Vice-President, presiding;
Mr. Samar Sen; Mr. Arnold Kean;

Whereas, at the request of Eduardo Zinna, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 30 December 1988 and 31 March 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1989, the Applicant filed an application, containing the following pleas:

"II. PLEAS

The Applicant respectfully requests the Tribunal to order the following measures:

(a) To declare itself competent to hear the Applicant's case in first instance and accordingly to invite the Applicant to submit a full statement concerning the substance of his application;

(b) Alternatively, to order the case remanded for institution of the required procedure and, in particular, to order the Joint Appeals Board to consider his appeal on its merits; and

(c) In either case, to order the Respondent to pay the Applicant the equivalent of three months' net base salary as compensation for the loss caused the latter by the procedural delay resulting from the Respondent's failure to protect the

Applicant's rights under staff regulation 11.1 and other pertinent regulations and rules."

Whereas the Respondent filed his answer on 22 September 1989;
Whereas, on 5 January 1990, the Applicant requested the Tribunal to order the production by the Respondent of two documents concerning his case;

Whereas the Applicant filed written observations on 30 March 1990;

Whereas the Applicant submitted an additional document on 27 July 1990;

Whereas the facts in the case are as follows:

Eduardo Zinna, a national of Argentina, entered the service of the United Nations on 11 October 1969, as a Translator Trainee at the Department of Conference Services. He served initially on a probationary appointment at the P-2, step I level, and then from 1 October 1971, on a permanent appointment as a Translator at the P-3 level.

On 26 November 1973, the Liaison Officer for the United Nations Environment Programme (UNEP) sought the Office of Personnel Services' (OPS) assistance in transferring the Applicant to the UNEP Liaison Office at Headquarters, as Assistant Liaison Officer, a post at the P-4 level. After interviewing the Applicant, in a memorandum dated 3 December 1973, a Senior Personnel Officer, OPS, recommended to the Chief of Staff Services, OPS, against the Applicant's transfer, "in view of [the Applicant's] nationality and relative merit" and only in the event there were "no other better qualified candidates". In a note dated 10 December 1973, Mr. Victor Elissejev, who at the time exercised the functions of Deputy Chief of Staff Services, OPS, recommended that UNEP's request for the Applicant's transfer be denied, on the ground that the number of nationals of Argentina employed in the Secretariat "exceed[ed] the upper limit of the geographical quota (17)" and consequently, "[the Applicant's]

transfer from a non-geographical to a geographical post [would] further aggravate the over-representation of [Argentina] in the Secretariat".

The memorandum of 3 December 1973, from the Senior Personnel Officer, OPS, to the Chief of Staff Services, OPS, containing Mr. Elissejev's recommendation, was filed in the Applicant's confidential personnel file and was never shown to him.

On 13 December 1973, the Chief of Staff Services, OPS, proposed to the UNEP Liaison Officer two further candidates for the UNEP post, noting that OPS was "not certain that [the Applicant was] particularly qualified for such an assignment ..." in view of his "lack of relevant experience and of his relatively short service with the UN ...". The Applicant was not transferred to UNEP.

On 3 June 1974, the Applicant was transferred to the Department for Political Affairs, Trusteeship and Decolonization as a Political Affairs Officer and on 1 August 1977, to the Division for Policy Co-ordination, Planning and Information Section, OPS. On 1 April 1978, he was promoted to the P-4 level.

On 1 January 1981, the Applicant's functional title was changed to Acting Chief, Planning and Information Section, Division for Policy Co-ordination. At the time, Mr. Victor Elissejev was Acting Director of that Division.

On 28 April 1982, the then Assistant Secretary-General for Personnel Services announced to the staff in information circular ST/IC/82/23, the 1982 Senior Officer (P-5) Promotion Register, containing the names of staff at the P-4 level, whose inclusion in the Register, the Secretary-General had approved, upon the recommendation of the Appointment and Promotion Board. The Applicant's name was not included therein. On 24 May 1982, he instituted a recourse procedure before the Board, but was unsuccessful in this regard.

On 16 November 1982, the Applicant wrote to the former Assistant Secretary-General for Personnel Services, asking him why he had not endorsed a recommendation by his Director to promote him to the P-5 level, during the 1982 Promotion Review Exercise. The Applicant argued that since he had never worked directly for the Assistant Secretary-General, he was "inclined to feel that motives extraneous to [the Applicant's] performance may have influenced [the Assistant Secretary-General's] decision". In a reply dated 24 November 1982, the former Assistant Secretary-General for Personnel Services explained that at a meeting of all Directors of his former office, when recommendations from all Sections were discussed, objections had been made to the recommendation by the Applicant's Director to promote the Applicant on an accelerated basis, in view of the fact that "no concrete evidence was given that [his] performance was exceptional enough to warrant a recommendation for accelerated promotion". Accordingly, the Assistant Secretary-General had supported "the collegial decision not to recommend [the Applicant] on an accelerated basis". The Applicant was subsequently promoted to the P-5 level in connection with the 1983 Promotion Review Exercise.

On 22 August 1984, the Applicant asked the Chief, Personnel Records Unit, OPS, to make the necessary arrangements to examine his personnel file, noting that he had "never before taken advantage of the possibility of inspecting the declassified confidential file". The Applicant contends that when he examined his file, he saw for the first time the memorandum of 3 December 1973, containing Mr. Elissejev's note objecting to his transfer to UNEP, as well as the exchange of correspondence with the former Assistant Secretary-General, OPS, concerning his promotion. On 11 July 1985, he wrote to the Director, Division of Personnel Administration (DPA), asking that the exchange of correspondence between himself and the former Assistant Secretary-General, OPS, be removed from his official status file.

In a reply dated 18 July 1985, the Director, DPA, rejected the Applicant's request on the ground that the exchange of correspondence relating to his promotion, as well as memoranda relating to applications for different posts, were considered "to be of an official nature" and even assuming they were "marked 'confidential'", after the abolition of confidential files, were now placed in official status files.

On 3 June 1986, the Applicant wrote to the then Assistant Secretary-General for Personnel Services, asking him to "restore [his] reputation and career to what they would have been without Mr. Elissejev's direct and damaging interventions..." to disrupt his career. In a further communication dated 22 August 1986, to the then Assistant Secretary-General for Personnel Services, the Applicant expressed his "objections to the designation of ... as Officer-in-Charge of the Division for Policy Co-ordination during the absence of the Director and Deputy Director". He argued that "to jump ... over [his] head on a regular basis [was] yet another act of petty discrimination designed further to harm [his] professional reputation and prejudice [his] future career".

He further stated that "Mr. Elissejev's pattern of behaviour, seen in the light of past prejudice, as proved by evidence already submitted, [showed] clearly the existence of present, continuous and harmful discrimination and warrant[ed] immediate and decisive action by the Office of Personnel Services". On the same date, the Applicant wrote to the Secretary-General, requesting review, under Chapter XI of the Staff Rules, of the "specific actions and decisions" referred in his letters of 3 June and 22 August 1986 and the "general violation of [his] terms of appointment" resulting from "actual, continuous and present discrimination against [him] by ... Mr. Victor F. Elissejev". The Applicant also asked for direct submission of his appeal to the Tribunal. In a reply dated 9 December 1986, the then Under-Secretary-General for Administration and Management informed the Applicant that since he had not

challenged any particular administrative decision, he could not conduct the administrative review envisaged by Staff Rule 111.2(a) and since he had "not stated a cause of action within the terms of Staff Regulation 11.1 and Staff Rule 111.2", his request for direct submission of his appeal to the Tribunal could not be entertained. On 21 November 1986, the Applicant lodged an appeal with the Joint Appeals Board (JAB) requesting the Board to endorse his request to submit the case directly to the Administrative Tribunal. On 22 January 1987, the Applicant submitted a supplementary statement of appeal to the JAB. The Board adopted its report on 19 November 1987. Its considerations, conclusion and decision read as follows:

"Considerations

7. The Panel noted that the appellant has not indicated in all his submissions to the Board a specific cause of action against which he is appealing within the context of staff regulation 11.1 and staff rule 111.2. It was arguable whether any of the instances of administrative action or inaction mentioned by the appellant could reasonably be construed to be administrative decisions within the meaning of staff rule 111.2.
8. In the Panel's view the expression 'administrative decision' in the context of staff regulation 11.1 refers specifically to a decision on an action taken by the Administration which violates the terms and conditions of a staff member's 'appointment including all pertinent regulations and rules' in force, or which amounts to the non-observance of the said terms of appointment, including all the relevant regulations and rules in force at the time of the alleged non-observance. In the Panel's opinion, contentions (a), (b) and (c) quoted by the appellant, i.e. unsubstantiated allegations of discriminatory treatment on grounds of nationality in 1973, lack of his supervisor's support in 1981 and 1982 and harassment in 1981 through 1986, could not reasonably be construed as decisions or actions for the purposes of staff regulation 11.1 and could not be entertained by the Panel. Contention (d), namely the appellant's request to remove harmful material from his official status file is likewise not receivable before the Panel, having taken place four years prior to the appellant's initiation of the appeals process under staff rule 111.2.

Conclusion and decision

9. Accordingly, pursuant to its staff rule 111.2(j) mandate, the Panel decides that it is not competent to entertain this appeal since contentions (a), (b) and (c) do not relate to a specific cause of action appealable under that rule and contention (d) is time-barred and consequently not receivable by the Panel."

On 9 March 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken note of the Board's decision, taken under paragraphs (e) and (j) of staff rule 111.2 not to entertain his appeal. He added:

"... Notwithstanding the Board's authority under staff rule 111.2 to decide on its competence and to waive the time-limits under staff rule 111.2(a) and (b), in exceptional circumstances, the Secretary-General has decided, in an attempt to settle your case and to resolve the matter satisfactorily:

(a) To remove from your official status file the referred letter of 24 November 1982, containing adverse material in personnel records, and

(b) To monitor carefully your career in the Organization to ensure that it is not prejudiced by the events that gave rise to this proceeding and that you receive the fair treatment to which you are entitled.

In this connection, I should like to assure you that you will be duly considered for any career opportunity that may arise pursuant to the relevant rules and procedures."

On 31 March 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to refuse to effect the Applicant's transfer to UNEP in 1973 was based exclusively on the Applicant's

nationality and thus constituted an act of discrimination, in violation of the Charter.

2. The Applicant's subsequent career was prejudiced and harmed by further acts of discrimination and harassment by the same official who had recommended against his transfer in 1973 and who became the Applicant's supervisor in 1982.

3. A number of actions by the Respondent constitute administrative decisions and the JAB should have entertained the appeal.

Whereas the Respondent's principal contentions are:

1. The JAB correctly decided that it was not competent to entertain the Applicant's contentions.

2. The JAB correctly decided that part of the appeal was time-barred.

3. The Applicant's claim for financial compensation for procedural delay is not well-founded.

The Tribunal, having deliberated from 17 October to 8 November 1990, now pronounces the following judgement:

I. Early in his application, the Applicant states that he proposes "to limit his exposition ... to those facts which appear essential to determine the question of receivability". There are several references to what he describes as "substantial" issues coupled with numerous offers to produce detailed evidence, should the Tribunal decide to examine the case on its merits. However, all the facts and arguments presented to the Tribunal by both the Applicant and the Respondent are adequate, in the view of the Tribunal, to assess the basic problem raised by the Applicant and to pronounce upon it.

II. The Applicant wished that a memorandum of 3 February 1988 from the Legal Counsel to the Under-Secretary-General for

Administration and Management, together with a copy of the Under-Secretary-General's response, should be produced by the Respondent for examination by the Tribunal, but the Respondent pleaded that these documents were privileged, and declined to supply them. There is no need in this case to pass on the question of privileged documents. The Tribunal denies the Applicant's request since it considers that the documents requested could not add to or detract from the issues before it, even if they contained material which ran counter to some of the arguments now advanced by the Respondent.

III. Similarly, the various legal opinions cited by the Applicant are of little assistance in the disposal of the question of receivability. This issue has to be determined by the provisions of article 7 of the Tribunal's Statute. The Applicant exhorts the Tribunal to interpret its power widely rather than narrowly, but the Tribunal cannot broaden its interpretation to a point where the basic concepts of its Statute are changed.

IV. In essence, the Applicant pleads that he has been a victim of long, elaborate and continuous discrimination and prejudice, and as a result, has been denied promotion and subjected to humiliation and distress of one kind or another. Thus, he cites the refusal of the Office of Personnel Services (OPS) to release him for service in 1973 with the United Nations Environment Programme (UNEP), the refusal by his supervisors to recommend him for promotion, the lack of adequate support and assistance in his daily work, and finally the appointment, for five days, of a staff member junior to him to be in charge of the Division for Policy Co-ordination, OPS, when Mr. Victor Elissejev, its Director, proceeded on home leave, as examples forming a pattern of systematic invidious discrimination. The resulting alleged

injury to the Applicant's interests and legal rights is the basis for the relief he considers himself entitled to.

V. The Tribunal has examined all these allegations and concluded that none of them can be treated as an administrative decision within the meaning of the Tribunal's Statute. However widely article 7 of the Tribunal's Statute may be interpreted, the Tribunal's main focus should be on the undesirability of having old, sometimes very old, claims presented either to a Joint Appeals Board (JAB) or to the Tribunal. No justification can be found for an Applicant, who thinks he is being victimized, to wait for years and years before resorting to the proper procedural steps. The Tribunal made this point in Judgement No. 475, Martorano (1990). In the Tribunal's view, the various time-limits provided in the Staff Rules are to ensure that remedies are sought from contested administrative decisions in a timely and proper manner.

VI. When, on 22 August 1986, the Applicant wrote to the Assistant Secretary-General, OPS, about his grievances, he received a reply which stated, inter alia:

"Since you have not challenged any particular administrative decision, it is not possible to conduct the administrative review envisaged by staff rule 111.2(a)".

Similarly, when the JAB Secretariat pointed out that no administrative decision had been identified against which an appeal could have been lodged, the Applicant repeated his general complaint of discrimination, and could do no better than state that his colleague, with less seniority, being put in charge of the office for five days was the "specific cause for action". Apart from the very minor nature of this complaint and the Applicant's own realization "that this decision, if taken by itself, might fail to convey the extent of the injury to his

reputation and career suffered by the Applicant", the fact remains that in day-to-day management, the Staff Regulations and Rules empower the Secretary-General to make such arrangements as he considers appropriate.

VII. The main thrust of the Applicant's complaint is that he has been subjected to discrimination over the years (since 1973) leading to various setbacks and irritations, but he has failed to give any reason why anyone should adopt a discriminatory and prejudiced attitude towards him - even on the part of Mr. Victor Elissejev who, in 1986 was the Director of the Division for Policy Co-ordination, OPS, and the Applicant's supervisor most of the time, and who, the Applicant alleges has been vehemently and systematically opposed to him .

VIII. The Applicant's failure to be inducted to UNEP at the P-4 level, which he expected, when he had been a staff member at the P-3 level for about two years was, he alleges, due to Mr. Elissejev's casual or even cavalier attitude about the Applicant's suitability for the new job, but the record shows that the reluctance of OPS to release him for the new job could have been for a number of different reasons. In this context, the Applicant questions the criterion of geographical distribution cited by several officials, and states that the principle is "applicable only to the recruitment of staff and is therefore not relevant to the transfer or promotion of staff members already in service". However, in this instance, the question was of a staff member moving from a post that was not subject to geographical distribution to a post that was. In any event, the Applicant knew of the denial of OPS to release him for UNEP, and there is nothing to show that he sought or questioned such reasons as may have prompted the decision of OPS. On the other hand, the evidence shows that despite the Applicant's utter dissatisfaction with Mr. Elissejev's attitude, he did in fact, as

the Applicant himself states, recommend the Applicant for promotion, which, however, was denied on recourse to the Appointment and Promotion Board.

IX. The Applicant states, at different stages, that he had exhausted all avenues of relief before filing his appeal to the JAB and then to the Tribunal. Yet, as late as 30 March 1990, in response to the Respondent's argument, he states that he could have taken his complaints to the Panel on Discrimination and Other Grievances (the Panel on Discrimination) and recognizes that these two avenues, the Panel on Discrimination and the JAB, open to staff members, are not mutually exclusive. Not only did the Applicant fail to go to the Panel on Discrimination, he omitted to respond to the letter dated 24 November 1982 from Mr. James Jonah, who was the former Assistant Secretary-General for Personnel Services and who took "strong exception to the unwarranted remark" made by the Applicant.

X. The Tribunal also notes that the Applicant wished to make a direct reference to the Tribunal rather than proceed through the JAB as he felt that "the role played in the present case by the Office of Personnel Services and the Division for Policy Co-ordination might involve a conflict of interest". The implication of this attitude is far from justified. The JAB, being an advisory body to the Respondent, could always be open to an accusation, however unjust, that it was liable to be influenced by the Administration. Yet it is the recognized and accepted channel through which appeals against administrative decisions are to be considered before they can come to the Tribunal. In any event, despite his reservation, when the Applicant's request for direct reference to the Tribunal was refused, he did, in fact, go to the JAB.

XI. Meanwhile, the Respondent has removed from the Applicant's personnel file the letter of 24 November 1982, which the Applicant claims was included in his record at the instance of Mr. Elissejev, and the Respondent has undertaken "to monitor carefully [his] career in the Organization to ensure that it is not prejudiced by the events that [gave] rise to this proceeding and that [he] receive[s] the fair treatment to which [he is] entitled". There is a further assurance that "[he] will be duly considered for any career opportunity that may arise pursuant to the relevant rules and procedures". Nonetheless, the Applicant complained, as late as 27 July 1990, that he had been shunted to some non-existent or inconsequential duties. The Applicant suspects that this has been done out of the Respondent's dissatisfaction with the Applicant for having invoked the help of the Tribunal. A forum for such a grievance, can be, in the opinion of the Tribunal, the Panel on Discrimination.

XII. In view of all these considerations, and particularly in the absence of any appeal made before the JAB against any specific administrative decision within the time-limits prescribed in the relevant Staff Rules, the Tribunal cannot conclude that the JAB acted erroneously or illegally in any manner. The Tribunal cannot therefore remand the case to the JAB, under article 9, para. 2 of its Statute, and far less adjudicate it under article 7 of its Statute.

XIII. Accordingly, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN

Member

Arnold KEAN
Member

New York, 8 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary