
ADMINISTRATIVE TRIBUNAL

Judgement No. 661

Case No. 721: AL-ATRAQCHI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, First Vice-President,
presiding; Mr. Luis de Posadas Montero, Second Vice-President;
Mr. Mikuin Leliel Balanda;

Whereas, on 30 March 1993, Mohammed Ali Al-Atraqchi, a former
staff member of the United Nations, filed an application requesting
the Tribunal, inter alia:

"... to find that:

1. The JAB [Joint Appeals Board] did not carry out a fair and full investigation as required by the staff rules and specifically failed to discuss and even mention the discussions I had with Mr. [Evgeniy] Gorkovskiy [Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs (PSCA)] to the effect that 'his Government decided to move him to the post of the late ... [Chief of Council and Committee Services Section (CCSS)], which constitutes the core of this case.

...

3. The transfer of Mr. [Evgeniy] Gorkovskiy to the post of Chief of CCSS violates the principle that no post should be the exclusive preserve of any Member State.

...

5. ... because the Secretary-General violated the principle that no post should be the exclusive preserve of any Member State, my candidacy was not given the 'fullest regard' and 'adequate consideration in a reasonable manner' regarding the vacant D-1 post.
6. That this new violation of my right to receive fair and full compensation from PSCA indicates the existence of prejudice and of a pattern of opposition to my promotion.
- ...
8. ... to award me compensation equal to two years net salary for this new violation of my right to receive fair and full compensation for this D-1 post."

Whereas the Respondent filed his answer on 11 June 1993;
Whereas, on 4 July 1994, the Tribunal put questions to the Respondent to which he provided answers on 6 July 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level, as an Associate Statistician, with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent appointment, and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer. The Applicant separated from the service of the United Nations on 31 July 1993, having reached the mandatory retirement age.

On 5 September 1991, Mr. Leonid Malyev, a national of the former USSR, who served as Chief of Council and Committee Services Section, died.

On 6 September 1991, the Director, Security Council and Political Committees Division, announced to the staff of the Department that "owing to the untimely death of Mr. Leonid Malyev and pending the appointment of the Chief of the Council and Committee Services Section, Mr. Qiu Yingjue [Chief, Official Reports and Proceedings Section] will act as Officer-in-Charge in the interim."

On 12 September 1991, the Applicant wrote to the Director, Security Council and Political Committees Division, stating that, in the light of past practice, it "would be fair that, in the present circumstances" he should "remain Officer-in-Charge, pending the appointment of the Chief of the Council and Committee Services Section for which [he would] be an applicant." On 3 October 1991, the Applicant sent a copy of this memorandum to the Assistant Secretary-General, Office of Human Resources Management (OHRM).

On 21 October 1991, the Under-Secretary-General in charge of PSCA, announced to the staff of his Department that Mr. Evgeniy Gorkovskiy, a national of the former USSR, who was serving in the same Department at the D-1 level, as Special Assistant to the Under-Secretary-General, had been appointed Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section, with effect from 18 October 1991.

On 12 November 1991, the Applicant requested the Secretary-General to review the administrative decision to fill the post by lateral transfer of another staff member.

On 10 January 1992, having received no reply from the Secretary-General to his request for review, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 7 December 1992. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations and conclusions

...

21. The Panel concluded that staff regulation 4.2, which the Appellant contends should be operative in this situation, does not apply, inasmuch as it deals with the filling of vacancies. ... The Administration's action in filling the post, while within the letter of the law, was not in its spirit. As a result, a staff member with many years of experience and demonstrated fitness and with a history of being passed over, was denied, by the Administration's resort to lateral transfer, the opportunity even to apply for a post that had become vacant.

...

Recommendations

23. The Panel recommends that the Administration make every effort to address the moral injury suffered by the Appellant, as well as his material injury, i.e. non-promotion, when he and others reasonably expected he would be promoted, and loss of salary. The Panel feels, for all of the reasons mentioned above, that the staff member is entitled to compensation for the denial of the opportunity to apply for a vacated post.
24. Accordingly, the Panel recommends that the Appellant be awarded the difference in emoluments that he would have received had he been selected for the post and those he actually received, commencing from the time the post was encumbered by the lateral transfer."

On 14 January 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your appeal in the light of the Board's report. He agrees with the Board's finding that your rights under staff regulation 4.2 were not violated but does not share its conclusion that the spirit of the applicable regulations and rules was violated. He wishes to re-affirm that, with respect to the post under appeal as well as with respect to any other post, programme managers have the delegated authority under staff regulation 1.2 to rotate or transfer staff laterally within their departments or offices, without prior consideration of each of the staff members at a lower level who might have relevant qualifications and experience. It is only after the appropriate lateral transfers have been made within the department or office that unfilled posts are considered

vacant and may be advertised under the applicable procedures, if the decision is made to fill them.

The Secretary-General, therefore, cannot accept the Board's recommendation in your case. No further action in regard to your appeal will be taken. I trust, however, that you will fully participate in the investigation initiated by the Under-Secretary-General for Administration and Management in your case in order to clarify some of the issues alluded to by the Board."

On 30 March 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent does not have an absolute right to transfer staff.
2. The Applicant's candidacy was not given the "fullest regard" regarding the vacant post.
3. The transfer of Mr. Evgeniy Gorkovskiy to the post violates the principle that no post should be considered the exclusive preserve of any Member State.
4. The JAB did not carry out a fair investigation.

Whereas the Respondent's principal contentions are:

1. Heads of Departments have the authority to rotate or transfer staff laterally within their departments or offices.
2. They are entitled to fill a vacancy by lateral transfer without being limited by the nationality of the staff member transferred.

The Tribunal, having deliberated from 22 June to 22 July 1994, now pronounces the following judgement:

- I. The Applicant claims that, by filling the post of Chief of Security Council and Committee Services Section through the lateral

transfer of another staff member, the Administration violated the rules and regulations then in force and followed the erroneous policy of making certain posts the preserve of certain Member States. He also submits that he has been the victim of prejudice and discrimination. The Respondent submits that he has the discretionary power to fill any post by lateral transfer instead of issuing a vacancy announcement and going through the established selection process.

II. The Applicant's claim is virtually identical to one of the claims asserted by the applicant in Judgement No. 657, Araim (1994), rendered by the Tribunal today. The reasons set forth in that judgement with respect to that claim are equally applicable to this case. They are reproduced below:

"III. The Applicant's specific complaints in the present case are (1) that when Mr. Malyev (a citizen of the former USSR), the incumbent of the D-1 post of Chief of Council and Committee Services Section died, the Respondent denied the Applicant an opportunity to be considered for the vacant post by filling it through the lateral transfer of another Soviet staff member who was then serving as Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs, and (2) that the Respondent, by filling through external recruitment the Special Assistant post thus vacated, denied the Applicant an opportunity to be considered for it.

The Tribunal notes that although the claims relate to two posts, in reality only one vacancy might have been available to be filled by the Applicant. If the Deputy Director post had not been filled by lateral transfer of the Special Assistant, the Special Assistant post would not have become vacant. It was only because of the lateral transfer that the Special Assistant post was open.

IV. The Respondent claims that under the prevailing Vacancy Management System, the lateral transfer of a staff member at the D-1 level was within the discretion of the Under-Secretary-General in charge of the department. The Tribunal does not question this right, which is provided for in administrative instruction ST/AI/338. The Applicant, however, was not at the D-1 level. He was at the P-5 level and therefore was not eligible for a lateral transfer to the D-1 post. As it was not contemplated, at that time, that the

D-1 Deputy Director post was to be, in the circumstances, filled by a promotion, the Tribunal does not consider that the Applicant has standing to challenge the lateral transfer, and the Tribunal need not consider the merits of this issue further."

III. The Tribunal therefore rejects the application in its entirety.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 22 July 1994

R. Maria VICIEN-MILBURN
Executive Secretary