
ADMINISTRATIVE TRIBUNAL

Judgement No. 690

Case No. 770: CHILESHE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Mikuin Leliel
Balanda; Mr. Mayer Gabay;

Whereas, on 16 August and 26 October 1993, Jonathan Hannock
Chileshe, a former staff member of the United Nations Economic
Commission for Africa, hereinafter referred to as ECA, filed an
application that did not fulfil all the formal requirements of
article 7 of the Rules of the Tribunal;

Whereas, on 3 December 1993, the Applicant, after making the
necessary corrections, again filed an application requesting the
Tribunal:

"... to set aside paragraph 22 of the Joint Appeals Board
Report No. 1021, Case No. 92-79 of 16 July 1993 that limited
itself only to recommending 'an indemnity equal in amount to
an SPA [special post allowance] to the D-1 level for the
period 1 April 1991 until (Appellant's) separation from the
Organization'.

11. [To find] the sum of US\$9,000 as indemnity totally
insufficient. The monetary compensation fails to take
account of the injury to my integrity, dignity and loss of
earnings to which I would have been entitled (i.e. I used to
receive DSA [daily subsistence allowance] and travel
calculations were at below D-1, my hardship allowance was at

a level below D-1 and the interest lost in the intervening period should be accounted for etc.) as a result of not having been promoted in the period in question indicated in paragraph 13 below.

12. ... to decide in my favour to be promoted RETROACTIVELY with effect from 22 December, 1990.

13. [To order] compensation with the support of the Tribunal for what I have suffered as stated in paragraph 11 to the tune of US\$60,000."

Whereas the Respondent filed his answer on 29 June 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of ECA on 4 May 1969, as an Economic Affairs Officer at the P-3, step I level, in the Trade and Economic Co-operation Division, Trade Section, on a probationary appointment. He was granted a permanent appointment, with effect from 1 May 1971. He was promoted to the P-4 level, with effect from 1 April 1974, and to the P-5 level, with effect from 1 April 1981. The Applicant's appointment was extended for three months beyond his scheduled retirement date, to 31 January 1993, when he separated from service.

In 1990, the D-1 post of Director, Trade and Development, Finance Division, was advertised with a deadline for applications of 10 September 1990. On 15 December 1990, the names of 15 candidates, including the Applicant, were transmitted for consideration to the Executive Secretary of ECA, who, on 15 January 1991, advised the ECA Personnel Section that none of these candidates was sufficiently qualified for the post. He requested that the post be re-advertised. The post was subsequently re-advertised with a deadline of 29 July 1991.

Pending recruitment for the post, the Applicant was designated Officer-in-Charge of Trade and Development, Finance

Division, with effect from 21 December 1990. His functional title was changed with effect from 1 January 1991. In a memorandum dated 2 April 1991, the Applicant requested the Chief, ECA Personnel Section, to pay him a special post allowance (SPA) at the D-1 level, with effect from 21 December 1990.

As a result of the second advertisement process, twenty-four applications were sent by OHRM to ECA for consideration on 23 August 1991. On 5 December 1991, the names of eight candidates, including the Applicant, were forwarded to the Acting Executive Secretary who had succeeded the former Executive Secretary. Discussions as to the restructuring of ECA commenced in December 1991, resulting in the postponement of a decision on the applications for the post.

In an interim report, dated 26 February 1992, the ad hoc Committee on Professional Staff Careers recommended the Applicant for promotion to the vacant D-1 post of Director, Trade and Development. On 23 March 1992, the Acting Executive Secretary wrote to the Chief, Administration and Conference Services Division (ACSD), and asked whether there was any administrative or organizational difficulty in selecting the Applicant for the post, noting that the Applicant was due to retire at the end of October 1992.

In a reply dated 29 April 1992, the Chief of ACSD advised the Acting Executive Secretary that, according to the Manual for Appointment and Promotion Committees at Offices away from Headquarters, promotions should not be granted "within a few months" of a staff member's retirement so as "to avoid the use of the promotion as a means to reward staff members for long service." At a meeting held on 6 May 1992, the Acting Executive Secretary informed the Applicant that he would not be promoted because he was approaching retirement age. On the same date, the Applicant wrote to the Acting Executive Secretary, stating, in essence, that the

Administration was unjustly using the policy against promotion where retirement is imminent as a basis for not selecting him for the post, although he had been performing the functions of the post for over 17 months.

On 12 May 1992, the Applicant requested the Secretary-General to review the administrative decision not to promote him to the D-1 post. In a memorandum dated 5 August 1992, the Chairman of the Departmental Panel for the 1992 Promotion Exercise advised the Acting Executive Secretary of ECA that the Panel "would have recommended the present Officer-in-Charge of TDFD [Trade and Development Finance Division] if this were not precluded by the policy whereby promotion cannot take place within 6 months of a staff member's separation." On 12 August 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 16 July 1993, Its considerations, conclusions and recommendations read, inter alia, as follows:

"Considerations

...

19. The Panel did not feel it necessary to establish malfeasance or misfeasance in this case. It is sufficient to note the numerous delays and the failure of management to address Appellant's legitimate claims to conclude that '... Respondent has been negligent as an employer in failing to extend to the [Appellant] fair and just treatment ...'

...

Conclusions and Recommendations

21. It is to be regretted that Appellant was not promoted during his service and did not have the satisfaction of recognition by the Organization of his contribution to it, as well as the pecuniary advantages. Had the Panel considered that a recommendation for his retroactive promotion was

practical, it would have made it. Instead, it decided that Appellant should be adequately compensated for his services as the official in charge of the Trade and Development Finance Division (TDFD).

22. ... that Appellant be paid an indemnity equal in amount to an SPA to the D-1 level for the period 1 April 1991 until his separation from the Organization."

On 16 July 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and advised him of the Secretary-General's decision to accept the JAB's recommendation that he be paid "an indemnity equal in amount to an SPA to the D-1 level for the period 1 April 1991 until the date of your separation from the service."

On 3 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not promoted because of incorrect and incomplete information regarding the policy on the promotion of staff approaching retirement, which the Personnel Section of ECA gave to the Acting Executive Secretary.

2. Delays in considering the Applicant's promotion by OHRM, by the ECA Personnel Section and by the restructuring exercise have resulted in unfair treatment.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, only a right to be considered for promotion.

2. While there was some delay in the process of selection of candidates for the vacant post, the delay was not malicious, nor an abuse of process.

The Tribunal, having deliberated from 6 to 21 July 1995, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 16 July 1993, not to promote him retroactively to the D-1 level. Instead, in accordance with the recommendation of the JAB, the Secretary-General decided that following his retirement, the Applicant should be paid an indemnity equal to a special post allowance (SPA) to the D-1 level for the period from 1 April 1991 until the date of the Applicant's separation from service. Although the Applicant's retirement was originally scheduled to occur on 31 October 1992, his appointment was extended for three months until 31 January 1993.

II. The Applicant asks for a retroactive promotion to the D-1 level on the ground that, although he was at the P-5 level, he filled the D-1 post in question satisfactorily from late December 1990 until his separation. The Applicant had applied for the post prior to being assigned thereto, along with 14 other candidates, in response to a vacancy announcement having a deadline of 10 September 1990. After the Applicant had been assigned, in an acting capacity, to the post, the then Executive Secretary of ECA decided that none of the candidates responding to the vacancy announcement was qualified. He asked that the post be readvertised, inter alia, so as to attract a qualified female candidate. This was apparently in keeping with ST/ECA/IC/90/43 dated 10 June 1990, which dealt with measures to increase the recruitment of women for high level posts. A new vacancy announcement was circulated with a deadline of 29 July 1991 and in August of that year, OHRM forwarded to ECA the applications of 24 candidates it deemed qualified for the D-1 post.

III. During the latter part of 1991, consideration appears to have been given to a possible restructuring of ECA which might have resulted, had it occurred, in a redeployment of the D-1 post in question. Before a decision was made regarding possible restructuring, the applications of eight of the candidates seeking the post were submitted to the Acting Executive Secretary who had succeeded the prior Executive Secretary. This occurred in early December 1991. On 23 March 1992, the Acting Executive Secretary inquired of the Administration and Conference Services Division as to whether there would be any difficulty in selecting the Applicant to fill the post. Presumably, this inquiry was motivated by the Acting Executive Secretary having concluded that the Applicant, who had filled the post satisfactorily for about two years, was the best qualified of the various candidates. In fact, the Acting Executive Secretary had received, about a month before, a recommendation from an Ad Hoc Committee on Professional Staff Careers, that the Applicant should be promoted to the vacant D-1 post.

IV. However, on 29 April 1992, the Acting Executive Secretary was advised by the ECA Administration that, pursuant to the policy set forth in a Manual for Appointment and Promotion Committees at

Offices Away from Headquarters, promotions should not be granted within a few months of a staff member's anticipated retirement. As a result of this and the restructuring, the Applicant was not promoted.

V. In view of the Tribunal's consistent jurisprudence holding that its review of discretionary decisions with respect to promotion is extremely limited, the Tribunal is unable to conclude that the Respondent's decision not to promote the Applicant retroactively was flawed. There was no wrongful motivation or mistake involved. On the contrary, the decision not to make an end-of-career promotion was premised on a rational policy expressed in the Manual referred to above. As the ILOAT recently said in a similar situation:

"... promotion is at the discretion of the Organisation, which must be free to grant or withhold it in accordance with objective working requirements. It follows that any grant of promotion at the time of retirement is inherently contrary to the Organisation's interests because by then there can no longer be any question of taking on the higher level of responsibility that promotion entails. The Tribunal therefore holds that the Organisation is right to follow the policy of refusing its staff promotion which would have the sole effect of laying a burden of social costs on the institution as a whole without conferring on it any benefit in return." In re Heritier, ILOAT Judgment No. 1388 (1995).

The Applicant's plea for a retroactive promotion therefore fails.

VI. Notwithstanding the lack of entitlement to a retroactive promotion, an element of unfairness is present in the treatment accorded the Applicant. This was not adequately remedied by the grant of an SPA to him, to which he seemed otherwise plainly entitled. The unfairness consisted of letting nine months elapse after readvertisement of the D-1 vacancy without selecting the best

qualified candidate, who evidently was the Applicant. This turned out to be quite harmful to the Applicant because, by the time the group of those with the best qualifications was submitted to the Acting Executive Secretary, the potential restructuring had come under consideration. This delayed even further the filling of the D-1 post. By the time these matters were resolved, the Applicant was close enough to retirement to cause his likely promotion to the D-1 level to fall by the wayside. In the circumstances of the harm to the Applicant caused by undue delay, he is entitled to compensation which the Tribunal fixes at \$7,000.

VII. In view of the foregoing, the Tribunal orders the Respondent to pay the Applicant \$7,000.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary