
ADMINISTRATIVE TRIBUNAL

Judgement No. 760

Case No. 822: ZOUARI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Mikuin Leliel Balanda; Ms. Deborah Taylor Ashford;
Whereas, at the request of Ahmed Zouari, a staff member of
the United Nations, the President of the Tribunal, with the
agreement of the Respondent, successively extended the time-limit
for the filing of an application to the Tribunal to 31 August and
30 November 1993, 31 January, 29 April, 31 July and 31 October 1994;
Whereas, on 27 October 1994, the Applicant filed an
application requesting the Tribunal, inter alia:

"8. ...

(a) To find that his assignment to ECA [Economic
Commission for Africa] was governed by the Vacancy Management
System;

(b) To find that failure by ECA Administration to take
action for the implementation by OHRM [Office of Human
Resources Management] of his promotion to the P-5 level as
from 1 January 1990 has deprived the Applicant from acquired
rights under ST/AI/338/Add.2, paragraphs 3 and 4, Add.4,
paragraph 3 and Add.6, paragraph 7;

...

(d) To rule that the comments and ratings by the Chief,
Administration and Conference Services Division, on the
Applicant's performance evaluation reports on 11 October 1991

should be deleted from the Applicant's first and third performance evaluation reports at ECA, that the second performance evaluation report should be expunged from the Applicant's file, that the period covered by the third performance evaluation report should begin on 1 December 1989, and that both the first and the third performance evaluation reports should be completed by the Executive Secretary of ECA on the basis of the ratings provided by the respective first reporting officer;

...

(f) To rule that the promotion of the Applicant must be effected under ST/AI/338/Add.2 para. 3, Add.4 para. 3, and Add.6 para. 7, based on the Applicant's performance evaluation reports as revised in accordance with the judgement of the Tribunal in the present case.

...

(h) To direct the Respondent, meanwhile, to pay to the Applicant the education grant for three school years of his daughter (September 1989 - June 1992), the DSA [daily subsistence allowance] denied to him and his daughter by the Chief, Administration and Conference Services Division following their evacuation from Addis Ababa to Nairobi while he was on assignment to ECA and the DSA for the two missions undertaken by the Applicant to service ECA conferences in Arusha, Tanzania (February 1990) and in Tripoli, Libya (April 1990);

(i) To direct the Respondent to pay to the Applicant travel expenses and DSA for his journey to and stay in New York in 1991 ...

(j) To award the Applicant compensation equivalent to a one year salary for the repeated and systematic violations of his rights as well as for the damage caused by the Respondent to the Applicant's reputation, both professionally and personally; and

..."

Whereas the Respondent filed his answer on 17 March 1995;

Whereas the Applicant filed written observations on 1 May

1995;

Whereas, on 25 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 May 1978, on a probationary appointment, at the P-2 level, as an Associate Arabic Translator in the Department of Conference Services at Headquarters. On 1 May 1980, he was granted a permanent appointment and promoted to the P-3 level. On 1 April 1983, the Applicant was promoted to Reviser at the P-4 level.

With effect from 30 April 1982, the Applicant was assigned to the United Nations Environment Programme (UNEP) in Nairobi, for a term of two years, which was extended twice, for two-year periods, through 28 April 1988. He returned to Headquarters as Translator in the Arabic Service, Translation Division, Department of Conference Services. On 1 July 1989, he was assigned to the Economic Commission for Africa (ECA) for a period of one year and granted a special post allowance (SPA) to the P-5 level. His functional title was Acting Chief, Translation Services, ECA.

A vacancy announcement for the post of Chief, Translation Services, ECA, was circulated in 1988. The Applicant applied for the post. None of the candidates was found to be acceptable by ECA.

The post No. UNH-13710-E-P5-041LG - Vacancy Announcement No. 88T-ECA-318-AA/Recirc. Chief, Translation Services - was re-advertised in May 1989, and the Applicant again applied. He was informed in a letter dated 24 May 1989, from the Recruitment and Placement Officer, Professional Staffing Service, that he would be "considered with regard to the eligibility criteria and the requirements of the post along with the qualifications of other candidates". He would "be informed of the outcome as soon as this information is available". Following a meeting between the Executive Secretary of ECA and the Applicant, on 16 June 1989, the Recruitment and Placement Officer informed the Applicant that "the

Executive Secretary of ECA has agreed to your assignment from Headquarters - for one year as Chief, Translation Services". A Personnel Action was issued stating "Assignment to ECA, ... for one year and entitlement to SPA to P-5, ..." It listed the Applicant's functional title as "Acting Chief, Translation Services".

Prior to his retirement, the Chief of Conference Services Section, ECA, who was the Applicant's supervisor, prepared a performance evaluation report (PER) for the Applicant, covering the period from 1 July 1989 to 30 November 1989. For the non-language items in the PER, the Applicant was given 5 "A"s and 7 "B"s, and his supervisor commented that the Applicant "maintains very good working relations with everybody" and that "the [Applicant] is very efficient in supervising and motivating ... staff". The Applicant's second reporting officer, the Chief, Administration and Conference Services Division (ACSD), did not, at the time, sign the report.

On 29 June 1990, the Chief, ACSD, cabled Headquarters requesting that the Applicant's assignment be extended "until such time as we will be able to better assess his performance". An extension of 12 months was authorized with effect from 16 July 1990. In a memorandum dated 17 August 1990, the Chief, ACSD, informed the Applicant that he "had very specific instructions from the Executive Secretary to prepare your PER covering the first year of your assignment to ECA". In the memorandum, he also criticized the Applicant's performance.

On 13 September 1990, the Applicant filed a complaint with the ECA Panel on Discrimination and Other Grievances (the Panel on Discrimination). On 11 January 1991, he was informed that his within-grade salary increment was being withheld, with effect from 1 July 1990, on the basis of a memorandum dated 9 January 1991 from the Chief, ACSD. The Applicant filed a rebuttal against this decision.

In a cable dated 28 January 1991, to the Director, Translation Division, Department of Conference Services (DCS), the

Chief, ACSD, proposed that the Applicant be transferred back to Headquarters on 28 February 1991. He stated that the Applicant "has shown himself since assignment here as being totally incapable of appreciating the most elementary aspects of his job as a supervisor and coordinator". On 29 January 1991, the Chief, Personnel Section, ECA, informed the Applicant that he would be returning to Headquarters as of 28 February 1991.

In a reply dated 1 February 1991, the Director, Translation Division, DCS, informed the Chief, ACSD, ECA, that the Applicant's assignment should continue until the Executive Secretary made a final decision on the Applicant's rebuttal and until the Panel on Discrimination had completed its investigation of the Applicant's complaint. On 4 February 1991, the Chief, ACSD, ECA, repeated his earlier request.

On 4 February 1991, the Coordinator of the Panel on Discrimination sent its report to the Executive Secretary. The report stated, inter alia:

"Conclusion

16. The panel concludes that it finds the grievance tabled legitimate. Action is needed to enable the staff member to work according to his job description without hardship.

Recommendation

17. The staff member should not be penalized for administrative oversight. The instruction by the Executive Secretary to prepare a comprehensive PER does not in any way imply by-passing normal procedures of UN Rules and Regulations.

The panel views the PER submitted on [the Applicant] by the [Chief, Conference Services] on his retirement as valid. It needs to be completed by the second reporting officer."

On 10 April 1991, the Chief, ACSD, signed the PER but expressed the belief that it was not valid. On 22 April 1991, he completed Part IV of the PER, commenting that the period it covered

"was too short for an objective appraisal to be made of the staff member's performance and conduct ... Consequently I disagree with the first reporting officer".

ECA had prepared PERs for the Applicant's second year of service, for the periods from 1 December 1989 to 30 June 1990, and from 1 July 1990 to 28 February 1991. On 17 April 1991, the Applicant complained that the Chief, ACSD, appeared on the PERs as both the first and second reporting officer.

On 29 July 1991, the Chief, Personnel Section, ECA, informed a Personnel Officer, Office for Human Resources Management (OHRM), Headquarters, that the Chief, ACSD, had not accepted the PER prepared by the retired Chief, Conference Services, because he and the Applicant were at the same grade level and "one staff member at a given level cannot act as the first reporting officer of another staff member of the same level in the same section ..."

On 2 August 1991, the Applicant requested the Secretary-General to review the refusal of the Chief, ACSD, to accept the Applicant's immediate supervisor as the first reporting officer, the negative evaluation of his performance outside of the PER system and the use of these evaluations to bar him from a promotion to which he was entitled under the Vacancy Management System (VMS).

In a cable dated 29 August 1991, the Assistant-Secretary-General for OHRM informed the Chief, ACSD, that the Applicant's assignment was not through the VMS. He directed that his assignment be extended through October 1991, and that, by that time, his PER and related procedures should be completed. He indicated that the primary responsibility for completion of a PER lies with the staff member's immediate supervisor as the first reporting officer, whether or not the supervisor is at the same level as the staff member being evaluated.

Three PERs were completed and transmitted to the Applicant for the periods from 1 July to 30 November 1989, from 1 December 1989 to 31 March 1990, and from 1 April 1990 to 31 October 1991.

The second PER, signed by the Chief, ACSD, as both first and second reporting officer, gave the Applicant an overall rating of "Fair". In the third PER, the Chief of Conference Services Section acted as first reporting officer and made the following comments with regard to the two "C" ratings relating to supervision: "The rating largely reflects the lack of co-operation [the Applicant] experienced from some staff members in the Division in the exercise of his functions ... His efforts in that direction deserve a higher rating since they have been thwarted by the uncooperative response of certain staff members ..."

The Applicant rebutted all three PERs. An ad hoc Investigating Panel was established on 4 November 1991. On 29 November 1991, the Applicant requested the Secretary-General to review the decision of 30 October 1991, to redeploy him back to Headquarters before the panel had completed its consideration of his rebuttals. On 13 March 1992, the ad hoc Investigating Panel transmitted its report to the Acting Executive Secretary, which concluded and recommended as follows:

"Rules and other established procedures governing PER's have not been duly observed by the second reporting officer and the extensive delay in completing the three PER's casts some doubts on the accuracy of the reports (see section II of this report for details).

The plaignant's (sic) assignment to ECA took place under unusual conflictual circumstances which developed throughout the period and which did not make it possible for [the Applicant] to exercise his supervisory role as appropriate. As discussed earlier [the Applicant] shared responsibilities in this situation with the ECA Administration and staff members of the unit at large.

As the main thrust of the PER's should precisely focus on the plaignant's (sic) proven ability to effectively supervise the ECA translation section, members of the panel are of the view that the above situation did not warrant a fair and objective assessment of [the Applicant's] performance throughout his assignment with ECA. We therefore recommend that the three PER's be suspended and that whenever feasible the staff

member be given another probationary opportunity under different circumstances."

On 23 March 1992, the Acting Executive Secretary initialled the document with the note "seen" but did not take any further action on it. On 4 May 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 14 January 1993. It contained the following considerations, findings and recommendation:

"29. The Panel reviewed Appellant's contention that he had been assigned to ECA under the Vacancy Management System (VMS) and that he should have been considered for promotion under the VMS provisions. The Panel agreed that the Administration had failed to define clearly the conditions under which Appellant was assigned, and concurs with the author of the note dated 12 August 1991 ... that Appellant had reason to be - at the least - confused.

30. The Panel remarked, however, that even if Appellant's assignment was under VMS - and, in its view, that had not been proven - then it was difficult to establish that he had suffered from the arrangement. It is true that he may have been deprived of the consideration for promotion to which he would have been entitled under VMS, but (a) there is no entitlement to promotion, and (b) a promotion would only have been possible with positive PERs, but given the nature of the PERs which would have been before the APB at the time of consideration, a favourable outcome was unlikely.

31. The Panel then turned to consider the PERs themselves. It noted that the provisions of ST/AI/240/Rev.2 had not been followed in their preparation, or, for that matter, in the withholding of Appellant's within-grade increment. It felt that there were irregularities in the preparation of the PERs which may well have affected fair consideration of his performance but that there was insufficient evidence that he had been so deprived. Appellant had not, in the Panel's view, produced evidence of any extraneous factors.

32. As to the decision, and the timing thereof, to return him from ECA to Headquarters, the Panel found that the Secretary-General acted within his authority under staff regulation 1.2.

Findings and recommendation

33. In arriving at its conclusion, the Panel took note of the reports and conclusions of the other panels which considered earlier aspects of this appeal in ECA. Having decided that Appellant had suffered injury as a result of the uncertainties of the nature of his assignment to ECA and of the irregularities in the preparation of his PERs while there, the Panel concluded that it could make no recommendation that would alleviate the injury.

34. The Panel recommends, therefore, that Appellant be paid the sum of two thousand dollars (\$2,000.00) as recompense for the injury suffered."

On 28 January 1993, the Director of Personnel transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had accepted the JAB's recommendation and "decided, accordingly, that you be paid \$2,000 in recompense for injuries from irregularities in the preparation of your periodic evaluation reports."

On 27 October 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas, the Applicant's principal contentions are:

1. The Applicant's assignment to ECA was under the VMS. He was entitled to a promotion in accordance therewith.

2. The Applicant's PERs were flawed by procedural irregularities, as was the decision to withhold his salary increment without a special report, as required.

3. The JAB's consideration of the Applicant's claims was vitiated by procedural flaws. The JAB did not have complete documentation relevant to the claims.

4. The Applicant has been the victim of repeated and systematic abuse of power and prejudicial treatment because of his former role as an outspoken Chairman of the United Nations Environment Programme Staff Union.

Whereas, the Respondent's principal contentions are:

1. The Applicant's claims for education grant, DSA following evacuation from Addis Ababa, travel expenses and DSA in 1991, are not properly before the Tribunal as they were not submitted to the JAB.

2. The Applicant has been adequately compensated for the injury suffered as a result of the uncertain nature of his assignment to ECA and for the irregularities in the preparation of his PER.

3. The Applicant does not produce evidence of prejudice against him.

The Tribunal, having deliberated from 10 to 26 July 1996, now pronounces the following judgement:

I. The procedure in this case commences with the institution, by the Applicant, of a recourse against the administrative decision of 31 October 1991, to end his services at ECA and to order him to return to Headquarters. In his first submission dated 29 November 1991, he claims that he had been assigned to ECA following his "application for the post of Chief, Translation Services, in the framework of the VMS [Vacancy Management System]".

He also adds that he worked at ECA for more than two years before being informed that his selection to fill the post had not been carried out in accordance with the VMS in force at the time, pursuant to ST/AI/338 and its addenda.

On 4 May 1992, the Applicant lodged an appeal before the JAB. In his submission, he states that his appeal is directed against "the way my career has been administered in connection with my assignment to ECA as Chief of Translation Services since July 1989". The main grievances listed by the Applicant relate to the manner in which his performance was evaluated.

The JAB considered both issues, i.e., that connected with the applicability of the VMS to the Applicant's transfer to ECA and that related to the manner in which he had been evaluated. In its report, the JAB recognized that the Applicant "had suffered injury as a result of the uncertainties of the nature of his assignment to ECA and of the irregularities in the preparation of his PERs ...". It consequently recommended the granting of compensation in the amount of US\$2,000.

II. As to the Applicant's contention that his transfer had taken place under the VMS, the JAB only gave its opinion by way of a remark, saying that "even if Appellant's assignment was under VMS - and, in its view, that has not been proven, then it was difficult to establish that he had suffered from the arrangement".

The JAB's report was subsequently considered by the Secretary-General, who decided to accept the JAB's recommendation and granted US\$2,000 as compensation. It is to be noted, however, that the decision taken by the Secretary-General to grant compensation is based solely on the injuries suffered in connection with the preparation of the Applicant's performance evaluation reports (PERs). It does not refer to the uncertainties of the Applicant's assignment to ECA that were mentioned in the JAB's report.

Upon receipt of the Secretary-General's decision, the Applicant appealed to the Tribunal.

III. In his submission to the Tribunal, the Applicant, in addition to his previous claims, requests promotion, payment of the education grant, reimbursement of travel expenses and changes in his PERs.

Bearing in mind the foregoing sequence of events, the Tribunal finds that the issues properly before it are only those connected with the applicability of the VMS and with the handling of his PERs.

The Applicant's claims connected with his promotion and his entitlement to education grants or to reimbursement of certain expenses were not submitted to the JAB and, consequently, cannot be entertained.

IV. First, the Tribunal will examine the question of whether the Applicant's assignment to ECA took place, or should have taken place, under the VMS rules.

The Applicant applied for the post of Chief, Translation Services, pursuant to Vacancy Announcement 88-T-ECA-318-AA/Recirc[ulated]. This post was to be filled according to the VMS. On 24 May 1989, the Recruitment and Placement Division, OHRM, acknowledged receipt of the application and added that his "qualifications will be considered".

On 26 May 1989, the Chief of Administration in ECA, informed Headquarters that "Executive Secretary has agreed to assignment from Headquarters to ECA of [the Applicant] for one year as Chief, Translation Services on post P-5-041".

The Applicant claims that he was assigned to the post pursuant to his response to the vacancy announcement. Consequently, he was subject to the provisions of the VMS, namely promotion to the following level after six months of satisfactory performance in the new post. The Respondent rejects such a claim.

To substantiate his claim, the Applicant submits that both ST/AI/338/Add.2 paragraph 2, and Add.4 paragraph 2, provide that "assignment of a staff member to a higher level post could only be

authorized within the vacancy management and staff redeployment programme". He also submits that, in a memorandum dated 6 June 1989, to the Administrative Officer in DCS, the Recruitment and Placement Officer, Professional Staffing Service, OHRM, referred to the Applicant's assignment as being under the VMS. A copy of this letter was furnished to the Applicant. Also, in a letter to the Applicant by the same Recruitment and Placement Officer dated 19 June 1989, it is stated that the Applicant's assignment was connected with the vacancy announcement.

The Respondent submits that the request for the Applicant's transfer was received on 29 May, i.e., only five days after the Administration acknowledged receipt of the Applicant's response to the vacancy.

V. The Tribunal recalls that, when promotion through the VMS system was established under ST/AI/338 and its addenda, it was intended that all the assignments of staff to higher level posts be conducted under its provisions. Therefore, the Administration acted irregularly when it did not follow the selection process initiated pursuant to the vacancy announcement.

However, in this case, in the light of the short period of time which elapsed between the application for the vacancy and the request for the Applicant's transfer, the Tribunal accepts the Respondent's view, because, under these circumstances, it is clear that he did not intend to follow the selection process established by the VMS. The mention of the VMS in various documents related to the Applicant's assignment is not sufficient to alter the Tribunal's conviction in this respect.

VI. It also appears from the evidence before the Tribunal, that the Applicant was cognizant that the VMS would not be followed.

The Applicant contends, in his request for review dated 29 November 1991, that it was only two years after he was assigned

to ECA that he was informed that his "selection to fill the post had not been duly processed through the APB".

Nevertheless, even if he was not formally notified at the outset that the VMS system would not be followed, it is evident, in the Tribunal's view, that the Applicant must have been aware of this fact. His actions, at that time, were not those of somebody who is awaiting the outcome of a selection process.

In his submission to the Tribunal, the Applicant clearly states that he called on the Executive Secretary in May 1989, in New York, and convinced him to drop certain objections against his candidature. Pursuant to this conversation, the Executive Secretary, back in Addis Ababa, agreed to the assignment of the Applicant to ECA on 29 May 1989.

On 24 May 1989, the Applicant was informed that his candidature under the VMS "will be considered". On 29 May 1989, his assignment to ECA was decided. Even if the Applicant was not familiar with the details of the selection process under the VMS, it is evident that he could not have thought that it would take only four days.

It is, therefore, to be concluded that the Applicant was cognizant of the fact that he was not assigned to ECA under the VMS. This conclusion is confirmed by the expressions of the Applicant in his request for review dated 29 November 1989, when he states that "It was then (June 89) explained to me - verbally - that the extension of my assignment or its conversion into a transfer ... would depend on my performance ..." (emphasis added).

For the foregoing reasons, the Tribunal concludes that, even if the assignment of the Applicant to ECA outside the VMS constituted an irregularity, he was estopped from claiming damages, since he was aware of the irregularity and accepted it.

VII. The other issue before the Tribunal is whether the Applicant was adequately compensated for the injuries suffered following

irregularities in the preparation of his PERs. In order to assess the fairness of the compensation granted, the Tribunal took into consideration the following sequence of events. On 19 December 1989, the Applicant's performance was evaluated for the period 1 July 1989 (the date on which began his service at ECA) to 30 November 1989. This PER was signed only by the first reporting officer. The second reporting officer did not sign it at the time.

On 28 June 1990, the Applicant was requested to fill a new PER form for the period 1 July 1989 to 30 June 1990, i.e., for his first year at ECA. On the same date, he was informed that the Chief, Administration and Conference Services Division, the second reporting officer, would also be his first reporting officer.

The Applicant, on 31 July 1990, objected to this procedure, claiming that his performance from July to November 1989 had already been assessed and should not be assessed again in the new PER. He refused to fill out the form.

The Applicant also requested the Panel on Discrimination to examine this point, among other issues. In its report, dated 4 February 1991, the Panel on Discrimination considered valid the first PER for the period July-November 1989.

On 1 March 1991, ECA initiated another PER for the Applicant's second year of service in ECA, from 1 July 1990 to 28 February 1991.

On 10 April 1991, the Chief, Administration and Conference Services Division, in view of the Panel on Discrimination's report, signed the original PER for the period July-November 1989, as second reporting officer.

On 17 April 1991, the Applicant complained to the Chief, Administration and Conference Services Division, regarding the fact that his name appeared as first and second reporting officer in the two PERs covering the periods 1 December 1989 to 30 June 1990 and 1 July 1990 to 28 February 1991.

On 22 April 1991, the Chief, Administration and Conference Division, inserted negative remarks in the PER for July-November 1989, which he had signed on 10 April.

On 29 August 1991, the Assistant Secretary-General, OHRM, in a cable to ECA, pointed out that "the primary responsibility for completion of the PER lies with the staff member's immediate supervisor as the first reporting officer and the next in line supervisor ... as the second reporting officer".

On 12 October 1991, the Applicant was informed by the Chief, Administration and Conference Services Division, that all his reports corresponding to his service with ECA would be completed according to the Assistant Secretary-General's recommendations.

Consequently, the report for the period July-December 1989 was considered valid, albeit with the negative comments inserted by the Chief, Administration and Conference Services Division. New PERs for the periods December 1989 to March 1990 and April 1990 to October 1991, had been prepared on 11 October 1991.

The Applicant rebutted all three reports. The Rebuttal Panel submitted its report on 13 March 1992. It concluded inter alia that the Rules governing PERs had not been fully observed. The Administration took no action regarding this report.

VIII. In view of this sequence of events, the Tribunal concludes that the Applicant has suffered considerably as a consequence of numerous irregularities, although some of them were subsequently remedied. Therefore, the Tribunal finds that the Applicant should be compensated in the amount of \$3,000, in addition to the \$2,000 already paid by the Respondent pursuant to the recommendation of the JAB.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of \$3,000.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary