
ADMINISTRATIVE TRIBUNAL

Judgement No. 875

Case No. 976: THACKER

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas at the request of Helen Thacker, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1996, 31 March and 30 June 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 May 1997, the Applicant filed an application requesting the Tribunal, inter alia, as follows:

- “(a) To recommend that the decision to separate the appellant from service be rescinded and to recommend her immediate reinstatement with full pay from the date of her separation up to the date of her retirement;
- (b) To recommend an additional payment of \$250,000 for the damages caused to the appellant’s career and reputation as well as for the moral and psychological injury caused by the Respondent’s actions;
- (c) To remove all negative and prejudicial material from the appellant’s file;
- (d) To recommend the additional payment of \$50,000 as compensation for the delays caused by the Administration in dealing with her case.”

Whereas the Respondent filed his answer on 23 September 1997;

Whereas the Applicant filed written observations on 29 December 1997;

Whereas, on 9 July 1998, the Tribunal put questions to the Respondent, to which he provided answers on 13 July 1998;

Whereas, on 10 July 1998, the Applicant submitted an answer to the Tribunal's questions of 9 July 1998;

Whereas, on 15 July 1998, the Applicant submitted her comments on the Respondent's communication of 13 July 1998;

Whereas, on 20 July 1998, the Respondent submitted an additional document, on which the Applicant commented on 22 July 1998;

Whereas, on 6 August 1998, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 January 1974, as a Clerk-Stenographer, at the G-3 level, on a fixed-term appointment in the Financial Resources Development Branch, Centre for Development Planning, Projections and Policies, in the Department of Economic and Social Affairs. On 3 April 1974, she received a probationary appointment. On 1 November 1975, she was transferred to the UN Centre on Transnational Corporations (UNCTC). On 1 January 1976, she was granted a permanent appointment. On 1 April 1977, she was promoted to the G-4 level, with the functional title of Secretary/Clerk. Her performance evaluations between 1974 and 1982, ranged from "A" (excellent) to "B" (very good). Her permanent appointment having been terminated for abolition of post, she separated from service with effect from 31 December 1993.

On 12 July 1984, the Chief of Staff Services and the Personnel Officer met with the Applicant to discuss two work-related incidents involving her dealings with other staff members. The Personnel Officer's Note on this meeting was placed in the Applicant's official status file and a copy was sent to the Applicant.

In June 1988, the Executive Office identified the Applicant as one of four staff members in her division whose performance evaluation reports (PERs) were overdue.

Although repeated reminders were sent, no PER could be completed because the Applicant had not filled out Part A.

In May 1992, the Applicant filled out Part A of her PER. In June 1992, the First Reporting Officer completed Part B, noting that he had supervised her only for the past two years and that his evaluation was based on her performance during the period 1990 - 1992. She received a rating of "B" (very good) in all categories except for "Sense of responsibility and dependability as regards working hours" and "Oral Expression in English" for both of which she received a rating of "A" (excellent). The Second Reporting Officer gave her an overall rating of "Good".

In 1992, the General Assembly mandated the Secretary-General to restructure and revitalize the economic and social sectors of the Organization. The restructuring, which took place in 1993, involved the movement of whole divisions between Rome, Vienna, New York and Geneva and the redeployment of about 150 staff, including 76 General Service staff, in a short period of time.

In a letter dated 28 June 1993, the Acting Director of Personnel, OHRM, informed the Applicant that the restructuring of the economic and social sectors had entered its full implementation phase, and that her post would be redeployed to UNCTAD by the end of September 1993. The Applicant was informed that a task force had been created to reassign locally recruited General Service staff whose posts would be redeployed. The Applicant's name had already been submitted to the General Service Staffing Section with a view to finding a suitable assignment for her. She asked the Applicant to review her fact sheet to ascertain whether all relevant information had been properly reflected therein and to bring any additional information to the attention of OHRM in writing.

In a memorandum dated 25 October 1993, the Officer-in-Charge, General Service Staffing Section, informed the Officer-in-Charge, Staff Administration and Monitoring Service, that she had been unable to place two of the General Service staff from UNCTC and CSTD, including the Applicant.

In a memorandum dated 29 October 1993, the Director of Personnel, reported to the

Under-Secretary-General, DAM, that most of the General Service staff in the four duty stations affected by the restructuring exercise had been placed. She recommended the termination of the appointments of nine staff members, including the Applicant, for abolition of post. On 3 November 1993, the Under-Secretary-General, DAM, approved the recommendation.

On 1 December 1993, the Officer-in-Charge, General Service Staffing Section, informed the Officer-in-Charge, Staff Administration and Monitoring Services, as a follow-up to her memorandum of 25 October, that she had sent the Applicant's file to numerous offices -- Department of Peace-Keeping Operations (DPKO), Field Operations Division (FOD), Department of Administration and Management (DAM), United Nations Centre for Human Settlements (HABITAT), and the International Civil Service Commission (ICSC) -- but that, due to the "controversial" material in her file, none of them had agreed to absorb the Applicant.

By letter dated 15 December 1993, the Director of Personnel confirmed to the Applicant that the Secretary-General had decided to terminate her appointment for abolition of post with effect from 31 December 1993, in accordance with staff regulation 9.1(a), and to grant her a termination indemnity in accordance with Annex III to the Staff Regulations, as well as three months' salary in lieu of notice as stipulated in staff rule 109.3(c).

On 30 December 1993, the Applicant requested the Secretary-General to review the administrative decision to terminate her permanent appointment.

On 25 February 1994, the Applicant, through her counsel, requested the Joint Appeals Board (JAB) to seek a conciliatory solution under staff rule 111.2 (b). A conciliator was designated, who pursued various possible solutions, but without success.

The JAB adopted its report on 26 July 1996. Its unanimous conclusions read, in part, as follows:

"Conclusions and Recommendation

...

36. The Panel was of the opinion that although the Appellant's personnel file did

contain documents which offered unfavorable descriptions of the Appellant's demeanor in the work-place, the Appellant had not been unaware of this material. On several occasions, the panel noted, she had elected to respond to the critiques. Thus, the Panel concluded, whether or not the Appellant had received copies of all of the documentation at issue at their origination times, she was aware that there was unflattering material in her personnel file. The Panel concluded that the Appellant did have the opportunity to inspect her file, to question and to challenge any data she deemed to be inaccurate or false and to request that certain documents be expunged from the record.

37. The Panel also concluded that, in compliance with staff rule 109.1, the Administration had undertaken efforts to find suitable posts for the displaced UNCTC staff and had been successful in placing most of them. The Panel also concluded that, although the Administration had not been able to place the Appellant, this would not appear to have been as the result of having wilfully ignored her nor did the Panel find any evidence of discriminatory behaviour toward the Appellant. However, the Panel wishes to note that the Appellant should have been issued a reply to her request that she be considered for a post in Geneva.

38. The Panel also wishes to express its belief that the Administration should be more proactive when attempting to help staff members find suitable positions following the abolition of their posts. Although it may not have affected the outcome of this case, the Panel notes that the staff member was not provided with detailed information about placement efforts put forth on her behalf. For example, she had not been informed about which departments had been asked to consider her, nor had she been told the reasons for their having rejected her.

39. Addressing the Appellant's contention that lack of timely performance evaluation reviews had adversely affected her placement opportunities, the Panel concluded that although the Administration had not been without fault when it neglected to ensure that the Appellant's PER's were issued and submitted when scheduled, the Appellant also contributed to this situation by procrastinating the completion of the PER sections for which she was responsible.

40. The Panel noted that the Appellant had been paid termination indemnity of twelve months salary, plus three months salary in lieu of notice. Therefore, the Panel concluded that the Administration had discharged its proper financial obligations to the Appellant. The Panel did not accept the Appellant's contention that because this termination time was close to her retirement date, it was discriminatory. The termination, it concluded, resulted from a department relocation and did not appear to have been the result of any wilful act of discrimination against the Appellant.

41. The Panel, having concluded that the Appellant's termination was a consequence of the relocation of UNCTAD, makes no recommendation in favor of this appeal."

On 19 August 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and has taken note of the considerations and conclusions of the Panel. He has also taken note that the Panel made no recommendation in favour of your appeal and, accordingly, the Secretary-General had decided to take no further action in your case."

On 29 May 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was subjected to discriminatory treatment and was separated from service in violation of her rights.
2. The Respondent did not make a good faith effort to place the Applicant in another position after her post was abolished.
3. The Respondent's failure to issue a PER for the Applicant for over ten years and the improper placement of negative material in her official status file adversely affected her ability to be placed in a new post.

Whereas the Respondent's principal contentions are:

1. The Applicant's permanent appointment was properly terminated for abolition of post in accordance with staff regulation 9.1 (a).
2. There is no evidence that the decision to terminate the Applicant's appointment was discriminatory.

3. The Respondent fully discharged his obligation under staff rule 109.1 (c) to make good faith efforts to find alternative placement for the Applicant.

4. Events and actions subsequent to the Applicant's separation, relating to conciliation efforts, are irrelevant to the present appeal.

The Tribunal, having deliberated from 9 to 31 July 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General to accept the Joint Appeals Board's (JAB) recommendation to take no further action in her case and to maintain the decision to terminate her permanent appointment. This decision was communicated to her by the Under-Secretary-General for Administration and Management, on 19 August 1996.

II. The Applicant is requesting the Tribunal to rescind the decision to terminate her appointment, to order her reinstatement with full pay and to recommend payment of \$250,000 for damages. She further requests that all negative and prejudicial material be removed from her file and that she be awarded an additional \$50,000 as compensation for the delays caused by the Respondent.

III. The Applicant contends that she was subjected to discriminatory treatment and that she was separated from service in violation of her rights under her contract of employment. Therefore, the main issue before the Tribunal is whether the decision to terminate the Applicant's permanent appointment for abolition of post under the provisions of staff regulation 9.1(a) violated her rights.

IV. Staff regulation 9.1(a) provides that the Secretary-General "may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the

service require abolition of post or reduction of the staff ...”. In 1992, the General Assembly in its resolution 46/235, mandated the Secretary-General to restructure the economic and social sectors of the Organization. That restructuring, which took place in 1993, appears to have been complex. It required the movement of whole divisions between Rome, Vienna, New York and Geneva and involved about 150 staff members. Of the 76 General Service staff affected by the reorganization, in the four duty stations, most were placed.

V. According to staff rule 104.5 and Appendix B to the Staff Rules, General Service posts are filled by local recruitment. The Applicant was one of 44 New York General Service staff whose posts were abolished in the restructuring. The Applicant was one of ten General Service staff members in the four duty stations for whom no suitable assignments could be found. The Director of Personnel recommended that nine of them, including the Applicant, be terminated.

VI. The Applicant’s post was abolished with effect from 31 December 1993. She was granted a termination indemnity in accordance with Annex III to the Staff Regulations, as well as three months salary in lieu of notice as provided in staff rule 109.3(c). She was thus paid for 15 months of the period remaining until she reached retirement age.

VII. The Tribunal has previously held in its Judgement No. 54, Mauch (1954), that staff regulation 9.1 should not be applied in an arbitrary or capricious manner, nor for specious or untruthful reasons, indicating a lack of good faith or due consideration for the rights of the staff member concerned. The Applicant submits that staff rule 109.1(c) provides that when the necessities of service require abolition of post or reduction of staff, staff members with permanent appointments shall be retained in preference to those on other types of appointment. This is, of course, “subject to the availability of suitable posts in which their services can be effectively utilized” and “provided that due regard shall be had in all cases to relative competence, to integrity and length of service.”

VIII. The record indicates that the Applicant's file was sent to various offices in order to find an appropriate replacement post. The Respondent claims that due to the "controversial material" in her file none of these offices agreed to absorb her. This claim seems to be substantiated by the Respondent's response to questions posed by the Tribunal. However, the "controversial material" in her file does not consist of official performance evaluation reviews. It is composed of several negative memoranda from colleagues and from her supervisors. From 1 December 1982, through 31 March 1992, the Applicant received no PERs. Due to the missing PERs, the "controversial material" relating to negative episodes carried more weight than it might otherwise have done. The Applicant had a series of positive performance evaluation reports (PERs) through 1982.

IX. The Tribunal notes that the Applicant contributed to the lengthy period without PERs by procrastinating in the completion of the section for which she was responsible. The Tribunal has held that the right to a fair and impartial assessment of performance is an essential entitlement of a staff member (Judgement No. 363, De Franchis (1986)). The Tribunal finds that the Administration was largely responsible for failing in its obligation to present the Applicant with timely PERs, which may well have been the reason why the "controversial material" carried more weight than the previous positive reviews of her work.

X. The Tribunal does not agree with the findings of the JAB that the Applicant did not meet the burden of proving that the Administration was discriminating against her. While it appears to the Tribunal that the abolition of a number of posts was due to the Organization's restructuring, the Applicant seems to have been singled out. The Tribunal finds there is no convincing evidence of the Administration's good faith in its attempt to find an alternative post for the Applicant during the remaining months of her service until retirement age. This lack of good faith is particularly troubling in the Applicant's situation, as there was less than two years remaining

until her retirement. For this, and for the failure to prepare timely evaluations, the Applicant is entitled to compensation, which the Tribunal assesses at the equivalent of seven months of her net base salary at the time of her separation from service.

XI. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant the amount of seven months of her net base salary at the rate in effect at the time of her separation.
2. Rejects all other pleas.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah Taylor ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary