



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 909

Case No. 1003: SIMS

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, on 25 November 1997, Winston Sims, a former staff member of the United Nations, filed an application that did not fulfil all the requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 January 1998, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"The Tribunal is requested to find:

1) That the memo ... of 14 April 1992: i) is a "special report" in the context of ST/AI/240/Rev.2 and ST/AI/292 and not a "note for the file"; ii) did not reflect and did not meet the standards set forth in para. 2 of ST/AI/240/Rev.2 and, iii) since the PERs [performance evaluation reports] for 1986-89 and 1989-92 were, for similar reasons, thrown out in the first instance by the Secretary-General on the recommendation of the JAB [Joint Appeals Board] and in the second instance by OHRM [Office for Human Resources Management] itself, therefore, iv) should also be thrown out;

...

6) That the Applicant has been denied, for the last decade of his service with the United Nations, any fair, consistent, objective and impartial assessment or statement of his performance and, therefore, has also been denied any sound foundation for assessment of his capabilities by firms outside of the United Nations for purposes of future employment;

...

And to order:

i) That a recommendation be made to the Secretary-General that the behaviours of the officials involved be referred to the Joint Disciplinary Committee for examination of breach of trust, abuse of authority, discrimination, prejudice and other persistent violations of the requirements of the Code of Conduct; ii) That the Applicant be awarded 5 years' salary for the pain, distress, destruction of [his] career ...; and iii) such other remedies as the Administrative Tribunal believes appropriate."

Whereas the Respondent filed his answer on 31 August 1998;

Whereas, on 21 September 1998, the Respondent submitted additional documents, in response to the Applicant's request for production of such documents;

Whereas the Applicant filed written observations on 29 October 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 13 August 1973, on a one-year fixed-term appointment at the P-2 level, as Associate Social Affairs Officer, in the Department of Economic and Social Affairs. The Applicant's appointment was successively extended, and on 1 April 1975, he was promoted to the P-3 level, as Social Affairs Officer. On 1 April 1976, his appointment became permanent. On 1 April 1979, he was promoted to the P-4 level. On 22 October 1979, he was transferred from Headquarters to the Department of International Economic and Social Affairs, Centre for Social Development and Humanitarian Affairs (CSDHA), Social Welfare Services Section in Vienna. On 21 September 1993, the Applicant was transferred to the Department for Policy Coordination and

Sustainable Development in New York as a result of organizational restructuring. On 31 December 1995, the Applicant separated from service pursuant to an agreed termination.

In a memorandum dated 14 April 1992, the Officer-in-Charge, Developmental Social Welfare and Social Integration Branch (DSWSIB), Social Development Division (SDD), Developmental Social Welfare Unit (DSWU) (hereinafter "OIC, DSWU"), explained to the Chief, Personnel Service, United Nations Office in Vienna (UNOV), his views on the Applicant's performance and recommended that the Applicant's within-grade salary increment be withheld on the ground that the Applicant's performance had been "entirely unsatisfactory".

On 27 April 1992, the Officer-in-Charge, Personnel Service, transmitted a copy of the above communication to the Applicant and informed him as follows:

"... [O]n the basis of your performance as reflected in the attached special report, Personnel Service is taking the necessary action to withhold your increment ... in accordance with the provisions of ST/AI/240/Rev.2 ..."

On 29 May 1992, pursuant to a request made by the Applicant on 1 May 1992, the Personnel Officer, Personnel Service wrote to the Director, SDD, CSDHA, and to the Chief, DSWSIB, SDD, CSDHA, seeking their views on the evaluation of the Applicant contained in the 14 April memorandum. On 22 June 1992, the Chief, DSWSIB, SDD, CSDHA, responded, "I was surprised when I read it. ...I find it difficult to agree with [the author's] assessment of [the Applicant]." On 23 June 1992, the Director, SDD, CSDHA, responded that his "basic views on the evaluation of [the Applicant's] performance ... have been expressed by withholding the staff member's grade salary increment."

Also on 23 June 1992, a Personnel Officer, OHRM, informed the Chief, Personnel Service, UNOV, by cable as follows:

"I NOTE THAT RECOMMENDATION FOR WITHHOLDING OF WITHIN-GRADE INCREMENT WAS MADE ON 14 APRIL 1992 I.E. AFTER REVIEW

DUE DATE OF 1 APRIL 1992. UNDER PD/1/69 WITHHOLDING OF SALARY INCREMENT CANNOT BE RETROACTIVE. CONSEQUENTLY INCREMENT NEEDS TO BE REINSTATED. ALSO MEMORANDUM DATED 14 APRIL 1992 FROM [THE OIC, DSWU] TO YOU SHOULD NOT BE TREATED AS SPECIAL REPORT BUT AS NOTE FOR THE FILE. MOST IMPORTANTLY I NOTE THAT NO PER [PERFORMANCE EVALUATION REPORT] PREPARED SINCE 1986. IT IS IMPERATIVE THAT UPDATED PER BE PREPARED AS SOON AS POSSIBLE."

On 1 July 1992, the Personnel Officer, Personnel Service, informed the Applicant, "Following a further review of your case, it has been decided on procedural grounds to reinstate the due increment with retroactive effect as of 1 April 1992."

On 2 July 1992, a PER for the period 16 July 1986 to 31 July 1989 was signed by the Assistant Director-in-Charge, DSWSIB, as First Reporting Officer. The ratings consisted of three A's and eleven B's. On 7 July 1992, the Director, SDD, CSDHA, signed the PER as Second Reporting Officer, giving the Applicant an overall rating of "A very good performance". He added the following comment: "I have rated the staff member according to ratings provided by the First Reporting Officer. In my view, however, some of the ratings have been inflated."

On 15 July 1992, the OIC, DSWU, wrote to the Applicant, criticizing the contents of review papers he had prepared, complaining that the Applicant had failed to address the assignments in the manner requested, and noting that three of the papers were submitted late.

On 15 October 1992, the OIC, DSWU, wrote to the Applicant suggesting that he "complete as soon as possible [his] section of the PER" for the period 1989-1992, and noting that after the OIC, DSWU, completed his section, the Applicant "will then in due course have an opportunity to take recourse in respect to anything with which [he] disagree[s]".

On 28 October 1992, the OIC, DSWU, wrote to the Applicant, stating, in part, as follows:

"You have expended far more energy in identifying reasons for not complying with my requests [to carry out the assignments given to you] than you have in contributing to the work of our team. ... Judging from your past performance and attitude, I can have no confidence whatsoever that, even if I wait a second year, you will have contributed very much more of value than you have done during the first year of this programme. Consequently, ... I am obliged to instruct you to cease all further work on the assignments given to you in September 1991. I have no option but to add these tasks to the work of the other professional staff in the Unit, including myself. ..."

On 29 October 1992, the Officer-in-Charge, Personnel Service, advised the OIC, DSWU, "In the event that [the Applicant] continues to refuse to complete Part A of Section II of his performance evaluation report in a timely manner, you and the other reporting officers should nevertheless proceed with completion of your respective sections. ..."

On 2 November 1992, the Applicant sent to the Director, SDD, CSDHA, a fourteen-page memorandum, with 28 annexes, in which he complained about the conduct of the OIC, DSWU, accusing him of abuse. He questioned the adherence by the OIC, DSWU, to the "Standards of Conduct of International Civil Servants". The Applicant also objected to the 14 April memorandum and contested the critical remarks made by the OIC, DSWU, in his 15 July and 28 October 1992 memoranda.

On 1 December 1992, the Applicant wrote to the Chief, Personnel Service, UNOV, arguing that the 14 April memorandum "could enjoy no real legitimacy as it seems to meet none of the minimum standards or requirements called for" by ST/AI/240/Rev.2. He also questioned the appropriateness of completing any PER in the light of the circumstances surrounding the 14 April memorandum.

On 4 December 1992, the Officer-in-Charge, Personnel Service, wrote to the Applicant, summarizing his earlier discussions with the Applicant as follows:

"2. ...

(a) [The OIC's] memorandum of 14 April 1992 was submitted as a special report in support of his recommendation to withhold your annual increment;

- (b) Following consultation with Headquarters, we were advised that since withholding of an increment cannot be done retroactively, the recommendation and report would have had to be received before 1 April, i.e. the first of the month in which the increment became due;
- (c) On account of this technicality, the increment was restored;
- (d) OHRM also advised us that the 'memorandum dated 14 April 1992 from [the OIC, DSWU] to you should not be treated as special report but as note for the file';
- (e) That memorandum therefore falls under the category of 'adverse material' as described in para.2 of ST/AI/292; the concerned staff member may submit comments in rebuttal (the formal rebuttal procedure set out in paras. 10-15 of ST/AI/240/Rev.2 would not apply to this type of material).

..."

After several further communications between the Applicant and the Administration concerning completion of his PER, on 18 December 1992, the Chief, Personnel Service, UNOV, wrote to the Applicant again requesting him to complete his section of the PER and noting that ST/AI/240/Rev.2 and the Staff Rules provided for an adequate review process. On 22 December 1992, the Applicant requested that the Chief, Personnel Service, "not proceed with the implementation of the PER until [the issues he had raised] have been resolved."

On 11 January 1993, the Personnel Officer, Personnel Service, instructed the OIC, DSWU, "to proceed with the completion of Section II (Part B) and Section III of the [Applicant's] PER", noting that the Applicant "ha[d] not complied with the deadline for the completion of Section II, Part A of his PER". By copy of that memorandum, the Personnel Officer requested the Second and Third Reporting Officers to complete their sections of the PER as well.

On 19 January 1993, the Applicant wrote to the Chief, Personnel Service, asking that his memorandum of 2 November be placed in his Official Status File as a partial response to the statement by the Officer-in-Charge, Personnel Service, that

the 14 April memorandum falls within the terms of ST/AI/292.

On 20 January 1993, the Chief, Personnel Service forwarded to the OIC, DSWU, a list of the Applicant's "Tasks and assignments", which he had received from the Applicant on 14 January. The Chief, Personnel Service, suggested that the OIC, DSWU, take the list into consideration when preparing his evaluation. Also on 20 January, the Chief, Personnel Service, informed the Applicant that his list had been forwarded to the OIC, DSWU, and suggested that he contact the OIC, DSWU, immediately to arrange to complete and sign Section II, Part A of his PER.

On 3 February 1993, the Applicant requested the Secretary-General to review the decision of the Officer-in-Charge, Personnel Service, dated 4 December 1992, to treat the communication of 14 April 1992 as a Note for the file.

On 8 February 1993, the Director and Deputy to the Under-Secretary-General, UNOV, wrote to the Applicant, who had provided the former with a copy of his memorandum of 2 November with attachments, stating in part as follows:

"...

2. The written material that you provide paints a sad picture of a hopelessly deadlocked situation, in which you appear to accuse [the OIC, DSWU], of completely failing in his duties as supervisor while he sees as [sic] a serious deficiency in your performance as evidenced by his recommendation that your increment be withheld.

...

5. All considered, it seems best to resort to the mechanisms that the Organization provides. The performance evaluation procedure seems an appropriate tool in this regard, since it would involve all supervisors within the Division and, if rebutted, provides for an independent panel to look into the matter."

On 18 February 1993, the Applicant requested the Secretary-General to review the decision of 18 December 1992 by the Chief, Personnel Service, UNOV,

requesting the Applicant to complete his section of the PER for 1989-1992.

On 22 April 1993, the Director, Social Development Division, signed the Applicant's PER for August 1989 to July 1992. The OIC, DSWU, was the First Reporting Officer. It was noted that the Applicant had failed to complete Part A.

On 18 and 25 May 1993, the Applicant lodged appeals with the JAB against the decisions contained in the 18 December 1992 memorandum from the Chief, Personnel Service, and the 4 December 1992 memorandum from the Personnel Officer, Personnel Service, respectively. On 24 June 1993, the Applicant requested the Secretary, JAB, to join the two appeals.

On 20 November 1995, the Chief, Cluster 5, Operational Services Division, OHRM, informed the Applicant as follows:

" After looking into the circumstances under which your performance report for the [period 1989-1992] has been prepared, it has been decided that not all the provisions of the ST/AI/240/Rev.2 were followed and therefore, the validity of that report may be questioned. Therefore, we consider that the report in question should be disregarded and not included in any official status file.

...

By copy of this memorandum, the Executive Office, DPCSD, is requested to fill in the PER for you from August 1989 up to now."

On 29 December 1995, the Applicant replied as follows:

"... I believe that OHRM has let so much time lapse in reaching this conclusion that it is no longer possible to retrieve the opportunities it had available almost three years ago. ...

... I believe that any PER, covering that period, prepared at this date would also not be in keeping with the letter and intent of ST/AI/240/Rev.2.

Since OHRM took the decision, which is welcome, nonetheless, only a few weeks shy of my retirement, I believe, it has not [been] able to undo any of the enormous damage to my reputation and career within the Organization that was done by the rogue actions of a few officials."

The JAB adopted its report on 30 April 1997. Its conclusions and recommendations read as follows:

"Conclusions and recommendations

45. The Panel unanimously found that:

- (a) Preparation of the PER concerning the period 1986-1989 was procedurally defective and that the PER concerning the period 1989-1992 was flawed - and rightly withdrawn. Neither should form part of his record.
- (b) While the Appellant had not proved that the contested decision had been motivated by prejudice or other ulterior motives, he had given significant evidence of a failure to fulfill managerial responsibility and to observe proper procedures on the part of his supervisors.
- (c) While it could not be found that the Appellant had suffered any specific damage to his career on account of the above, the Appellant had suffered moral injury and considerable distress which could have been avoided had the proper procedures been adhered to. For this failure to observe his conditions of service, he deserved to be compensated.

46. The Panel unanimously recommends that the Appellant be granted compensation in the amount of one month's net salary, and that in the absence of any formal record of his last 9 years of service, he be provided with a statement that this had been satisfactory."

On 28 July 1997, the Officer-in-Charge, Department of Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusions that:

- a) Preparation of the PER concerning the period 1986-1989 was procedurally defective and that the PER concerning the period 1989-1992 was flawed - and rightly withdrawn. Neither should form part of the record.
- b) While you had not proven that the contested decision had been

motivated by prejudice or other ulterior motives, you had given significant evidence of a failure to fulfill managerial responsibility and to observe proper procedures on the part of your supervisors.

c) While it could not be found that you had suffered any specific damage to your career on account of the above, you had suffered moral injury and considerable distress which could have been avoided had the proper procedures been adhered to. For this reason, you deserve to be compensated.

Finally, the Secretary-General has taken note of the Board's unanimous recommendation and has decided to accept it, namely that you be granted compensation in the amount of one month's net base salary, and that in the absence of any formal report of your last nine years of service, you be provided with a statement that this had been to the full satisfaction of the Organization. The Secretary-General has decided to take no further action regarding your case."

On 28 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the provisions of ST/AI/240/Rev.2 by placing the 14 April 1992 memorandum of the OIC, DSWU, in the Applicant's Official Status file without giving him the opportunity to rebut that memorandum. That memorandum was a

“special report”, rather than a “Note for the file” and was thus subject to the terms of ST/AI/240/Rev.2.

2. The Respondent treated the Applicant with extreme prejudice and discrimination by failing to apply the appropriate rules for his PERs and for the 14 April memorandum and related correspondence, causing the Applicant moral injury, anguish and distress.

Whereas the Respondent’s principal contentions are:

1. This application is not receivable under the terms of article 7 of the Tribunal's Statute.

2. Should the Tribunal decide that the application is receivable, the Respondent concedes that procedural errors were made but asserts that they were corrected without detriment to the Applicant.

The Tribunal, having deliberated from 28 October to 20 November 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 28 July 1997. That decision adopted a unanimous Joint Appeals Board (JAB) recommendation that the Applicant be granted compensation in the amount of one month’s net base salary. In addition, the JAB recommended that, in the absence of any formal report of the Applicant’s last nine years of service, he be provided with a statement that his performance during that period had been to the full satisfaction of the Organization.

II. Prior to considering the case on the merits, the Tribunal must determine whether the Applicant’s case is receivable according to article 7 of the Tribunal’s Statute. The Respondent claims that certain of the Applicant’s pleas have already

been upheld by the JAB and accepted by the Secretary-General and therefore are not receivable under the terms of article 7.2 of the Statute. However, the Tribunal notes that an application may be receivable under article 7.3 in cases where the Secretary-General has accepted the JAB's recommendations favourable to the Applicant, but the Applicant considers the outcome to be unfavourable (cf. Judgement No. 739, Chakravarti (1995)). Having reviewed the record, the Tribunal disagrees with the Respondent on this point and considers that a number of the JAB's recommendations were unfavourable to the Applicant. Therefore, the Tribunal finds that the application is receivable.

III. The record indicates that there were many errors committed by the Administration and numerous procedural flaws that were never corrected. For example, the memorandum dated 14 April 1992, which recommended that the Applicant's within-grade increment be withheld, did not fulfil the formal requirements of a special report under ST/AI/240/Rev.2, paragraphs 16 and 18. That memorandum was not submitted before the salary increment was due. Nor was it in the correct form. Subsequently, the increment was reinstated. The Applicant has requested that the memorandum of 14 April 1992, be removed from his file. However, the Tribunal does not find any justifiable reason for removing such a document from the personnel file of the Applicant.

IV. In addition, the lack of proper performance evaluations reports (PERs) for the last nine years of the Applicant's employment in the Organization, constitutes a glaring violation of procedure on the part of the Respondent. The Tribunal agrees with the JAB that "the delay in completing the [PER for the period 1986-1989] and its explicit use as a tool to settle a 'hopelessly deadlocked situation' were seriously prejudicial to the [Applicant]."

V. Regarding the PERs for the periods 1989-1992 and 1992-1995, the

Respondent, once again, did not comply with all the provisions of ST/AI/240/Rev.2. The latter PER, covering the period ending 31 December 1995, should have been provided to the Applicant before his departure. It appears that it had not even been prepared by that time.

VI. Based on the foregoing, the Tribunal finds, as did the JAB, that the Applicant's rights in regard to having up-to-date and proper PERs have been violated. However, the amount of compensation recommended by the JAB is insufficient in light of the serious prejudice caused to the Applicant by the numerous procedural flaws surrounding his case.

VII. Therefore, the Tribunal orders the Respondent to pay the Applicant as compensation, an additional amount equal to three months of his net base salary at the rate in effect on the date of his separation from service.

VIII. The Tribunal rejects all other pleas.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah TAYLOR ASHFORD
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary

