



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1013

Case No. 883: XU

Against: The Secretary-General
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo;
Ms. Brigitte Stern;

Whereas, in December 1997, Jin Xu, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time-limit for filing an application with the Tribunal until 31 July 1998 and periodically thereafter until 30 April 1999;

Whereas, on 16 April 1999, the Applicant, after making the necessary corrections, again filed an Application in which he requested, in accordance with article 12 (formerly article 11) of the Statute of the Tribunal, the revision of Judgement No. 796 rendered by the Tribunal on 21 November 1996;

Whereas the Application contained pleas which read, in part, as follows:

"II. Pleas

(a) In response to the United Nations Administrative Tribunal (UNAT) Judgement No. 796, I hereby request the UNAT to admit for serious consideration the

fact that the Applicant had, in 1988, and again in 1989 - long before the expiration of my contract - discreetly contacted U.N. officials seeking advice on possibilities of career appointment, at tremendous risks under the political conditions of the time.

...

(b) Under article 9, paragraph 1, the Applicant hereby respectfully contest[s] and request[s] rescission of the Tribunal's decisions as contained in the Administrative Tribunal Judgement No. 796 ...

...

(d) I hereby respectfully request that:

i. I ... be granted a career appointment immediately or at an earliest possible date, ...; or

ii. I ... be paid three years' net base salary as ... compensation, [should a] career appointment not be granted, and at the same time be placed as a priority candidate ... for short-term contracts... ; or

iii. I ... be appointed to work at a different capacity or office within the United Nations ...

(e) In the event the Tribunal decides not to grant any compensation sought above, [I] hereby request that I be granted a special exception to the rule that G-level positions be open only to candidates with Master degrees.

..."

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent answer until 21 June 1999 and periodically thereafter until 30 June 2000;

Whereas the Respondent filed his Answer on 5 June 2000;

Whereas the facts in the case were set forth in Judgement No. 796.

Whereas the Applicant's principal contentions are:

1. The Tribunal overlooked material facts in reaching Judgement No. 796.

2. The Tribunal erred in considering the Applicant's case with those of other Applicants as the efforts he made to discuss his situation with United Nations officials rendered his case unique.

3. The Tribunal erred in finding that the Applicant's proceedings were inspired by Judgement No. 482, as the Applicant's efforts at obtaining a career appointment predated that Judgement.

4. The Tribunal erred in not construing the Applicant's efforts to discuss his situation with United Nations officials as:

- (a) Exhausting internal channels;
- (b) Obviating any question of time-limits;
- (c) Circumstances beyond the Applicant's control which prevented him from submitting a request for review and timely appeal.

5. The Tribunal erred in not applying Judgement No. 713, *Piquilloud* (1995) to the Applicant's case.

Whereas the Respondent's principal contention is:

The Application fails to meet the requirements for revision of judgement, as it does not introduce the discovery of any fact of such a nature as to be a decisive factor, which was unknown to the Tribunal and also to the Applicant at the time of the Judgement.

The Tribunal, having deliberated from 25 October to 20 November 2001, now pronounces the following Judgement:

I. The Applicant joined the United Nations on a fixed-term appointment, on 25 January 1985, on secondment from the Government of China. On 24 January 1990, he was separated from service at the expiration of his fixed-term contract.

II. On 20 September 1990, the Applicant and seven other former Chinese language staff members wrote to the Secretary-General alleging denial of due process because they had not

been considered for career appointments and requesting re-instatement. The case was referred to the Joint Appeals Board (JAB) which disagreed with the Respondent's position that the complaints were not receivable as they were time-barred. In the Applicant's case, the JAB recommended that he be granted a career appointment and paid retroactive salary and allowances or, alternatively, should the Secretary-General decide not to grant him a career appointment, that he be paid three years net-base salary. In January 1992, the Secretary-General rejected the recommendations of the JAB and an Application to the Tribunal followed on 31 October 1995.

In Judgement No. 796, the Tribunal noted that the exceptional circumstances identified by the JAB to justify a waiver of the time limits were "general circumstances relating to secondment, rather than individual circumstances relating particularly to the Applicants". It also noted that its jurisprudence demonstrates that

"any circumstances beyond the control of the Applicant which prevented the staff member from submitting a request for review and filing of an appeal in time may be deemed exceptional circumstances.' ... The rendering of a subsequent judgement [Judgement No. 482, *Qiu, Zhou, and Yao* (1990)] cannot be deemed exceptional circumstances in accordance with this logic".

Thus, on 21 November 1996, the Tribunal rejected the Application in its entirety.

III. In the instant case, the Applicant requests the Tribunal to revise Judgement No. 796 and to give serious consideration to facts he believes material to his case which were overlooked, in particular the efforts he made in seeking advice from United Nations officials in 1988 and 1989 on the possibilities of a career appointment, prior to the expiration of his fixed-term appointment.

Contrary to Judgement No. 796, the Applicant claims that the facts and law with respect to all Applicants in that case were not the same, as he "was the only person who, as early as ... 1988, took serious risks and actually contacted officials in the United Nations who are paid ... to advise staff members on career related issues", and that, therefore, his case was unique and different from those of the other Applicants who had not, to his knowledge, taken similar action. Furthermore, he contests the statement contained in the Judgement that "the exceptional circumstances ... are general circumstances relating to secondment, rather than individual circumstances relating particularly to the Applicants". This is because he had the courage to

break "the last taboo and [go] over the head of the watchful Chinese Government to talk to [United Nations] officials". This, in his view, amounts to exceptional circumstances.

The Applicant further contends that the jurisprudence of the Tribunal provides that "any circumstances beyond the control of the Applicant which prevented the staff member from submitting a request for review and filing of an appeal in time may be deemed exceptional circumstances". (See Judgements No. 372, *Kayigamba* (1986); and, No. 713, *Piquilloud* (1995).) The Tribunal held in *Piquilloud*, paragraph IV that:

"It seems, in fact, that the Applicant's case corresponds, *prima facie* to the definition of 'exceptional circumstances' ... She was prevented from presenting her request in a timely manner, partly because of her status as a staff member on secondment subject to the system of rotation applied to seconded staff members by the Chinese Government, and partly because of the negligence of her counsel who was, notwithstanding, picked from among the members of the United Nations Panel of Counsel."

IV. Article 12 of the Tribunal's Statute provides that:

"The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement."

In examining the justifications submitted by the Applicant, the Tribunal finds itself in agreement with the view of the Respondent that the Applicant has failed to introduce a new fact unknown to the Tribunal of such nature to be a decisive factor permitting revision of the Judgement. For instance, the events of 1988 and 1989 referred to by the Applicant are not new facts. It is significant to note that the Applicant points out that the facts to which he refers are material to his case, but he does not claim that they are new. Therefore, in the view of the Tribunal, the Applicant does not fulfill the requirements of article 12.

V. The Tribunal is also of the view that any actions, short of a formal appeal, that the Applicant took prior to the expiration of his contract and prior to the Administration's decision

not to offer him a further appointment cannot be considered an appeal of that decision. It notes that the position of the Applicant in *Piquilloud* is similar to the instant Applicant's case in one aspect: both were staff members on secondment, subject to the system of rotation applied to seconded staff members by their Governments. However, the difference is that the Applicant in *Piquilloud* had already initiated efforts to pursue legal recourse following her separation from service and prior to Judgement No. 482. Moreover, she was hindered by the negligence of her counsel under circumstances that were beyond her control, whereas there is no evidence that the Applicant in this case was prevented from filing an appeal in time by anything other than failing to comply with staff rule 111.2 (a).

Apparently the Applicant is retroactively seeking application of Judgement No. 482 to his case. However, the Respondent rightly points out that the imposition of any time limits other than those set forth in the Staff Rules would be arbitrary. The JAB correctly noted that the Applicants *Qiu, Zhou and Yao* met the time limits set forth in the rules, as did a number of other staff members who had initiated proceedings following their separation and prior to Judgement No. 482. Therefore, the Tribunal reaffirms that the Respondent's decision to accept a finding of time-bar was a reasonable exercise of discretion.

VI. In view of the foregoing, the Tribunal maintains the decision taken in Judgement No. 796 and rejects the Application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Omer Yousif BIREEDO
Member

Brigitte STERN
Member

New York, 20 November 2001

Maritza STRUYVENBERG
Executive Secretary