



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1016

Case No. 1148: GHARSELLAOUI

Against: The Secretary-General
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President;
Mr. Spyridon Flogaitis;

Whereas at the request of Abdessattaar Gharsellaoui, a staff member of the United Nations, 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 March 2000 and thereafter until 31 July 2000;

Whereas, on 31 July 2000, the Applicant filed an Application containing pleas which read as follows:

"II. Pleas

Request for ... Witnesses

...

10. The Applicant requests that the Tribunal hold an hearing in this matter where the Applicant may present his case orally, and also question the following witnesses ...
11. The Applicant also requests that either a stenographic or audio-tape record of all proceedings before the UNAT [United Nations Administrative Tribunal],

including the examination of witnesses, if any, or consideration of other evidence, be undertaken and made available to the parties hereto.

12. The Applicant is requesting the ... UNAT to quash the decision taken by the Secretary-General (...) upon the recommendation (...) of the Geneva Joint Appeals Board [JAB] ...

Redress Sought

13. The Applicant respectfully requests that the UNAT order the Secretary-General to provide further redress for [the] Applicant's treatment by [the] Respondent, as detailed below:
 - that the Applicant be retroactively appointed to grade G-3 from 1 April 1992, and to Grade G-4 with retroactive effect from 1 April 1995, and that he be paid all additional salary, benefits, emoluments, and other adjustments that he should have received had he been deemed to be at grade G-3 from 2 April 1992, and grade G-4 from 1 April 1995;
 - that the Applicant be awarded the sum of three million (US\$3,000,000) dollars in compensation for the actual and moral injury the Applicant suffered as a result of the impugned decision and subsequent actions incident thereto, including the damage to his physical and mental health, and his acute pain and suffering;
 - that the Applicant be reimbursed ... the sum of twenty five thousand (US\$25,000) dollars for his expenses and other costs occasioned by this appeal;
 - that the Tribunal award the Applicant a sum it deems appropriate in compensation for the inexplicable delay of the JAB in considering the subject case and issuing its recommendation ...
 - that the Tribunal award interest on any sums recommended hereunder at the rate of six (6%) percent per annum, from 1 April 1992 through the date of satisfaction of any judg[e]ment hereunder;
 - referral of the discrimination allegations raised by the Applicant above to an independent and *ad hoc* investigative and disciplinary committee (...), in particular the seeming violation by [Mr. Marian Baquerot, former Director, Division of Human Resources Management, Office of the United Nations High Commissioner for Refugees (UNHCR)] of General Assembly resolution 51/226, which calls for sanctions against managers who mismanage staff and willfully neglect or disregard rules and procedures (...);
 - in the event the [Secretary-General] fails to initiate such a disciplinary investigation, an order lifting the functional privileges and immunities of Mr. Baquerot so that the Applicant may seek redress from him directly in any applicable national court of his choosing; and
 - such other relief as the Tribunal deems just, fair and equitable under the foregoing circumstances."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2001 and twice thereafter until 31 May 2001;

Whereas the Respondent filed his Answer on 30 April 2001;

Whereas the Applicant filed Written Observations on 28 September 2001, amending his pleas as follows;

"... In addition, in light of developments which have occurred subsequent to the filing of his Application, the Applicant also seeks an additional eighteen (18) months of salary representing the termination indemnities due to him under ... staff rules 9.3 (a) and 9.3 (b), and Annex III, subsection b ... Additionally, the Applicant respectfully requests that his moral damages be increased accordingly on account of this further brazen and arrogant *demarche* on the part of the Respondent in attempting to legally deny to the Applicant what is rightfully his."

Whereas, on 18 October 2001, the Respondent submitted comments on the Applicant's Written Observations;

Whereas, on 7 November 2001, the Tribunal decided 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 Office at Geneva (UNOG) on 7 April 1981, on a temporary contract as an Usher (*huissier*) at the G-1 level. On 17 January 1983, he received the first in a series of fixed-term appointments as an Usher at the G-2 level. Effective 1 October 1988, the Applicant was granted a permanent appointment as Usher-Messenger at the G-2 level, UNOG. Effective 2 October 1989, the Applicant was assigned to the Messenger Unit of UNOG which served UNHCR.

On 5 February 1990, the Applicant wrote to the Secretary-General, alleging that the UNOG promotion exercises were corrupt, and had been unfair and discriminatory towards him. The Chief, Personnel Service, UNOG, replied on 3 April 1990 and again on 24 June 1991, explaining the promotion process and advising the Applicant that, if he felt he had been

discriminated against, he could seek redress through the Panel on Discrimination and Other Grievances.

Effective 1 April 1992, UNHCR created its own Messenger Unit. As of that date, the Applicant was assigned to the new Unit on reimbursable loan. Subsequently, the Applicant, and two other UNOG staff members who held permanent appointments and had been assigned to UNHCR, applied for a permanent transfer to UNHCR. The two other staff members, who were French nationals, were successful in their application, but the Applicant remained on reimbursable loan.

On 10 May 1993, the Applicant wrote to the High Commissioner, complaining about discrimination allegedly perpetuated by the then Director, Division of Human Resources Management, UNHCR.

On 18 August 1993, the Acting Deputy High Commissioner wrote to the Applicant, confirming in writing their verbal offer of a one-year secondment from UNOG at the G-3 level. In the absence of a reply, UNHCR withdrew the offer on 18 November 1993, as confirmed in their decision of 29 November 1993.

On 3 December 1993, the newly-appointed Director, Division of Human Resources Management, UNHCR, responded to the Applicant's letter of 10 May, addressing some of the allegations.

On 6 December 1993, the Applicant and the Director, Division of Human Resources Management, UNHCR, signed a "Note for the File" agreeing that the Applicant would be offered a fixed-term contract at the G-3 level from 1 July to 31 December 1993, during which time he would be on secondment from UNOG, and that the Applicant would return to UNOG on 3 January 1994. On the same day, the Chief, Personnel Services, UNOG, agreed to the arrangement. Upon completion of his secondment, the Applicant returned to UNOG at the G-2 level.

On 26 May 1995, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances, alleging that he had suffered as a result of the discrimination and corrupt practices of the former Director, Division of Human Resources Management, UNHCR. On 9 November 1995, the Applicant wrote to the Under-Secretary-General for Internal Oversight

Services, alleging that the former Director, Division of Human Resources Management, UNHCR, had exercised corrupt practices in promotion exercises.

On 21 March 1996, the Panel on Discrimination and Other Grievances submitted its report on the Applicant's allegations of 26 May 1995 to the Director General, UNOG. It concluded that the Applicant was not accorded treatment at UNHCR equal to that accorded his two colleagues, so that his opportunities for advancement were limited, and recommended that he be retained as a candidate and considered for promotion, should he fit the requirements of an available post. It further recommended that if such promotion was "not ... feasible in the near future, it might be appropriate ... to assign him the responsibilities of a higher grade level *ad interim* to gain experience".

On 17 June 1996, the Chief of the Registry, File and Mail Section, UNOG, informed the Applicant that he would be assigned the functions of "Agent de triage/Messenger" until he could be promoted. The Applicant rejected this offer on 20 June. On 19 July, the Chief of Personnel Services reiterated the offer and, on 26 July, the Applicant accepted it.

On 12 May 1997, the Applicant was informed that, effective 1 May 1997, he had been promoted to the G-3 level.

On 10 July 1997, the Applicant wrote to the Secretary-General requesting administrative review of the 12 May decision.

On 9 October 1997, the Applicant lodged an appeal with the JAB. The JAB submitted its report on 21 April 1999. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

48. The Panel ... considered the substance of the appeal. In the first place, the Appellant claims that his 'secondment' on 2 October 1989 to UNHCR was illegal and in violation of the Inter-Organization Transfer Agreement. The Panel considers that *prima facie* this claim is inadmissible *ratione temporis*. If the Appellant considered that his rights had been violated, he should have lodged an appeal within the prescribed time limits.

49. This notwithstanding, the Panel notes that, ... the latter was initially reassigned - a measure not covered by the Inter-Organization Transfer Agreement - and not *seconded* to the Office of the United Nations High Commissioner for Refugees, since at the time the messenger service was administered by UNOG. The Panel noted, moreover, that nothing in the file indicates that the decision to reassign the Appellant was based on discrimination. Lastly, the Panel notes that when in April 1992 responsibility for the messenger service was transferred to UNHCR, the Appellant himself had requested to remain.

50. Secondly, the Appellant alleges that he was discriminated against ...

51. The Panel again notes that *prima facie* these complaints are not receivable *ratione temporis*. However, the Panel is of the view that the fact that the Appellant was considered an external candidate when applying for vacant posts at UNHCR was as a result of his contractual status and cannot be considered to have been discriminatory. The Panel considers, moreover, that the Appellant's career was not blocked. During his period of service to UNHCR, the Appellant had the opportunity to apply as an internal candidate for vacant posts in UNOG. The Panel considers that it was the Appellant's personal choice to have concentrated his efforts on obtaining a post at UNHCR, despite his status as an external candidate, and that the Appellant was solely responsible for that choice.

52. Regarding the transfer of the Appellant's two colleagues, the Panel notes that no evidence of discrimination was presented by the Appellant and that, on the contrary, the Appellant's personnel file contains a note explaining why UNHCR decided not to transfer the Appellant to UNHCR in the first place.

53. Lastly, the Appellant contends that, having attained the G-3 level during his service at UNHCR, there was no reason for demoting him to the G-2 level upon his return to UNOG. In this regard, the Panel notes that the Appellant was promoted to the G-3 level on 1 July 1993 during his six-month secondment to UNHCR. The Panel notes, moreover, that paragraph 9(e) of the Inter-Organization Transfer Agreement provides that, following a secondment, the organization releasing the staff member shall not be obligated to recognize changes in the status of the staff member upon his return, except for purposes of the calculation of certain payments. The Panel therefore considers that UNOG was not obligated to reinstate the Appellant at the G-3 level and that the reinstatement of the Appellant at the G-2 level did not constitute a demotion.

Conclusions and Recommendations

54. In view of the foregoing, the Panel **concludes** that the Appellant has no right or reason to receive ... compensation ... The Panel also **concludes** that, given the fact that the Appellant is already receiving a special allowance pursuant to rules 103.20 (l) to 103.20 (r) of the Staff Rules, i.e. a special education grant (disabled children), his request for compensation ... is without merit.

55. Accordingly, the Panel **recommends** to the Secretary-General that he **reject** the present appeal."

On 25 June 1999, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had accepted the JAB's conclusions and recommendations, and that he had decided to take no further action on the Applicant's appeal.

On 31 July 2000, the Applicant filed the above-referenced Application with the Tribunal.

An initial fact-finding investigation by the Office of Internal Oversight Services into the Applicant's allegations of 9 November 1995 resulted in a "Note to the File", dated 27 April 2001, which stated that there was a "lack of evidence to support the [Applicant's] allegations".

Whereas the Applicant's principal contentions are:

1. The Administration's denial that the Applicant's reassignment/secondment to UNHCR was governed by the Inter-Organization Agreement and subsequent requirement that he be treated as an external candidate when applying for positions at UNHCR was a violation of his rights of due process.
2. The bias, prejudice, or discrimination and the unequal treatment suffered by the Applicant blocked the progression of his career, and resulted in severe physical and mental injury.
3. The failure to promote the Applicant was an illegal forfeiture of his fundamental right as an international civil servant to serve in a post commensurate with his grade, abilities and experience.
4. The failure of the Administration to maintain the Applicant at the G-3 level when he returned to UNOG in 1994 was a substantive irregularity which entitles him to redress.
5. The Applicant's version of the facts should be controlling: as the Tribunal's consideration of the case is *de novo*, the JAB's finding of facts have no legal weight or priority.
6. The Applicant was heavily medicated when he signed the "Note for the File" on 6 December 1993.

Whereas the Respondent's principal contentions are:

1. The Applicant misuses the appellate process to bring to the Tribunal unrelated claims outside the scope of the administrative decision actually appealed, which claims are in addition, time-barred.
2. The Applicant has adduced no valid evidence that he has been the object of discriminatory treatment. The internal administrative mechanisms of the Organization have found the Applicant's allegations of discrimination to be unfounded.

The Tribunal, having deliberated from 7 to 20 November 2001, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 25 June 1999, accepting the recommendation of the JAB to reject the Applicant's appeal based on the grounds that his claims were time-barred and were not supported by evidence. The Applicant submits that he was subject to discriminatory treatment, resulting in delays of his promotion to the G-3 and the G-4 levels and, ultimately, in his separation from service.

II. The Applicant began his career with a series of fixed-term appointments at UNOG at the G-1 and G-2 levels for about 7 years. On 1 October 1988, the Applicant was granted a permanent appointment. Effective 2 October 1989, the Applicant was assigned to the Messenger Unit, which served UNHCR. The Applicant remained in this position until 1 April 1992, when UNHCR created its own Messenger Unit.

On 5 February 1990, the Applicant notified the Respondent about alleged misconduct within UNOG, and specifically he alleged unfair and discriminatory treatment towards him. The Chief, Personnel Service, UNOG, advised the Applicant on 3 April 1990 and again on 24 June 1991, that he should seek proper redress through the Panel on Discrimination and Other Grievances.

On 10 May 1993, the Applicant wrote to the High Commissioner, alleging abuse of power, injustice and discrimination on the part of the then Director, Division of Human Resources Management, UNHCR. Between 18 August and 6 December 1993, the Respondent and the Applicant exchanged a series of correspondence which resulted in the Applicant's return to UNOG at the G-2 level, on a fixed-term contract for the period 1 July to 31 December 1993.

On 26 May 1995, the Applicant lodged a complaint with the Panel on Discrimination and Other Grievances alleging discrimination and corrupt practices in promotion exercises on the part of the former Director, Division of Human Resources Management, UNHCR and, on 9 November 1995, the Applicant filed a similar complaint to the Under-Secretary-General for Internal Oversight Services. The initial fact-finding investigation by the Office for Internal Oversight Services revealed that there was insufficient evidence to support the Applicant's claims.

III. On 17 June 1996, the Director General, UNOG, requested that action be taken in the Applicant's case along the lines recommended by the Panel on Discrimination and Other Grievances. Subsequently, the Chief, Registry, File and Mail Section, UNOG, informed the Applicant that, until the recommendation to promote him had been approved by the appropriate administrative bodies, he was assigned to perform messenger functions at the G-3 level. The Applicant accepted this offer on 26 July 1996 and finally, on 12 May 1997, he was promoted to the G-3 level with effect from 1 May 1997.

On 9 October 1997, the Applicant lodged an appeal with the JAB, seeking review of the administrative decision of 12 May 1997 and asking for compensation for the moral harm sustained as a result of the actions of the UNHCR and UNOG Administrations. On 21 April 1999, the JAB recommended that the appeal be rejected on the basis that the Applicant had no right or grounds to receive compensation and that, given the fact that he was already receiving a special allowance for his disabled daughter, his request for compensation was without merit. The Respondent accepted the recommendations of the JAB and rejected the Applicant's claims. This Application followed.

IV. The Applicant claims that he should have been promoted to the G-3 level on 1 April 1992, not on 12 May 1997, and to the G-4 level on 1 April 1995; that the decision to "reassign/second" him to UNHCR in 1989 was illegal; and, that he was unfairly treated by UNHCR when he was considered as an "external" candidate.

The Respondent submits that the Applicant is misusing the appellate process by bringing unrelated claims which are beyond the scope of the administrative decision actually appealed. Further, the Respondent submits that the Applicant's claims are time-barred under the Staff Rules.

Staff rule 111.2 (a) provides that, "a staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing". Staff rule 111.2 (f) provides that unless this condition has been met or waived, an appeal shall not be receivable.

V. The Tribunal has consistently held that time limits must be complied with in order to ensure finality of litigation. This is one of the essential principles of law, adhered to by the Tribunal in its jurisprudence. Additionally, the Tribunal has held that "the various time-limits provided in the Staff Rules are to ensure that remedies are sought from contested administrative decisions in a timely and proper manner". (See Judgement No. 498, *Zinna* (1990), paragraph V.)

The Respondent notes that staff rule 111.2 (f) provides that a late filed claim may be receivable if the JAB panel constituted for the appeal agrees to waive the time-limits in "exceptional circumstances". The Tribunal has defined these circumstances as "any circumstances beyond the control of the Appellant which prevented the staff member from submitting a request for review and filing of an appeal in time, may be deemed exceptional circumstances". (See Judgement No. 713, *Piquilloud* (1995), para. I, referring to Judgement No. 372, *Kayigamba* (1986).) Furthermore, the Tribunal has held that only the existence of exceptional circumstances could warrant such a waiver and that "it would not be easy to present convincing reasons that ... a delay had been due to 'exceptional circumstances' beyond the control of the staff member concerned". (See *Kayigamba*, *ibid.*, para. III.)

Based on the Applicant's delay in prosecuting the matter and the lack of any credible evidence presented by the Applicant that such delay was due to exceptional circumstances, the Tribunal finds that the Application is time-barred. Therefore, the Applicant's claims are not receivable.

VI. Although the Tribunal finds that the Applicant's claims are time-barred, it will address the Applicant's second claim that the JAB erred when it found that he was not the subject of discriminatory treatment, which affected his promotions to the G-3 and G-4 levels, and ultimately, his separation from service. The Applicant contends that he had been discriminated against on the basis of his nationality and race and subjected to abuse of authority for a period of approximately nine years.

The Respondent argues that the Applicant has repeatedly failed to produce any credible evidence that he was the object of discriminatory treatment. Additionally, the Respondent argues that the Applicant utilized all competent internal administrative mechanisms, including the JAB, for review of his allegations of discrimination and that all recommendations by those bodies consistently found the Applicant's claims to be unsubstantiated.

The Tribunal rejects the Applicant's claims based on the fact that the Applicant was afforded proper procedural due process. The Applicant exhausted all internal administrative mechanisms including the JAB and his claims were consistently found to be unsubstantiated.

Furthermore, the long-standing jurisprudence of the Tribunal has held that burden of providing proof of prejudice or improper motivation rests with the Applicant (see Judgement No. 93, *Cooperman* (1965), para. XII). As the Applicant has not met his burden of substantiating his allegations, the Tribunal rejects his claims.

VII. In conclusion, the Tribunal holds that the Application is time-barred.

VIII. In view of the foregoing, the Tribunal rejects all pleas in their entirety.

(Signatures)

Mayer GABAY
President

Kevin HAUGH
Vice-President

Spyridon FLOGAITIS
Member

New York, 20 November 2001

Maritza STRUYVENBERG
Executive Secretary