



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1127

Case No. 1212: ABU-RAS

Against: The Secretary-General of the
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President;
Mr. Spyridon Flogaitis;

Whereas at the request of Wahiba Abu-Ras, a former 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 2001 and thereafter until 29 June 2001;

Whereas, on 31 July 2001, the Applicant filed an Application containing pleas which read, in part, as follows:

“II: The Pleas

1. The Applicant requests the Tribunal to rule that:

The Respondent erred in not renewing [the] Applicant’s fixed-term contract ...

The Respondent failed to exercise the discretion entrusted to him under paragraph 15 of General Assembly resolution 51/226 and paragraph 6 of administrative instruction ST/AI/412 to duly consider exempting [the] Applicant from the need to sit national competitive examination for the purpose of appointing her to a P-3 post.

At all material times, [the] Applicant was not a national of a country which was over-represented.

[The Applicant] did not receive due consideration for taking the examination ...

[The Applicant] did not receive due consideration for other mission replacement posts or appointments against consultancy funds.

Administrative instruction ST/AI/1999/9 is not applicable to [the Applicant's] case and consequently it is not a bar to allowing her to apply for P-2/3 posts as an internal candidate.

Accordingly, [the] Applicant pray the Tribunal to order the Respondent to consider her for appointment at the P-3 level as an internal candidate, alternatively permit her to sit the national competitive examination ... also ... be awarded monetary damages ... in the amount of two years salary."

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 2002 and periodically thereafter until 30 June 2002;

Whereas the Respondent filed his Answer on 20 June 2002;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on 21 June 1992, as an Associate Political Affairs Officer at the P-2 level on a 9-month-11-day fixed-term appointment with the Division for Palestinian Rights, Department of Political Affairs (DPA). This appointment was against a mission replacement post and was subsequently extended several times through 31 May 1994, when the Applicant went on a mandatory break-in-service. The Applicant was re-appointed on a fixed-term contract against a mission replacement post on 20 June 1994, which appointment was also extended several times. The Applicant separated from service on 29 February 1996.

On 5 January 1996, administrative instruction ST/AI/412, entitled "Special Measures for the Achievement of Gender Equality" was issued, inter alia limiting the continuous appointment of staff on short-term contracts and requiring staff at the P-2 or P-3 level to successfully pass the competitive examination (NCE) in order to receive an appointment of one year or more. It also determined that, women who had been in the service of the Organization for at least one year, under any type of

appointment, would be eligible to apply as internal candidates for vacancies at the Professional levels and above, with the exception of appointments at the P-2 and P-3 levels, which remained subject to the above restriction. It further established that, on an exceptional and limited basis, highly qualified women, who were nationals of Member States that were over-represented, and were serving under appointments of less than one year at the P-2 or P-3 levels while encumbering an established post, could take the January 1996 NCE (the 'catch-all' NCE).

On 5 March 1996, the Office of Human Resources Management (OHRM) denied DPA's request to re-appoint the Applicant against an established P-3 post, pointing out that such posts were to be filled by candidates through internal reassignment or promotion, or by candidates who successfully passed the NCE, and noting that the Applicant was found ineligible to take the catch-all NCE.

On 8 April 1996, the Applicant was re-appointed on a fixed-term contract at the P-2 level against yet another mission replacement post and, on 31 March 1997, she went on a mandatory break-in-service.

On 3 April 1997, the General Assembly adopted resolution 51/226 on Human Resources Management, which, in section B stated, *inter alia*:

"15. *Reaffirms* the policy of the Secretary-General that appointment to P-1 and P-2 posts ... shall be made exclusively through competitive examinations and that appointment to posts at the P-3 level shall normally be made through competitive examinations.

...

26. ... [D]ecides that persons on short-term appointments filling regular budget posts of one year or more cannot apply for or be appointed to their current post within six months of the end of their current service."

On 4 April 1997, the Applicant was re-appointed on a fixed-term appointment.

On 9 May 1997, the Under-Secretary-General for Administration and Management informed the Under-Secretary-General for Political Affairs as to the implications of General Assembly resolution 51/226 for DPA's "short-term" staff. The Applicant's name was included in an attached list of DPA staff who, pursuant to the resolution, would have to be replaced by individuals who passed the NCE.

In June 1997, the Applicant was advised that, in light of ST/AI/412 and resolution 51/226, she could not be considered as an internal candidate for posts at the P-2 and P-3 level and that her appointment would not be renewed beyond its expiration date of 31 July.

On 30 June 1997, the Applicant requested the Secretary-General to review the administrative decision not to renew her fixed-term appointment and, on 2 July, she wrote to the Joint Appeals Board (JAB), requesting suspension of action.

In its report of 18 July 1997, the JAB concluded that the implementation of the Secretary-General's decision would directly and irreparably injure the Applicant's rights and therefore recommended that the request for suspension of action be approved. On 24 July, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had not accepted the JAB's recommendation.

The Applicant's appointment was extended, on an exceptional basis, for one final month, until 31 August 1997. The Applicant subsequently worked for DPA on a special service agreement, until 30 September.

On 2 September 1997, the Applicant lodged an appeal on the merits with the JAB.

On 22 December 1997, the General Assembly adopted resolution 52/219 entitled "Implementation of General Assembly Resolution 51/226" which states, *inter alia*:

"Decides, that the restrictions contained in paragraph 26 of section III.B of resolution 51/226, which preclude staff appointed for less than one year against regular budget posts or extrabudgetary posts of one year or longer from applying for or being appointed to their current post within six months of the end of their current service, shall apply to staff appointed after 3 April 1997 only."

The JAB adopted its report on 1 May 2000. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

...

29. The Panel did not know where the Appellant got the notion that paragraph 26 of 51/226 was the basis of the contested decision. There was no evidence that any one in the Administration had ever so stated on record. On the contrary, on 19 August 1997, ... the Appellant [was advised] that the difficulty with her contract renewal [lay] in the requirement of having to pass an NCE, and that this problem would still exist no matter how paragraph 26 of 51/226 was to be interpreted and applied.

30. Moreover, the Panel believed that the second part of paragraph 26 of 51/226 had little, if any, relevance to the present case, as it spelled out time frame within which separated staff members could apply for or be appointed to their current posts. The present case was about whether it was proper for the Administration to separate the Appellant, and not about whether she was entitled to apply for or be appointed to her post immediately after separation.

...

33. ... In [the Panel’s] view, paragraph 11 of ST/AI/412 left it to the managerial discretion of the Administration to determine whether the operational needs of the Organization warranted allowing female staff members from Member States above mid-point of their desirable range, such as the Appellant, to take an NCE on a limited basis. Consequently, the failure of the Administration to hold an NCE examination for the Appellant, in the exercise of its discretionary authority, could not have violated any of ... her rights as a staff member. ...

34. The Panel noted that prior to her separation OHRM had sent the Appellant copies of the ISCS bulletin of vacancies and encouraged her to apply. It also noted that after she had separated the Appellant worked for a month on a special service agreement for DPA. All this appeared to factually contradict the Appellant’s claim that she had not received consideration for other vacancies or for appointment as a consultant.

...

37. In view of the exceptional circumstances of the present case and in view of the Appellant’s gender, the Panel felt that an exception ... should be made so that the Appellant could be considered as eligible to apply as an internal candidate within the Secretariat for internal vacancies at the P-2 or P-3 level.

Conclusions and Recommendation

38. In light of the foregoing, the Panel *unanimously recommends* that the Appellant be considered as eligible to apply as an internal candidate within the Secretariat for the internal vacancies at the P-2 or P-3 level. In order not to tie the Administration’s hands unduly, the Panel limits the period during which the Appellant may be eligible to apply for internal vacancies to three years.

...”

On 11 July 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

“...

The Secretary-General agrees with the Board’s conclusion. However, he considers that the Board’s recommendation is inconsistent with paragraph 1.4 of administrative instruction ST/AI/1999/9 on “Special Measures for the Achievement of Gender Equality”, which provides that women staff members holding a current appointment at the P-3/L-3 or P-4/L-4 levels may apply to internal vacancies at the P-4 level and above. The Board’s recommendation is also inconsistent with the policy requiring that appointments at the P-2 and P-3 levels be made through competitive examinations, which was reaffirmed by the General Assembly in its resolution 51/226. Accordingly, the Secretary-General cannot accept the recommendation of the Board.

...”

On 31 July 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The contested decision was based on wrong interpretation of General Assembly resolution 51/226. In particular, paragraph 26 was not intended to apply retroactively.
2. Prior to 1996, the Applicant was informed that she did not have to take the NCE in order to be considered for long-term employment.
3. In accordance with General Assembly resolution 51/226, while the taking of the NCE appears obligatory for appointment to P-1 and P-2 posts through use of the words ‘shall be made exclusively through competitive examination’, the same cannot be said for P-3 posts, since the words used are ‘shall normally be made through competitive examination.
4. The Administration’s failure to consider the Applicant for the ‘catch-all’ NCE denied the Applicant her due process rights.

Whereas the Respondent's principal contentions are:

1. A fixed-term appointment does not carry any legal expectancy of renewal or of conversion to any other type of appointment. None of the Applicant's rights were violated by the decision not to renew her appointment.
2. General Assembly resolution 51/226 and administrative instruction ST/AI/412 were correctly applied.

The Tribunal, having deliberated from 27 June to 25 July 2003, now pronounces the following Judgement:

I. The thrust of the Applicant's complaint is not strictly that her rights as a Staff Member were violated by the decision not to renew her fixed-term contract. Rather, she argues that, the reasons invoked for ruling that she was ineligible to be reappointed against an established P-3 post, as had been requested by the Department of Political Affairs (DPA), and which resulted in her separation from service, were erroneous and too restrictive.

II. On 21 June 1992, the Applicant, a national of Israel, entered into the service of the Organization as an Associate Political Affairs Officer with the Division of Palestinian Rights, DPA. She was employed against a mission replacement post at the P-2 level on a fixed-term contract initially for a term of nine months and eleven days. The Applicant remained at the P-2 level encumbering several mission replacement posts throughout her service.

From 1 July 1995 until 29 February 1996 the Applicant received a special post allowance to the P-3 level.

III. In January 1996, ST/AI/412 was issued establishing, inter alia, that on an exceptional basis, highly qualified women staff members, from over-represented Member States, who would not have otherwise been eligible to take the NCE, were permitted to sit for the January 1996 examination. The criteria for being allowed to sit this "catch-all" examination included a requirement that such staff members had served the Organization for more than one year *and had encumbered an established post* at the P-2 or P-3 level. It appears that the Applicant had not formally applied to sit this catch-all examination, although this is not free from doubt, as the 5 March 1996 memorandum contains a

reference to her having been found ineligible to do so, thus raising the Tribunal's suspicions that she may have, at a minimum, sought to know if she was eligible and been told that she was not. It appears to the Tribunal that in either event, the Applicant was most probably ineligible because she did not meet the exception. She was serving against a temporary mission replacement post and did not encumber an established post as required to have qualified. However, the Tribunal expresses no definitive view on either aspect as, had an application been made, it would have been for the Administration to determine whether the Applicant was qualified. The Applicant has not persuaded the Tribunal that she had applied to sit the said catch-all examination, nor that her application was erroneously or mistakenly refused. Moreover, it would have been for the Administration to determine whether she had met the other criteria for eligibility for the "catch-all" NCE, such as whether she was exceptionally well qualified. The Tribunal can find no evidence to support the Applicant's suggestion that she had "not been required [by the Administration] to sit for one examination for Israeli nationals which was held while [she] had already joined the Organization". It appears, in fact, that the last NCE which had been held for Israeli nationals took place in 1989, well before the Applicant entered the service of the Organization.

IV. On 3 April 1997, the General Assembly adopted resolution 51/226 entitled Human resources management. On 9 May 1997, the Under-Secretary-General for Management briefed the Under-Secretary-General for Political Affairs on the immediate implications of this resolution for DPA, stating, *inter alia*, that the five staff members at P-1 through P-3 levels, including the Applicant, had to be replaced by individuals who had passed the NCE.

Subsequently, the Applicant was orally informed that, in light of ST/A1/412 and General Assembly resolution 51/226, she could not be considered as an internal candidate for posts at the P-2 and P-3 level and that her appointment would end on 31 July 1997. On 24 June 1997, the Applicant was informed of same in writing.

V. The Applicant submits that her separation from service was erroneous, as General Assembly resolution 51/226, which administrative instruction ST/AI/1997/7 of 20 November 1997, entitled "Recruitment Procedures for Professional Staff" was designed and intended to implement, was never meant to apply retroactively. Accordingly, it was not intended that staff members who, like the Applicant, were on board before the adoption of the said resolution on 3 April 1997, would be

required to leave their posts. Whatever doubt existed as to the meaning and intention of the resolution in question is now beyond doubt by reason of General Assembly resolution 52/219 of 22 December 1997, which stated in the clearest of terms that it had not been intended that the earlier resolution should apply retroactively.

However, in this regard the Tribunal shares the JAB's consideration and is likewise not convinced that the Administration had based the contested decision on the provisions of paragraph 26 of resolution 51/226.

VI. The question now arises as to how the clarification provided by General Assembly resolution 52/219 affects the contested decision in so far as it was inspired, *inter alia*, in reliance on paragraph 26 of resolution 51/226, in the belief that it had been intended that its provisions had retroactive application and that they applied to the Applicant. More particularly, the question arises as to whether this contested decision had adversely effected the Applicant or caused her to suffer any denial of her rights.

VII. The Applicant submits that, the circumstances surrounding her separation from service show that, the contested decision could not stand, as it was made for wrong reasons, i.e. the erroneous belief that the aforesaid paragraph 26 had applied to her situation.

The Respondent submits that regardless of paragraph 26 of resolution 51/226, the Applicant would have been found ineligible for appointment to the requested post because she had not passed the necessary NCE.

The Tribunal is satisfied that paragraph 26 of resolution 51/226 dealt only with the period within which a staff member was entitled to reapply for or to be appointed to his or her current post. Accordingly these provisions are irrelevant to whether the Applicant's rights were denied or violated by the administrative decision not to renew her contract. The Tribunal is satisfied that the decision not to renew the Applicant's contract was made to comply with the express mandate of the General Assembly, set forth in resolution 51/226, Section III.B, requesting, in paragraph 9:

“... The Secretary-General to restrict the practice of making temporary appointments against regular budget posts or extrabudgetary posts of one year or more to temporary needs, for example, replacement of staff on field mission assignment or authorised leave”.

and reaffirming, in paragraph 15:

“... the policy of the Secretary-General that appointment to P-1 and P-2 posts ... shall be made exclusively through competitive examinations and that appointments to posts at the P-3 level shall *normally* be made through competitive examinations”. (Emphasis added.)

VIII. The Applicant submits that, under paragraph 15 of General Assembly resolution 51/226 and paragraph 6 of ST/AI/412, the Respondent had the discretionary power to exempt her from the requirement to sit the NCE. She requests the Tribunal to order the Respondent to consider exercising this discretion in her favour. In the alternative, she seeks an Order requiring the Respondent to consider her for appointment at the P-3 level as an internal candidate or that arrangements be made to enable her to sit the exam. She further claims compensation for wrongful deprivation of her employment and for moral injury.

The Respondent submits that, in so far as he enjoys discretion under paragraph 15 of General Assembly resolution 51/226, it is an extremely limited one and can only be invoked where it is absolutely necessary so as to make an appointment. Furthermore, he submits that both the above resolution and paragraph 6 of ST/AI/412, which allows for the exemption of certain candidates from the requirement of passing the NCE, are not applicable to the Applicant. The Respondent further claims that, it would be contrary to the policy laid down by the General Assembly to consider appointing the Applicant to a P-3 level post as an internal candidate. Additionally, he argues that the Applicant has no legal right to such consideration and she has at no time been eligible to sit the NCE, as it has not been open to Israeli nationals from the time when she joined the Organization. Consequently, the Respondent submits that the Applicant has not been wrongfully deprived of employment nor has she suffered any moral injury.

IX. The Applicant argues that, the wording “appointment to posts at P-3 level shall *normally* be made through competitive examinations” means that the passing of the NCE is

not *always* required for an appointment to such a post and that accordingly, the Administration had the discretion to exempt her from such requirement.

In response the Respondent submits that, the only situation in which a staff member might be appointed to a P-3 post without having passed the NCE, is when an external vacancy announcement had been circulated. This could only have been done if the Administration determined that it was unable to identify a suitably qualified candidate who had responded to an internal vacancy announcement and, thereafter, was unable to identify a suitably qualified candidate who had passed the NCE at the P-3 level in the relevant professional category. This is what was provided by administrative instruction ST/AI/1997/7 implementing General Assembly resolution 51/226. In other words, the Respondent submits that in effect, abnormal solutions must be resorted to only when the normal solutions cannot yield a result.

The Tribunal accepts the logic and correctness of this submission. To construe an interpretation such as urged on behalf of the Applicant, that the Administration could waive the normal requirement for any variety of reasons, would be to render the policy requirements of the resolution as nugatory or meaningless. If the words could be properly construed as throwing open every kind of reasoning as justifying a departure from the norm, this would defeat the intention of the policy. The Tribunal accordingly considers that the formula provided in ST/AI/1997/7 was appropriate and rejects the interpretation contended by the Applicant.

X. The Tribunal is satisfied that the Applicant's allegation, that she was not given reasonable consideration is not acceptable by reason of the provisions of ST/AI/412, the relevant portion of which provides as follows:

"6. In order to avoid the apparent circumvention of recruitment policies through the use of short-term appointments, the appointment of staff for periods of up to 11 months shall be exercised strictly on a one-time basis and the practice of perpetuating short-term contracts by means of short breaks in service shall be discontinued. A staff member serving under a short-term contract or a contract of less than one year at the P-2 or P-3 level may not receive an appointment of one year or more unless he or she successfully passes a competitive examination in the appropriate occupational group. Eligibility for such examinations shall be limited to candidates encumbering established posts who are nationals of Member States that are unrepresented, underrepresented or below the mid-point of their desirable range."

The Applicant submits that the use of the word “may” rather than using “shall” immediately preceding the words “*not receive an appointment*” suggests that the Administration is vested with a discretion as to whether a person in the Applicant’s situation can be considered for such an appointment, notwithstanding the absence of a successful NCE. Whilst “*may*” is indeed sometimes used to denote the existence of discretion, it is also sometimes used as meaning “*must*”. In its negative form “*may not*” is almost inevitably used to connote an absolute prohibition rather than implying the issue is subject to the exercise of a discretion. The question here is whether the “*may not*” should be considered to be a discretionary or a mandatory “*may*”.

In the context of paragraph 6 of the said Administrative Instruction, the Tribunal is satisfied that it was intended to impose a clear prohibition on appointment without such examination, rather than to invest in the Administration a discretion as to whether an exam was required. If it had been intended to be a discretionary “*may*”, no doubt the Administrative Instruction would have at least outlined the matters to be taken into account in the exercise of the discretion, rather than to leave the Administration at large.

XI. The Tribunal is satisfied that no right of the Applicant was violated by reason of the Respondent declining to consider her for an internal appointment. Firstly, she had no legal right to be so considered and secondly, had the Respondent decided to so consider her, this would have been contrary to the express provisions of ST/A1/412, which required that for persons such as the Applicant to be eligible for appointment, they would have been required to have passed the NCE.

The Tribunal is further satisfied that, when the Respondent declined to act upon the recommendation of the JAB, he did so on the grounds, inter alia, that to have done so would have been inconsistent with the terms of General Assembly resolution 51/226. In the view of the Tribunal, this is a legitimate ground, and it matters little whether such consideration would also have been incompatible with paragraph 1.4 of administrative instruction ST/AI/1999/9. Accordingly it is unnecessary to decide this issue.

In all of the circumstances, the Applicant has failed to establish to the satisfaction of the Tribunal that she suffered a violation or denial of any legal right or entitlement, or that she suffered any wrongful loss of employment or moral injury.

XII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio Barboza
President

Kevin Haugh
Vice-President

Spyridon Flogaitis
Member

Geneva, 25 July 2003

.../ABU-RAS

Maritza Struyvenberg
Executive Secretary