

**Administrative Tribunal**

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## ADMINISTRATIVE TRIBUNAL

## Judgement No. 1158

Case No. 1254: ARAIM

Against: The Secretary-General of the  
United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms.  
Jacqueline R. Scott;

Whereas, on 18 October 1990; on 2 March 1992; on 28 August 1992; and, on 10 May 1993, Amer Araid, a former staff member of the United Nations, filed Applications requesting the Tribunal, inter alia, to find that the Administration had failed to give his candidature to a number of D-1 posts meaningful consideration, and alleging discrimination. In respect of the above Applications, the Tribunal rendered the following Judgements: No. 533 (1991), No. 622 (1993), and No. 657 (1994), awarding the Applicant a total of \$9,000 for injuries sustained when the Administration failed to give his candidature to the D-1 posts meaningful consideration but rejecting all pleas relating to discrimination; and, No. 658 (1994) rejecting the Application in its entirety.

Whereas at the request of Amer Araid, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing another application with the Tribunal until 31 January 1995 and periodically thereafter until 31 May 2002;

Whereas, on 17 April 2002, the Applicant filed an Application, requesting the Tribunal to find, inter alia, that:

“7. The Applicant is entitled to damages for the moral, financial and emotional injuries inflicted upon him by the Respondent and that the

compensation be equivalent to four years net base salary at the time of his separation from the United Nations.”

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 August 2002 and periodically thereafter until 10 January 2003;

Whereas the Respondent filed his Answer on 10 January 2003;

Whereas the Applicant filed Written Observations on 3 October 2003;

Whereas the facts in the case, additional to the facts outlined in Judgements No. 533, No. 622, No. 657 and No. 658, are as follows:

Pursuant to the Applicant's appeal against the decision to appoint another staff member to a D-1 post, on 7 May 1992, the Joint Appeals Board (JAB) issued its report recommending that the Applicant be afforded the opportunity to apply for D-1 posts within the Department of Political Affairs (DPA) and awarding him damages in the sum of \$7,500. On 16 June, the Applicant was informed of the Secretary-General's decision to reject the Board's recommendations; he was further informed that "The Secretary-General, however, is deeply concerned by your perception that you have been and continue to be the victim of discrimination in the Organization. He has decided to constitute a panel which will investigate your claims."

On 15 September 1992, the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management (OHRM), reminding of the above mentioned decision of the Secretary-General and urging to promptly constitute the said Panel. On 24 November, the Under-Secretary-General for Administration and Management appointed the Deputy Director, General Legal Division, Office of Legal Affairs and the Chief, Socio-Economic Policies and Institutions Section, Department of Economic and Social Development, as members of the Panel to investigate the Applicant's allegations of discrimination based on "his ethnic origin, which resulted in his non-selection for three posts in the Department of Political and Security Council Affairs [now DPA]". The Panel was also to investigate the processing of the Applicant's applications to these posts and the reasons for his non-selection to any of them.

On 12 January 1993, the Applicant wrote to the Administrative Tribunal expressing his "apprehensions" regarding the membership of the Investigation Panel and raising concerns of conflict of interests of its appointed members. The Applicant reiterated his concerns again on 9 February.

On 28 April 1993, the Investigation Panel submitted its report, concluding, inter alia:

“47. The Panel is satisfied that, while [the Applicant] may have some reason to complain against the management style ... and the replacement procedure whose application in this case deprived him in reality of the opportunity to compete for a number of posts under the Vacancy Management procedure, his allegation that his non-selection was due to ‘discrimination’ was totally unsubstantiated. There is no evidence that [the Applicant was] excluded from promotion by reason of his nationality or race... Furthermore, the ‘replacement’ procedure used to fill two of the posts [that the Applicant] competed for and for which he was not selected is still an accepted part of the United Nations recruitment policy and ... remains sanctioned by the General Assembly.

48. ... the Panel was satisfied that ... the non-selection of [the Applicant] was not motivated by any malice, or ill will against him, and that it did not amount to discrimination.

...

#### ***RECOMMENDATIONS***

...

50. It is clear from our investigation that the career prospects of [the Applicant] in the Centre against Apartheid is unlikely to advance beyond his present level. ... It might thus be the best for [the Applicant] to be encouraged to move into another Department where his talents can be used to the maximum with better possibilities for eventual promotion.

...”

On 24 May 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the Investigation Panel’s report to the Applicant and informed him as follows:

“I am satisfied that the work of the Panel was carried out in accordance with the Secretary-General’s decision as stated in the letter of 16 June 1992 ... in compliance with the Terms of Reference of the Panel as laid out in the letter of 24 November 1992 to Panel members ... and with full observation of due process.

I, therefore, have accepted in their entirety the conclusions of the Panel on the subject of your allegations.

...

In view of the above, I hereby reject on behalf of the Secretary-General your allegations that you have been and continue to be the victim of discrimination in the Organization.”

On 25 May 1993, the Applicant requested the Secretary-General to review the administrative decision to accept the Investigation Panel's report and, on 4 June the Applicant requested the JAB to suspend any action to redeploy him from DPA. In its report dated 12 June, the JAB concluded that "there were no grounds for a suspension of action, as there was no reason to believe that Appellant would be harmed by continued efforts to locate suitable vacancies". Accordingly, the JAB recommended, and the Secretary-General accepted its recommendation, that the request for suspension of action be denied.

On 13 August 1993, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 11 April 1994. Its considerations, conclusions and recommendations read, in part, as follows:

***"Considerations***

...

29. The Panel [noted that] the Investigation Panel's Report, ... had been before the Administrative Tribunal and that the Tribunal had referred to it in its Judgement No. 622.

30. ... the Panel noted that [the] Appellant had questioned both the propriety of the composition of the Investigation Panel and of its recommendations ...

...

33. The Panel found that the Tribunal did not put in question the legality of the Investigation Panel. The Panel also found that the Tribunal referred to the Investigation Panel as the 'long arm' of the Secretary-General bearing in mind his authority to request the assistance of any individuals, committees or panels to advise and make recommendations to him on particular issues of concern.

34. The Panel concluded that it was not within its competence to consider the issues of the composition of the Investigation Panel on the alleged conflict of interest of the Panel members, matters which were already before the Tribunal.

...

38. The Panel did not consider it feasible or even within its competence to make an in-depth evaluation of the Investigation Panel's work and to look into its records. .... The Panel found that the Appellant did not successfully discharge the burden of proof required.

39. The Panel noted the Appellant's contention that the Investigation Panel exceeded its mandate by recommending the Appellant's transfer out of ... DPA.... The Panel agreed with the Appellant on this point and found that the Investigation Panel had indeed exceeded its mandate.

### ***Conclusions***

40. ... the Panel concluded that the Secretary-General did not violate the Appellant's rights by accepting the recommendations of the Investigation Panel. The Panel observed, however, that while the Investigation Panel was set up under the authority of the Secretary-General, it could not override the appellate and grievance procedures which contain safeguards necessary for the protection of the staff member involved which the *ad hoc* investigative process lacks. The Panel felt that, in this case, more careful consideration should have been given to the composition of the Investigation Panel. The Panel also concluded that the Investigation Panel has acted *ultra vires* by recommending the transfer of the Appellant from DPA.

### ***Recommendations***

41. The Panel recommends that the Administration should not take any action aimed at transferring the Appellant from DPA unless requested by him to do so.

42. The Panel also recommends that the Administration consider establishing Rules of Procedure for the appointment and composition of Investigation Panels.

..."

On 20 June 1994, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General is in agreement with the Board's ultimate conclusion that your rights were not violated by his acceptance of the recommendations of the Investigation panel. He is in agreement with the Board's observation that an Investigation Panel is not a substitute for appellate and grievance procedures although he does not support the assertion that the *ad hoc* investigative process lacks safeguards necessary for the protection of the staff member involved.

The Secretary-General has taken note of but is not in agreement with the conclusion of the Board that the Investigation panel acted *ultra vires* by recommending your transfer from the Department of Political Affairs (DPA). The Panel was constituted to advise the Secretary-General and its findings and recommendations are not binding upon him. It is up to the Secretary-General to determine the value and usefulness of the recommendations made.

The Secretary-General has taken note of the recommendation of the Board that the Administration should not take any action aimed at transferring you from DPA unless requested by you to do so. In this regard, the Secretary-General refers to attachment 9 to the Board's report containing the Administration's statement that possible vacancies for your reassignment would be identified taking into account your willingness to be considered for a specific vacancy, and to decisions to be made by the General Assembly regarding the abolition of the Special Committee against *Apartheid* Section and their effects on availability of posts.

The Secretary-General has taken note of the recommendation of the Board that the Administration consider establishing Rules of Procedure for the appointment and composition of Investigation Panels. He intends to address this matter in the context of the reforms in the administration of justice programme.

Other than actions reflected in the above comments, the Secretary-General has decided to take no further action in respect of your appeal.”

On 17 April 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The membership of the Investigative Panel ran counter to established principles of law regarding conflict of interest; it failed to follow basic principles of justice and its report exceeded its mandate. The Investigation Panel did not fulfil its obligation to fairly investigate the issue of discrimination against the Applicant.
2. The JAB erred in concluding that the Applicant's rights were not violated by the recommendations of the Investigation Panel.
3. The Administration refused to adopt any meaningful measures to remedy the Applicant's situation following Judgements No. 533, 622, 657 and 675.

Whereas the Respondent's principal contentions are:

1. The issues raised by the Applicant in the present Application have already been considered by the Tribunal and the promotion decisions were found to be free of discrimination or other improper motivation, independent of the *ad hoc* Investigation Panel report.
2. The *ad hoc* Investigation Panel did not take the place of United Nations appellate and grievance procedures and the Secretary-General's acceptance of the Panel's report did not violate the Applicant's rights.
3. In the event the Tribunal decides to consider this matter *ab initio*:
  - (a) The Secretary-General did not err in accepting the report of the *ad hoc* Investigation Panel. Its composition was proper and its findings, which were consistent with the findings by the Tribunal and the JAB, were based on a thorough examination of the record. Its recommendation that the Applicant be encouraged to move into a different department in no way impinged upon his rights.

- (b) The Applicant has not met the burden of proving his allegations of discrimination.

The Tribunal, having deliberated from 24 October to 20 November 2003, now pronounces the following Judgement:

I. On 20 June 1994, the Under-Secretary-General for Administration and Management informed the Applicant of the Secretary-General's position with regard to the JAB's report and of the decision to take no further action in respect of the Applicant's appeal. This decision is the subject of the present Application before the Tribunal.

In the above mentioned letter, the Under-Secretary-General for Administration and Management stated, *inter alia*, that:

- (i) The Secretary-General did not agree with the JAB that the Investigation Panel acted *ultra vires* by recommending the Applicant's transfer from the DPA, as the Investigation Panel was constituted only to advise the Administration, and, as such, its findings or recommendations were not binding.
- (ii) Nevertheless, the Applicant would not be transferred as, in keeping with the Investigation Panel's recommendation, a possible transfer would only be carried out subject to the Applicant's acceptance thereof.

II. The contested decision is related to and stems from procedures that followed the Administration's decisions taken between 1990-1992, not to promote the Applicant to a D-1 post, which lead to the Tribunal's Judgements, No. 622, *Araim* (1993); No. 657, *Araim* (1994); and, No. 658, *Araim* (1994). In these Judgements, the Tribunal, *inter alia*, rejected the Applicant's claims that his non-selection was motivated by discrimination based on his national origin or ethnic background.

III. The underlying contention brought by the Applicant in the present case appears to yet again involve his allegations of discrimination and mistreatment.

In June 1992, the Applicant was informed of the Secretary-General's decision to constitute an Investigation Panel with a mandate to thoroughly examine the Applicant's allegations of discrimination. The Investigation Panel's report was issued on 28 April 1993 and was before the Tribunal when it rendered Judgement No. 622, in which the Tribunal made the following reference to the report:

“The Tribunal has taken into account the report and recommendations of the Panel on Discrimination and Other Grievances (the Panel on Discrimination), as well as the Administration's position with regard thereto. The latter is set forth in communications to the Panel on Discrimination and to the Under-Secretary-General for Administration and Management in an ad hoc report [the Investigation Panel's report]. This report addresses the Panel on Discrimination's findings and recommendations and the various claims asserted by the Applicant. The Tribunal does not view the ad hoc report as the equivalent of a report by the Panel on Discrimination. Rather, in the context of this case, the Tribunal has considered it only as a response to the assertions by the Applicant of discriminatory treatment, and as an explanation for the Administration's unwillingness to adopt the recommendations made by the Panel on Discrimination. In the Tribunal's view, the latter recommendations rest mainly on subjective impressions and unsubstantiated inferences based on material of little probative value.”

In deciding the case, the Tribunal concluded that, “in the circumstances of this case, the Tribunal, like the JAB, is unable to find that the Applicant was the victim of discrimination based on ethnic or national origin”. Consequently, the Tribunal finds that the underlying contention of the present Application is covered by the *res judicata* of the Tribunal's decision in its Judgement No. 622.

IV. The Applicant contests the composition of the Investigation Panel, claiming that it was not properly constituted and that it was biased against him. The Tribunal finds that the Applicant is estopped from raising such a claim. While the Respondent has full discretion in forming an ad hoc Investigation Panel, which is not within any legal or institutional obligation or procedure, as is the case in the present Application, the Tribunal notes that in this case, the Applicant had agreed in writing to the Investigation Panel's composition. In so doing, the Applicant lost his legal standing to contest before the Tribunal this alleged irregularity in procedure, and, therefore, this contention is not receivable.

Furthermore, the record indicates that, during the Tribunal's deliberations leading to Judgement No. 622, the Applicant submitted at least two communications in which he contested the composition of the Investigation Panel. The Tribunal notes, as did the JAB, that “the Tribunal did not put in question the legality of the Investigation Panel” and it is therefore reasonable to deduce that the Tribunal did not share the Applicant's concerns on this issue. Moreover, in its subsequent Judgement on the same issue (No. 658, *ibid.*), the Tribunal again made reference to the Investigation Panel report stating, *inter alia*:



“The Tribunal notes that [the reports of the Panel on Discrimination and other Grievances] were reviewed later and at great length by persons especially appointed by the Secretary-General to examine ‘Allegations of Discrimination by [the Applicant]’, and they produced a substantial report. The Applicant was involved in this review and irrespective of his reaction, the Tribunal finds nothing to support the view that the Applicant was victimized because of his ethnic origin or other factors.”

In light of the above, the Tribunal finds that, even if the Applicant’s contention on this issue was receivable, it too would be subject to *res judicata*, as the Tribunal in its previous Judgements, with the same Applicant, dealt with the same issues.

V. The Tribunal now turns its attention to the Secretary-General’s decision to accept the Report of the ad hoc Investigation Panel, with the following recommendation: “It might thus be best for [the Applicant] to be encouraged to move into another Department where his talents can be used to the maximum with better possibilities for eventual promotion”.

The Applicant claims that in making the said recommendation, the ad hoc Investigation Panel exceeded its mandate, rendering the recommendation *ultra vires* and that by accepting the said recommendation, the Respondent violated the Applicant’s rights.

The Tribunal rejects this claim.

In the first place, the wording of the recommendation cannot lead to the inference of definitive action to be taken by the Administration (to transfer the Applicant from DPA) as it only suggests that the Applicant *be encouraged* to do so. Thus, even though it was accepted by the Secretary-General, this recommendation does not have any direct legal consequences for the Applicant. It therefore does not constitute an administrative act, which is a pre-requisite for an appeal before the JAB and the Applicant’s contention is therefore not receivable.

Furthermore, the Tribunal notes that it is the Secretary-General’s prerogative to seek the assistance, advice and recommendation of any staff member, committee or panel and that recommendations they make, such as were made in the present case by the ad hoc Investigation Panel, are not binding on him.

VI. The issue of the Investigation Panel was the subject of another appeal brought by the Applicant before another Panel of the JAB. In that case, the JAB

found and recommended in the Applicant's favour (JAB report dated 26 February 1996) as follows:

*"Findings and Recommendations*

56. The present Panel unanimously *found* that:
- (a) the Respondent had not proven that the candidature of the Appellant had been fully and fairly considered for any of the seven D-1 posts in the 1992 Promotion review as the Administration failed to produce 'underlying and supporting documentation, such as minutes, notes and other records of APB...' as mentioned in the Administrative Tribunal's Judgement No. 675;
  - (b) the decision of the Secretary-General, as transmitted by [the Under-Secretary-General for Administration and Management] in her letter of 23 June 1993 to the Appellant, rested on partly erroneous basis as the report of the Ad Hoc Investigation Panel on which it was based was itself tainted by errors.
  - (c) the Administration had not been candid and transparent in its dealing with the Appellant;
  - (d) the Appellant was entitled to compensation for the injury he had suffered.
57. Therefore, the present Panel unanimously *recommends* that:
- (a) the Appellant be granted a compensation amounting to two months net base salary.
  - (b) a candid and honest explanation be given to the Appellant regarding his career prospects."

As for the Applicant's claim that he was discriminated against because of his nationality or ethnic background, the JAB stated that it had "failed to find any evidence substantiating the Appellant's claim. It therefore concurred with the ad hoc Investigation Panel on that point."

The above recommendations were accepted in their entirety by the Secretary-General and the Applicant never appealed that decision.

The Tribunal, however, finds that, independently from its consideration that the case is covered in its entirety by the *res judicata*, the Applicant cannot indirectly re-open that case before the Tribunal. In fact, the Administration agreed to pay the Applicant damages and provide him the explanations as recommended by the JAB, and it did so. The Applicant decided to accept the benefits of that decision, and he never questioned it before the Tribunal, as he never appealed against it. It is an established principle in administrative law that no one can revive procedures when a case is time-barred, that no one has a legally protected interest to bring up

proceedings against decisions that he has accepted and not questioned in time, and finally that no one can be compensated for the same reason more than once.

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

(Signatures)

Julio **Barboza**  
President

Spyridon **Flogaitis**  
Member

Jacqueline R. **Scott**  
Member

New York, 20 November 2003

Maritza **Struyvenberg**  
Executive Secretary