United Nations AT/DEC/1168

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1168

Case No. 1251: TANKOV Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, First Vice-President, presiding; Ms. Brigitte Stern, Second Vice-President; Ms. Jacqueline R. Scott;

Whereas at the request of Alexander Tankov, 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 periodically thereafter until 30 March 2002;

Whereas, on 30 March 2002, the Applicant filed an Application containing pleas which read as follows:

"**II. PLEAS**

…

IN RESPECT OF THE MEASURES OF INQUIRY AND THE PRODUCTION OF DOCUMENTS:

(3) **To order** the Respondent to produce the following documents or information …:

…

AS TO THE MERITS OF THE CASE AND THE LEGAL ISSUES DIRECTLY RELEVANT TO ITS SUBSTANCE:

…

(6) **To find** that the proper recognition of the acquired right to receive every reasonable consideration for a permanent appointment under [s]taff [r]ule 104.12 (b) (iii) cannot be reduced to a departmental review, but also requires the appropriate exercise of managerial discretion on the part of [the Office of Human Resources Management (OHRM)] ...

(7) **To examine** the Applicant's claim of unfairness on the basis of the adduced documentary evidence … **To find,** in this connection, that the Respondent's decision of 12 August 1999 and the contested exercise of managerial discretion were tainted …

…

(9) **To find** that the Respondent failed to afford the Applicant every reasonable consideration for a career appointment …

…

AS TO THE RELIEF SOUGHT:

(11) **To order** the Respondent to provide the Applicant with the full, objective and equitable consideration for the granting of a permanent appointment ...

(12) **To rescind** the decision confirmed by the Respondent on 12 August 1999 to deny the Applicant a permanent appointment and **to recommend** that, in the interests of fairness and good administration, the Applicant be favorably considered for such an appointment, with retroactive effect from 12 November 1995 …"

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 15 August 2002 and periodically thereafter until 31 January 2003;

Whereas the Respondent filed his Answer on 31 January 2003;

Whereas, at the Applicant's request, the Tribunal decided on 29 September 2003 to postpone consideration of the case until its summer 2004 session;

Whereas the Applicant filed Written Observations on 17 May 2004;

Whereas, on 26 May 2004, the Applicant submitted an additional communication, amending his pleas as follows:

"**WITH REGARD TO THE TRIBUNAL'S COMPETENCE AND PROCEDURE:**

(3) **To adjudge and declare** that once the final decision on the appeal and [Joint Appeals Board (JAB)] Report is taken by the Respondent and communicated to staff member under Staff Rule 111.2 (p), it cannot be materially altered or reversed in the course of the subsequent adversary proceedings. Any presentation

amounting to direct and explicit amendment of the final decision on the appeal is estopped by record and not proper before the Tribunal.

AS TO THE RELIEF SOUGHT:

(13) **To decide**, in its wisdom and discretion, considering also the gravity of procedural irregularities and the adduced evidence of prejudice and discrimination, whether the Applicant, even though he did not suffer any loss of salary and emoluments, should be awarded damages for: (a) grievous harm to his career development; (b) tangible damage to his professional reputation; (c) humiliation, stress and uncertainty which were occasioned by the Respondent's treatment and (d) mental anguish endured both by him and by his family; and if so, **to fix,** under Article 9 of its Statute and in accordance with the established precedents, the appropriate and adequate amount of compensation for all the actual, consequential and moral injuries sustained as a result of the Administration's actions or lack thereof.

(14) **To fix,** pursuant to Article 9, paragraph 1, of the Statute of the Tribunal, the amount of indemnity to be paid in lieu of specific performance at 2 years' net base salary of the Applicant."

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 7 November 1985, on a three-month fixed-term appointment as an Administrative Officer at the P-3 level in the Financial Management and Budgetary Control Service, Programme Support Division, Department of Technical Cooperation for Development (DTCD). His appointment was extended and, on 7 March 1986, the Applicant's functional title changed to Finance Officer. The Applicant's appointment was subsequently extended a series of times. At the time of the events giving rise to this Application, the Department for Development Support and Management Services (DDSMS) had inherited most of the activities and staff, including the Applicant, of DTCD.

On 3 April 1995, the Under-Secretary-General for Development Support and Management Services wrote to the Under-Secretary-General for Administration and Management, referring to information he had received from OHRM that conversion of staff on overhead account (OHA) posts to career appointment could not be approved as "the Organization might not be able to maintain OHA posts the following year". He pointed out that DDSMS had never based its recommendations for such appointments "on how a post [was] funded" and that the majority of his staff on OHA posts held permanent appointments, and requested agreement to proceed with the granting of career appointments to certain staff members. In his reply of 25 April, the Under-Secretary-General for Administration and Management advised that OHRM would

only consider staff on regular budget posts for conversion. On 17 May, the Under-Secretary-General for Development Support and Management Services responded that the Staff Rules do not allow for discrimination based on the source of funding for a post, and requested regularization of seven eligible staff members. This request was denied.

On 12 June 1995, the Executive Officer, DDSMS, wrote to OHRM, identifying the Applicant as one of the seven staff members in question and recommending that his fixed-term appointment be converted to permanent. On 14 June, OHRM reiterated that it was not in a position to consider the Applicant's conversion. The Applicant was advised of this exchange of correspondence on 25 July, when he was offered a two-year extension to his fixed-term appointment.

On 25 September 1995, the Applicant requested the Secretary-General to review the administrative decision to deny him a career appointment on the basis that his post was funded from overhead resources.

On 3 January 1996, the Applicant lodged an appeal with the JAB in New York.

On 18 April 1996, the Applicant wrote to the Secretary-General requesting reconsideration of his case in light of Judgement No. 712, *Alba et al* (1995), in which the Tribunal held that the "practice of excluding an entire group of staff [i.e., those staff members on extra-budgetary posts] even from consideration for career appointment is unfair" and ordered that the Applicant Alba be given reasonable consideration for a career appointment.

The JAB adopted its report on 8 April 1999. Its considerations and recommendations read, in part, as follows:

> "***Considerations***
>
> …
>
> 20. ... [The] Respondent's reply did confirm that [Judgement No. 712, *Alba et al* (1995)] clearly established that the reason given by the Administration in 1995 not to consider the Departmental recommendation was invalid. …
>
> 21. … [The] Appellant's department had formally recommended that he be granted a career appointment. Consideration of that recommendation had been barred for reasons now acknowledged to be invalid. The Panel could only conclude that [the] Appellant should have been considered in July 1995 for a career appointment.
>
> …

Recommendations

25. The Panel recommends that [the] Appellant be given every reasonable consideration for the granting of a career appointment, free of any limitation or restriction that may currently be in effect.

26. The Panel makes no further recommendation with respect to this appeal."

On 12 August 1999, 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 not in agreement with the Board's conclusion ... [Y]ou were … considered for a career appointment in 1995, when your Department recommended that you be granted such an appointment on 12 June 1995. … As the right to be considered for a career appointment is not tantamount to a right to conversion to such an appointment, the fact that you were not accorded such an appointment does not violate your rights. The Secretary-General has therefore decided to take no further action on your appeal."

On 30 March 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's rights in accordance with staff rule 104.12 (b)(iii) were violated, as departmental review does not amount to reasonable consideration.

2. The Applicant's rights of due process were violated.

3. The Applicant was the subject of discrimination on the basis of the source funding for his post as well as nationality.

Whereas the Respondent's principal contentions are:

1. The decision not to grant the Applicant a career appointment was a proper exercise of discretion.

2. Judgement No. 712, *Alba* (1995), requires that a staff member be considered for permanent appointment once, not repeatedly.

3. The Respondent's decision in 1995 was not tainted by prejudice.

The Tribunal, having deliberated from 23 June to 23 July 2004, now pronounces the following Judgement:

I. Staff rule 104.12 (b)(iii) provides as follows:

> "[U]pon completion of five years of continuous service on fixed-term appointments, a staff member who has fully met the criteria of staff regulation 4.2 and who is under the age of fifty-three years will be given every reasonable consideration for a permanent appointment, taking into account all of the interests of the Organization".

II. The Applicant had joined the Organization in 1985 and had thereafter served on a series of successive fixed-term appointments. As of 1995, he was serving as a Finance Officer in DDSMS, on an overhead account (OHA) post as opposed to a regular budget post.

Between the months of April and July 1995, correspondence took place between the Applicant's Department and the Department for Administration and Management, wherein DDSMS sought to have the Administration overturn or make exception to its then-stated policy so that staff members such as the Applicant who were on OHA funded posts would be ruled as eligible for conversion to career appointments in accordance with the terms of staff rule 104.12 (b)(iii). DDSMS pointed out that in the past the Department had never based its recommendations for permanent appointments on the funding of posts and observed that the Staff Rules did not make a distinction in the granting of career appointments based on how a post was funded, and it expressed its opinion that post assignments should not be a determining factor in the granting of career appointments, arguing that to discriminate against staff based on the source of funding for the post would amount to discrimination of a sort not permitted by the Staff Rules. Throughout the correspondence, the Department for Administration and Management maintained the consistent line that "OHRM will maintain its policy on conversion and consider requests for conversion only if staff members recommended encumber established posts against the regular budget".

On 12 June 1995, DDSMS formally recommended that the Applicant's fixed-term contract be converted to permanent. OHRM responded on 14 June that, in light of a previous decision of the Under Secretary-General for Administration and Management as contained in his letter of 25 April, it was not in a position to consider the Applicant's conversion to permanent appointment, "*at this time*". This was an

undoubted reference to the aforementioned policy that such conversions would not be considered if the staff member in question was not encumbering an established post against the regular budget.

On 25 September 1995, the Applicant requested administrative review of the decision "whereby I was denied a career appointment solely on the grounds that I encumbered a post funded from overhead resources" and, in the absence of a substantive reply, he commenced his appeal to the JAB.

III. In light of the decisions of the Tribunal in Judgements No. 712, *Alba et al* (1995) and No. 1040, *Uspensky* (2001), the Applicant is pushing against an open door in relation to the substantive issue in these proceedings, being his claim that he was improperly denied reasonable consideration for conversion based on the source of the funding of his post. In *Alba*, the Tribunal determined that the provisions of staff rule 104.12 (b)(iii) were enjoyed by eligible staff members independent of the source of the funding of their post and that the Administration's policy insofar as it sought to confine its provisions to staff members whose posts were funded from the regular budget was impermissible.

IV. The Respondent's principal contentions in reply to the substantive issue when it was before the JAB may be summarised as follows:

(a) The *Alba* decision, while it mandated that a staff member be considered for permanent appointment regardless of the source of financing of his post, "does not mandate either that a staff member be granted a permanent appointment or that the staff member be considered repeatedly or indefinitely"; and,

(b) The Applicant had been considered for career appointment in 1992, and it was not incumbent upon the Administration to reconsider him for a career appointment at the expiration of each subsequent fixed-term appointment.

The Respondent again offers these submissions in answer to the Applicant's substantive claim in these proceedings before the Tribunal and, now also, he contends:

(c) In addition to the consideration given to the Applicant in 1992, the Tribunal should find that "consideration" within the meaning of staff rule 104.12 (b)(iii) had been given to him in 1995, on the basis that the recommendation from his Department was evidence that he had been given reasonable consideration.

As to points (a) and (b), the Tribunal is satisfied that they provide no answer to the Applicant's claim on the substantive issue, i.e., the failure to consider him in 1995. The central fact is that the Administration had ruled that the Applicant was ineligible even for consideration, solely because of the source of funding for his post and had not declined to consider him or rejected his conversion because he had been considered in the past. The very reason given as to why he would not be considered in 1995 was stated as being because his post was not funded from the regular budget and this was an unlawful and invalid reason, as already explained.

Furthermore, there is nothing in the Staff Rules to support a contention that a staff member is to be afforded only one opportunity to be considered for conversion to a career appointment. It may well be that a second or subsequent attempt might be validly rejected for reasons given on an earlier occasion or that successive applications made without any change in circumstances might be considered to be an abuse of process. The Tribunal expresses no definitive view on this aspect and it might be better left to a case where such an issue arose. Suffice it to say that there had been a change of circumstances between 1992 and 1995, as in 1992 the Applicant had not had the favourable recommendation of his Department, which he did receive in 1995.

The Tribunal is satisfied that no consideration as contemplated by staff rule 104.12 (b)(iii) was ever afforded to the Applicant in 1995. The request for conversion was found to be inadmissible or not receivable or not entitled to consideration for reasons which are invalid and impermissible. The Tribunal is reminded of its Judgement in *Uspensky*, *ibid.*, wherein it held that

> "at the decision-making level, the Respondent gave at best only an illusory consideration to the determination of the Applicant's eligibility and no consideration to the request for conversion. There is no evidence of a meaningful consideration of the Applicant's performance and length of service."

It may well be that, in any event, the Applicant had not enjoyed reasonable consideration in 1992. The Tribunal lacks information as to the facts of that issue and expresses no view as to the adequacy thereof. It may be that, likewise, he was then denied reasonable consideration so that the Respondent would not have been entitled to rely on its result as somehow invalidating the application made in 1995.

Accordingly, the Tribunal is satisfied that an invalid reason was relied upon as grounds to deny the Applicant his right to reasonable consideration for conversion to a career appointment in 1995. He was wrongly denied his rights under the said staff rule and the grounds (a) and (b) advanced by the Respondent are rejected.

V. As to the ground advanced by the Respondent in (c) above, the Tribunal is satisfied that the "consideration" envisaged by the relevant staff rule is consideration by the person or body charged with adjudicating upon the matter, being the person or body which can, in effect, ensure that there is a conversion made in the event of the consideration proving favourable to the Applicant. In this instance, the Applicant never received consideration by such person or body, as the Administration declined to consider his conversion by reason of the policy which was in force at the time and which was found in *Alba* to be invalid and inappropriate. Consideration at the Departmental level in order to provide Departmental support to the staff member cannot, by any stretch of the imagination, amount to consideration in accordance with the staff rule, as the Department was never in a position to actually grant the conversion. Accordingly, this defence is likewise rejected.

VI. The Tribunal cannot say what the outcome would have been, or even what it probably would have been, had the Applicant been given reasonable consideration. However, from the facts available, taking into consideration that he carried his Department's recommendation and given his prior satisfactory service, the Tribunal must consider that there was a reasonable prospect of a favourable result, had he been properly considered in accordance with the relevant staff rule. In any event, the violation of his rights as a staff member is such that he is entitled to restitution for the Respondent's failure to afford him proper consideration.

To order the Respondent to now grant consideration retroactive to 1995 would be an unreal exercise. Times have changed and circumstances have changed and these changes would surely influence the decision which would now be made. Furthermore,

the Tribunal cannot in effect now decide as to what the result would have been had the Applicant been given reasonable consideration back in 1995. The Tribunal would have no function in such a matter nor would it have the jurisdiction to make an order which would be effectively making its adjudication on that 1995 claim some eight years later. Therefore, the Tribunal has decided to award compensation to the Applicant in the amount of three months' net base salary to compensate him for the denial of his right to reasonable consideration. In addition, it awards him a further sum equivalent to three months' net base salary to compensate him for the unquantifiable loss which may have resulted from the Respondent's failure to consider him. Had he been reasonably considered at the appropriate time, and had he been granted a career appointment, the Applicant would undoubtedly have enjoyed greater job security and peace of mind. Just because one cannot say how the Applicant's status may have fared had he been properly considered in 1995, does not mean that the Applicant must now be treated as if he would have been denied conversion following reasonable consideration.

VII. The Tribunal must now turn its attention to a claim of discrimination on the basis of national origin asserted by the Applicant. As was the case in *Uspensky*, the Organization had transferred a disproportionate number of staff members from the United States onto established posts, in order to minimise the impact on the Tax Equalization Fund of having U.S. citizens against OHA posts. The Tribunal is satisfied that this was done with the best of budgetary intentions, and not as a deliberate measure to deprive staff members from other countries from being considered for permanent appointments. However, the absence of malice aforethought notwithstanding, the net result was that American citizens found themselves in a more favourable position than their colleagues to be considered for conversion to permanent status. Whilst the Tribunal takes a serious view of discrimination, it does not consider that, in the circumstances of this case, additional compensation is called for.

VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant in the amount of three months' net base salary at the rate in effect at the date of this Judgement, to compensate him for the denial of his right to reasonable consideration;

2. Orders the Respondent to pay the Applicant in the amount of three months' net base salary at the rate in effect at the date of this Judgement, to compensate him for the unquantifiable damage he suffered as a result of the violation of his rights; and,

3. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
First Vice-President

Brigitte **Stern**
Second Vice-President

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary