



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1174

Case No. 1266: ZLATAR

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Brigitte Stern Vice-President, presiding; Ms. Jacqueline R.
Scott; Mr. Dayendra Sena Wijewardane;

Whereas at the request of Jorge Zlatar Parvex, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 September 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 15 August 2002, the Applicant filed an Application containing pleas which read, in part, as follows:

“II: PLEAS

...

2.3 ... [T]he Applicant respectfully requests the Tribunal *to order that*:

(a) the job description [be resubmitted using the correct (Professional) form] to the appropriate administrative services ... for classification of the post ...

...

(c) in classifying [the] Applicant's post, job descriptions of similar posts ... should be used for comparison of the degree of complexity ... and their classification levels with the degree of complexity of [the] Applicant's functions and classification level;

(d) after appropriate classification, [the] Applicant should be promoted to the level of the post effective January 1995, i.e. the date of the initial classification exercise ...

(e) [The] Applicant be compensated for the hardship endured ... and the delay in implementation of [the] job description at the correct level by payment of six months' base 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 19 November 2003;

Whereas the Respondent filed his Answer on 18 November 2002;

Whereas the Applicant filed Written Observations on 10 January 2003;

Whereas on 25 May 2004 the Applicant submitted an additional communication and on 14 June 2004 the Respondent commented thereon;

Whereas on 9 June 2004, the Applicant submitted a corrigendum to his 25 May communication;

Whereas the facts in the case are as follows:

The Applicant joined the Economic Commission for Latin America and the Caribbean (ECLAC), Chile, on a one-year fixed-term appointment, as Supervisor, Building Management Unit, at the G-8 level, on 21 September 1982. On 26 March 1987 the post which the Applicant was encumbering was re-classified at the Professional level. The Applicant, however, was not placed against this post but assigned to a newly created post at the G-7 level. From 1 January 1988 onwards, the Applicant was granted special post allowance to the P-2 level for periods of time.

In 1991, the International Civil Service Commission (ICSC) approved the Global Classification Standard for Non-Headquarters Duty Stations, based on a seven-level grading structure. Accordingly, on 20 September 1995, the Applicant's post was reaffirmed at the G-7 level and his functional title was changed to Building Services Assistant.

On 22 December 1995, the Applicant appealed against this classification, claiming that the functions and responsibilities of the post were, essentially, of a Professional level and that, therefore, it should have been classified at the Professional category. The Applicant's supervisor supported the appeal, stating that the functions of the post required knowledge of professional engineering.

On 28 August 1998, an audit was conducted in order to clarify the functions of the post and, on 8 September, the Assistant Secretary-General, Office of Human

Resources Management (OHRM) forwarded to the New York General Service Classification Appeals and Review Committee (NYGSCARC) the audit report as well as a report prepared by the Compensation and Classification Policy Unit, OHRM, which had reviewed the case and had concluded that the post was appropriately graded.

On 12 May 2000, the Applicant was informed by the Secretary, NYGSCARC, (who, in his previous capacity as Classification Officer, Compensation and Classification Policy Unit, OHRM, had written the 28 August 1998 audit report) that the review of his case had been delayed but that it was scheduled to be heard shortly. The Applicant was provided with copies of the above reports for his comments, which he provided on 31 May. On 24 August, the Officer-in-Charge, Division of Administration, ECLAC, wrote to the Secretary, NYGSCARC, endorsing the Applicant's statements and expressing his belief that the professional nature of the post's functions was supported by the Manual of Common Classification of Occupational Groups. In his response of 6 September, the Secretary, NYGSCARC, observed that the subject classification appeal pertains to "the functions of the subject post on 1 January 1995 ... which is several years prior to your arrival at that office". Subsequently, on 8 September, the new Officer-in-Charge, Division of Administration, ECLAC, wrote to the Secretary, NYGSCARC, endorsing the statements of her predecessor while adding that "his statement accurately represents the opinion of ECLAC Administration at that time as well as its current views". She further added that, at the time of implementation of the classification exercise at ECLAC, she held the post of Chief, General Services Section, and was thus fully acquainted with the requirements of the subject post.

On 1 March 2001, the NYGSCARC, with the participation of its Secretary, reviewed the Applicant's case. Its report, submitted to the Assistant Secretary-General, OHRM, on 12 March, stated, *inter alia*:

"7. ... To ascertain whether the functions of the post represent Professional work, the standard methodology to distinguish between work in the Professional and General Service category was applied by comparing the occupational group of the post to the ... [Common Classification of Occupational Groups].

...

10. The Committee ... noted that ... the decisions and recommendations of the post were of a supportive nature ... The Committee concluded that the post was not supervisory in nature, but rather served in a monitoring capacity.

11. ... the Committee noted that the post was not involved in the planning of the activities or project design. ... [T]he work ... was of a general service nature in that it is primarily procedural and organizational but not conceptual or analytical. After further review of the audit, the points raised by the appellant, other supplemental materials, and the job description, the Committee again reviewed the type of decisions, and the recommendations, and the judgement required for the post. The Committee concluded that the predominant work of the post did not fit the professional category.”

Also on 12 March 2001, the Assistant Secretary-General, OHRM, informed the Applicant that she had accepted the NYGSCARC recommendation that “the subject post is properly classified under the functional title of Building Services Assistant at the G-7 level”.

On 10 May 2001, the Applicant wrote to the Secretary-General, requesting his intervention “to bring about a new revision of the case” and, on 12 June, the Officer-in-Charge of Human Resources Management, responded, informing the Applicant, inter alia, that any further recourse would have to be submitted to the Administrative Tribunal.

On 28 November 2001, ECLAC forwarded an updated version of the Applicant’s job description to the Assistant Secretary-General, OHRM, as per her request made following a meeting with the Applicant. On 7 December ECLAC was advised that, since due process was assured in all respects of the case, there would not be another review of the post’s functions and, should the Applicant wish to further pursue the matter, his recourse would be with the Administrative Tribunal.

On 13 February 2002, the Applicant requested the Secretary-General to review the decision not to re-examine the functions of his post and, on 26 April the Applicant was informed that he could submit his case directly to the Tribunal.

On 15 August 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to apply the correct Professional classification standards when classifying the Applicant’s post.
2. The proceedings of the classification and appeals process were tainted by lack of due process, procedural errors, bias and undue delays.
3. The functions of the Applicant’s post are, at other duty stations, classified at the Professional level.

Whereas the Respondent's principal contentions are:

1. The Respondent's discretionary decision in respect of the classification level of the Applicant's post was properly taken, including an independent review by a specialized appeals body.
2. The Respondent properly took into account the submissions of the Applicant who has been accorded due process in accordance with applicable procedures.
3. The decision in respect of the classification level of the Applicant's post was not vitiated by bias, improper motivation, or other extraneous factors.

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

I. The Applicant is appealing against the decision to reclassify his post at the G-7 level, instead of at the Professional level. The Applicant claims that there are sufficient reasons why the matter should be revisited and requests the Tribunal to remand it to the appropriate authorities for expert reconsideration on the basis of all available material. He further claims that the complexity and professional nature of the post which he encumbers did not receive due recognition and that his highly specialized duties and responsibilities are unique to ECLAC and have been measured against standards that did not correspond to the actual level of work he performs. He maintains that as a result, the Respondent has failed to apply the Professional classification.

II. The position accepted both by the Applicant and the Respondent reflects the Tribunal's jurisprudence, according to which the classification of posts calls for an exercise of judgment and that it is not for the Tribunal to substitute its own judgment for that of the Secretary-General, provided, of course, that the judgment in question has not been vitiated by procedural irregularities, prejudice, abuse of power or any other extraneous factors or improper motivation. (See Judgements No. 396, *Waldegrave* (1987); No. 541, *Ibarria* (1991); and, No. 1136, *Sabet & Skeldon* (2003).) The question is, therefore, whether in this case the judgment exercised for the reclassification of the post has been so vitiated and ought, for that reason, to be set aside as having denied the Applicant the due process to which he is entitled.

III. After careful consideration, the Tribunal has come to the conclusion that the reclassification exercise that was carried out with respect to the Applicant's post was

not vitiated by any sustainable ground and that there is no valid legal reason for interfering with the exercise of judgment that has been made. The Tribunal will deal briefly with each of the grounds which the Applicant has advanced in support of his appeal for a fresh evaluation.

IV. The Applicant claims that the decision is flawed because his job description was completed using an incorrect form and that had the correct form been used, it would have elicited a different classification. The Applicant's job description was prepared using the form applicable to General Service posts rather than the one used for Professional posts. The Respondent maintains that the correct form was used, being the one applicable to the level that the post encumbered. The Respondent has pointed out that, indeed, other General Service posts were upgraded to the Professional level on the basis of submissions made on General Service forms.

The Tribunal considers that, even if the wrong form were used, it would not constitute a material irregularity which would vitiate the whole process, as the Tribunal is satisfied that the NYGSCARC gave the pertinent matters substantive consideration prior to reaching its conclusion. The Tribunal agrees with the Respondent that the functions and responsibilities of the post, rather than the form on which they are described, determine the classification of a post.

V. The Applicant states that he was denied due process, because his supervisors were not afforded the opportunity to be present during the proceedings of the NYGSCARC, thus denying the Applicant an opportunity to have the special nature of his case explained to the Committee. The Applicant further submits that such opportunity was extended to incumbents of posts of another occupational group.

The Tribunal does not consider the presence of the Applicant's supervisors during the proceedings of the NYGSCARC to be an essential requirement for the proper consideration of his case. Indeed, the Applicant himself is cautious in the way he formulates this contention. It is only put forward as introducing "a higher degree of invalidation to the whole process", which correctly acknowledges that, by itself, this is not a vitiating factor; it can only be viewed as advancing, if at all, the Applicant's case, if cumulatively the process would be considered invalid. The Tribunal notes that the availability of the relevant administration officials of ECLAC was brought to the attention of the NYGSCARC, which ultimately decided not to call for their participation. It was within the Committee's discretion to so decide.

VI. The Applicant further claims that there was a lack of expertise in assessing the specialized technical field of the post and that such expert bodies as the American Institute of Architects or Civil Engineers should have been consulted as regards the complexity and professional nature of his duties, in comparison with the nature and functions of similar posts at other duty stations. Furthermore, he claims that after a meeting with the Assistant Secretary-General, OHRM, an expectation had been raised that outside technical expertise would be sought, which in fact did not take place.

Whilst the issue might have been examined at different levels, the Tribunal does not consider that the failure to obtain outside advice, or to make specific comparisons, vitiated the judgment of the NYGSCARC. Indeed, the Tribunal is of the opinion that in reaching its recommendation, the NYGSCARC followed the guidelines of the Organization, as is required of it, and that there is no requirement for the Committee to consult any outside expert body.

VII. The Applicant contends that procedural irregularities vitiated the decision, primarily as concerns potential conflict of interest vis-à-vis the NYGSCARC proceedings and the undue delay of more than five years that elapsed from initiation of his classification appeal until the final decision was taken in his case by the Assistant Secretary-General, OHRM. The Applicant argues that the same person who initially carried out the audit regarding the classification of this post, later also acted as the Secretary of the NYGSCARC. The Applicant claims that that person's role in both functions created a potential conflict of interest.

The Tribunal agrees with this contention and reaffirms the importance of ensuring that there is no conflict of interest (See Judgement No. 1117, *Kirudja* (2003)). The Tribunal notes that the Secretary was not a member of the Committee and had no vote in its decisions. The Secretary duly brought to the attention of its members the availability of the ECLAC Administration to participate in the meeting, and the comments of the Applicant and of the Administration on the issues before the Committee. The Tribunal is satisfied that the Committee took all these matters into account in arriving at its recommendation and that, consequently, the decision of the Assistant Secretary-General, OHRM, based on this recommendation, is not flawed. However, the Tribunal wishes to emphasize that not only must there be no conflict of interest, but it is important that there be no appearance of any such conflict. The facts in this case infringe the latter principle and to that extent the Applicant has a justifiable complaint, for which he should be compensated.

The Tribunal also agrees with the Applicant's contention regarding the delays in the appeal process. The Tribunal notes that the Applicant initiated the appeal against the reclassification decision on 22 December 1995. On 12 May 2000, more than four years later, he was informed that his case would be heard shortly, but, in fact, it was not heard until 1 March 2001. The final decision in his case was made on 12 March 2001, totalling more than five years. The Tribunal considers this to be an inordinate delay warranting further compensation and reaffirms its position on this matter, as expressed in its Judgment No. 1104, *Tang* (2003);

“[T]he Tribunal has previously held, for example in *MacMillan-Nihlén*, [(Judgement No. 880 (1998))], that an Applicant does not have to show any specific damages resulting from undue delay, since ‘... an inordinate delay not only adversely affects the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an applicant’ (see also Judgements No. 353, *El-Bolkany*, (1985) and No. 414, *Apete*, (1988)).”

VIII. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation in the amount of \$10,000 and;
2. Rejects all other pleas.

(Signatures)

Brigitte **Stern**
Vice-President, presiding

Jacqueline R. **Scott**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary