United Nations AT/DEC/1187

Administrative Tribunal

Distr.: Limited
30 September 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1187

Case No. 1281: IGWEBE 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. Omer Youssif Bireedo;

Whereas at the request of Clementine Comfort Igwebe, a former staff member of the United Nations Economic Commission for Africa (hereinafter referred to as ECA), the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 22 December 2002, the Applicant filed an Application containing pleas which read as follows:

> "***PLEAS***
>
> a. … It is strongly contended that the finding and the decision of the Nairobi Joint Disciplinary Board [(JDC)] that the Applicant is guilty of misconduct completely overlooked the facts of the matter submitted to it and was accordingly erroneous.
>
> The Secretary General ought not to have accepted the said decision nor relied on same in determining the Applicant's employment and separating her from service with payment of salary in lieu of notice but without termination indemnity.

b. The Tribunal is prayed to dispassionately review the facts of this matter and come to the conclusion that the Executive Secretary, ECA, and the machinery controlled by him subjected the Applicant to an unprecedented pattern of maltreatment and discrimination.

…

…

f. …

The Tribunal is respectfully urged to hold that the Applicant merely reacted to the obvious injustice … against her by the Executive Secretary, ECA, who has with the aid of his exalted position denied the Applicant promotion to a post for which she was eminently qualified.

…

4. ***RELIEF SOUGHT***

i. … [I]t is respectfully prayed that the decision of the Secretary-General separating the Applicant from service be reversed.

ii. In consideration of the injuries, mental torture, humiliation and deprivation, the Applicant suffered, the Tribunal is also prayed to award her the equivalent of five years' net base pay as compensation.

iii. In recognition of the fact that the Applicant ought to have retired from service effectively on [31 December] 2001, the Tribunal is prayed to order that the Applicant retires from service accordingly with all benefits due to her."

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 11 July 2003;

Whereas the Respondent filed his Answer on 31 May 2003;

Whereas the Applicant filed Written Observations on 16 September 2003;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 13 September 1971, on a fixed-term appointment as a Clerk-Stenographer at the G-3 level in the Department of Economic and Social Affairs. Her contract was subsequently extended and she received a series of promotions and a permanent appointment. On 1 April 1978, she was assigned to ECA. At the time of the events which gave rise to this Application, the Applicant held the position of Programme Management Officer at the P-3 level.

On 21 July 1999, the Applicant wrote to the Executive Secretary, ECA, referring to him as the "Destructor (*sic*) of ECA"; alleging that he, amongst others, was guilty of fraud and corruption; and, threatening that if he made "one more false move" then the Staff Union would let "even the World Bank know that (he had) become a big liability to them in this region". She warned that "mob justice" might take place and told him "you might even force

the staff to … pursue you with a machete … Forget the security guards." She made similar threatening statements about another staff member. The Applicant catalogued a series of ills at ECA, as well as potential catastrophic consequences, and proposed that the situation could be remedied by her promotion to the P-5 level.

On 5 October 1999, the Applicant again wrote to the Executive Secretary, ECA, in a threatening manner. She stated, inter alia, " I am pleading with you not to force me to [fight] you to the finish. All I want is what I am legally entitled to. Your continued use of brute force is a thing you might live to regret."

On 14 October 1999, the Executive Secretary, ECA, apprised the Assistant Secretary-General for Human Resources Management of the Applicant's actions and asked that she be immediately suspended with pay pending an investigation. The Applicant was suspended with pay on 18 October 1999, for an initial period of three months pending further investigation. Thereafter, her suspension was extended for an additional period of three months.

In December 1999, the Applicant was asked to consult with the Medical Service in order to ascertain whether the allegations made against her could be attributed to distress that she might have been experiencing in connection with her job. The Applicant refused to cooperate with the Medical Service.

On 15 May 2000, the Applicant was formally charged with misconduct. She was informed that her memoranda of 21 July and 5 October 1999 contained defamatory and threatening statements against the Executive Secretary and other senior officials of ECA and that her conduct violated the standards of conduct expected of staff members of the United Nations. In addition, she was advised that, due to her "refusal to cooperate in the medical examination and in order to allow the alleged acts of misconduct to be investigated", she was being suspended with pay indefinitely, until the final disposition of her case. She was requested to provide a written statement of explanation within 14 days, and was informed of her right to counsel.

The Applicant responded on 7 July and 22 September 2000 that she had been truthful throughout and that it would have been "irrational" of her to "risk her very life in any medical procedure organized by ECA".

On 9 November 2000, the Assistant Secretary-General for Human Resources Management recommended that the case be referred to an ad hoc JDC in Nairobi. It had previously been suggested that Nairobi would be a more appropriate forum lest accusations of bias be made against a JDC constituted in Addis Ababa. Thereafter, the Applicant was advised that her case would be submitted to the JDC in Nairobi.

On 6 February 2001, the Applicant was advised that a JDC panel had been constitued in her case and was reminded of her right to counsel. She was asked to submit her defence within two weeks. The Applicant submitted what the JDC refers to as "extensive documentation" on 24 April.

On 2 July 2001, the Secretary, JDC, wrote to the Applicant care of ECA, and advised her that the panel was unable to understand her defence and that she should present her case in a clear, concise manner. He urged her to submit such a document within two weeks as failure to submit a proper defence would mean that the JDC would have to decide the case without the benefit of comprehending her defence. The Secretary again reminded the Applicant of her right to counsel. In the absence of a response, on 21 August the Secretary, JDC, wrote to ECA enquiring as to any efforts made to contact the staff member. ECA responded on 22 August that the 2 July letter had been faxed to the Applicant on 13 and 27 July, and provided the JDC with the fax confirmation reports and an e-mail from the Applicant which listed the fax number as a way to contact her. However, in response to an e-mail from the Secretary of the JDC, the Applicant asserted that she had not received the letter of 2 July until 27 August.

On 10 September 2001, the Coordinator of the Panel of Counsel sent a fax to the Secretary, JDC. She advised him that the Applicant had contacted her office for assistance and enquired whether the Applicant had been given an opportunity to respond to the allegations as well as reasonable time to identify counsel and prepare her response. The Chairperson of the panel replied on 18 September that the Applicant had been informed of her right to counsel as early as 6 February, and the panel felt she had had ample time to arrange her defence with the assistance of counsel. Also on 18 September, the Secretary, JDC, informed the Applicant that the JDC had decided to finalize the case on the basis of the documents she had submitted to date.

On 18 October 2001, the JDC submitted its report. Its consideration, conclusion and recommendation read as follows:

> "2. **Consideration**
>
> In deciding on the sanction, the panel felt that the alleged acts of misconduct were so severe as to make any further constructive work-relationship between the staff member and the Organization impossible. Therefore, the sanction had to be the termination of the employment relationship.
>
> 3. **Conclusion**
>
> In the light of the foregoing considerations the panel concludes that the staff member is guilty of the alleged acts of misconduct.

4. **Recommendation**

The panel therefore recommends that the staff member be separated from service with compensation in lieu of notice."

Remark:

Although the panel had doubts about the mental health of the staff member, in refusing a medical examination she presented herself as mentally healthy. Consequently, the panel had no choice but to proceed on that basis and presume full responsibility of the staff member for her acts and her ability to participate in these proceedings. However, the panel would like to emphasize its suspicion that the staff member might indeed have mental health problems."

On 7 January 2002, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed her as follows:

"The Secretary-General has given careful consideration to the findings of the Committee and he is in agreement with, and has decided to accept these findings, as well as the Committee's conclusion that any further constructive working relationship between you and the Organization is impossible. However, the Secretary-General shares the Committee's concern regarding the likelihood that your pattern of behaviour results from a medical condition. The Secretary-General is aware that you have refused earlier requests to undergo a medical evaluation. Nevertheless, in view of the foregoing concern, he has decided, to suspend the implementation of the decision to separate you from service, for the limited time required for a medical evaluation in order to provide you with a final opportunity to be medically evaluated. You are accordingly requested, *upon receipt of this letter*, which is faxed to you, to *urgently* contact … the [United Nations] Doctor at the Medical Dispensary at the UNDP Compound in Lagos, Nigeria, who will refer you to a Medical Doctor for such an evaluation. …

The Secretary-General will revert to you as soon as possible upon receipt of the medical report, or upon being advised, within a week of your receipt of this letter, that you did not contact [the United Nations Doctor]. In such a case, the Secretary-General will understand that you have decided not to undergo a medical examination and your separation from service for misconduct will be effected as of the day that you have received this letter."

On 4 March 2002, the Under-Secretary-General for Management wrote to the Applicant, informing her as follows:

"The Secretary-General notes that you availed yourself of the opportunity to be medically examined and he has now received the report of the medical practitioner who conducted your evaluation. The report establishes that you suffer from no psychiatric illness that would preclude you from work. In view of that finding, the Secretary-General considers that no justification exists for effecting your separation from service on medical grounds and he has,

> therefore, decided that you will be separated from service with compensation in lieu of notice pursuant to staff rule 110.3 (vii), but without termination indemnity, with effect from close of business on the day you receive this letter."

On 22 December 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JDC erred, and the Secretary-General should not have accepted its recommendation.

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

3. The Applicant was subjected to disproportionately harsh punishment.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes misconduct warranting dismissal. The decision to dismiss the Applicant was a valid exercise of that discretionary authority.

2. The Applicant failed to meet the standards required of an international civil servant.

3. The Applicant's rights of due process were fully respected.

4. There was no evidence of the pattern of discrimination and maltreatment alleged by the Applicant. Nor was the decision to dismiss her vitiated by bias, discrimination, improper motivation or other extraneous factors.

The Tribunal, having deliberated from 1 July to 23 July 2004 now pronounces the following Judgement:

I. This case arose from the Respondent's decision to separate the Applicant from service under staff rule 110.3 (vii), pursuant to a recommendation from the JDC in Nairobi. The Applicant contends before the Tribunal that the Respondent erred in his decision-making; that the disciplinary measure of separation from service was disproportionately harsh; and, that her rights of due process were violated.

II. The Applicant was charged with misconduct for making defamatory and threatening statements against the senior management of ECA and informed that her behaviour violated the standards of conduct expected of staff members of the United Nations. The charges were

lodged against her after she sent two letters to the Executive Secretary, ECA, in 1999. In the first of those letters, which was sent on 21 July 1999, the Applicant alleged, inter alia, that the Executive Secretary was guilty of fraud and corruption. She made reference to "mob justice" and warned that the staff of ECA might be forced "to … pursue [him] with a machete". In the second letter, dated 5 October 1999, she again made veiled threats as well as various *ad hominem* attacks against the Executive Secretary. It would appear that the Applicant considered that the "sorry state" of ECA could be remedied by her promotion to the P-5 level.

III. The Applicant alleges that the letters were in reaction to an "unprecedented pattern of maltreatment and discrimination". In this regard, she purports to rely upon the fact that she had been assigned G-5 level functions rather than those of the P-3 level she had attained. The Tribunal considers this entire matter to be *res judicata*, having rendered judgement thereon in Judgement No. 1035, *Igwebe* (2001). In that case, the Joint Appeals Board (JAB) found that the Applicant had been effectively demoted and had established that there was a pattern of discrimination against her. It recommended that she "be assigned to a function commensurate with her grade level, seniority and qualifications" and that she receive compensation of one month's net base salary, "in view of the pattern of mistreatment to which she has been subjected". Unbeknownst to the JAB at the time of its recommendations, however, the post in question had been formally classified at the P-3 level. In light of that information, the Tribunal rejected all substantive pleas in the Application before it, and concluded that

> "the JAB's findings that the Applicant had been discriminated against by having been *de facto* demoted most probably had a significant influence on its finding that the Applicant had been subject to a pattern of discrimination, for the evidence which she offered in support of her other claims of discriminatory conduct was relatively weak without the support of the finding of discrimination arising from the belief that she had been demoted. The Tribunal considers that had the JAB been informed that a classification of the Applicant's post by the Compensation and Classification Policy Unit at Headquarters had actually taken place and that the post had been classified as a P-3 post, the JAB would not have gone on to make its own assessment or to find that the Applicant had been *de facto* demoted. Had the JAB been informed of the said classification by the Compensation and Classification Policy Unit, the Tribunal believes that the JAB would have followed the [jurisprudence] of the Tribunal … and would not have found that there had been an actual demotion and accordingly that she had been discriminated against in that manner."

The Tribunal did award the Applicant one month's net base salary, on the basis that the Respondent had relied upon information in rejecting the JAB's recommendation which was not available to the JAB itself, and that as "the JAB's findings were sustainable in the light of

the information which had been placed before it, the Tribunal considers that it would be unjust and inequitable to deny the Applicant the compensation which the JAB recommended be paid to her".

In view of the fact that the Tribunal did not uphold her allegations of discrimination and harassment in 2001, the Applicant cannot now sustain her current claims of discrimination by premising them upon that self-same matter. Nor can she expect to rely upon that Judgement in claiming that the Tribunal had found a pattern of such behaviour. The Tribunal recalls its consistent position that the *onus probandi* rests with the Applicant where such allegations are made. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); No. 870, *Choudhury et al* (1998); and, No. 1069, *Madarshahi* (2002).) In the instant case, it finds that the Applicant has failed to discharge her burden of proof.

IV. The Tribunal now turns to the disciplinary matter before it. The Tribunal carefully examined the Applicant's letters of 21 July and 5 October 1999, and reached the conclusion that the texts, both in substance and style, were completely intolerable and unacceptable from a United Nations staff member. It is satisfied that they do, indeed, constitute misconduct on the part of the Applicant. The fact that they were not destined for external publication, and never were published, does not change this determination in the least. Even assuming that the Applicant's contention that the tone of her letters was in response to a "tirade of character assassination, falsehood and blatant maltreatment" was true, and the Applicant has far from proved this, the Tribunal agrees with the JDC and the Secretary-General that the letters rendered "any further constructive work-relationship between the staff member and the Organization impossible". The Tribunal adds, moreover, that the letters reveal a lack of balance and self-restraint on the part of their author which is simply unacceptable in a United Nations staff member.

Further, the Tribunal has consistently held that "in disciplinary matters the Secretary-General has a broad power of discretion. Its exercise can only be questioned if due process has not been followed or if it is tainted by prejudice or bias or other extraneous factors." (Judgement No. 583, *Djimbaye* (1992). See generally Judgements No. 210, *Reid* (1976); No. 300, *Sheye* (1982); and, No. 941, *Kiwanuka* (1999).) In accordance with the findings of the Tribunal in paragraph III above, the Applicant has failed to prove that the disciplinary process was vitiated in any way, and thus her claim must fail.

V. The text and tone of the letters were of such incredible character that the JDC panel confessed to sheltering some doubts concerning the Applicant's mental health, and appended the following "Remark" to its report:

> "Although the panel had doubts about the mental health of the staff member, in refusing a medical examination she presented herself as mentally healthy. Consequently, the panel had no choice but to proceed on that basis and presume full responsibility of the staff member for her acts and her ability to participate in these proceedings. However, the panel would like to emphasize its suspicion that the staff member might indeed have mental health problems."

The Tribunal is of the opinion that there was, indeed, no other option open to the panel, as the staff member could not be forced to undergo a medical examination.

The Applicant was, in fact, given one last opportunity as the Secretary-General "share[d] the Committee's concern regarding the likelihood that [her] pattern of behaviour resulted from a medical condition". He suspended the implementation of the decision to separate her from service for one week until she could be medically evaluated. The Applicant was subsequently examined by a doctor who reported that she suffered from no psychiatric illness which would preclude her from work and so the Secretary-General "consider[ed] that no justification existed for effecting [her] separation from service on medical grounds and … decided that [she would] be separated from service with compensation in lieu of notice pursuant to staff rule 110.3 (vii), but without termination indemnity".

The Tribunal finds that the Organization gave the Applicant the benefit of the doubt at every stage of the proceedings. Despite the nature of the letters in question, she presented herself as sane and was cleared by a medical doctor. The Applicant must, therefore, bear full responsibility for her actions.

VI. The Applicant asserts that separation from service was disproportionately harsh in the circumstances of her case. Whilst the Tribunal has "consistently taken the view that the Secretary-General has broad discretion under this regulation with regard to disciplinary matters, and this includes determinations of what constitutes serious misconduct, as well as the appropriate discipline" (Judgement No. 436, *Wiedl* (1988)), such discretion can be vitiated if the sanction imposed is found to be disproportionate. In Judgement No. 1090, *Berg* (2002), the Tribunal held that, in imposing disciplinary measures disproportionate to the facts, "[t]he Respondent's actions exceeded the scope of his broad discretionary powers". The Tribunal has undertaken proportionality reviews in a number of disciplinary cases and has awarded compensation where it found that the disciplinary sanction imposed was disproportionate in

the circumstances of the case. (See, for example, *Berg*, *ibid*., and Judgement No. 1011, *Iddi* (2001).)

In the instant case, the Tribunal finds that separation from service was not disproportionate and was, in contrast, entirely appropriate in the circumstances. It is disappointing that such a measure had to be imposed upon a staff member so close to retirement, but the Applicant herself bears the responsibility. The United Nations is entitled to expect a level of decorum and conduct from its staff members which is far above that displayed by the Applicant of defamation, hostility, and both veiled and actual threats.

VII. Finally, the Applicant contends that her rights of due process were violated. This contention is premised upon her assertion that she was prevented from submitting a proper defence to the JDC, which prejudiced her case.

The Applicant was invited to submit her defence to the JDC in early February 2001. She submitted "extensive documentation" but, on 2 July, the JDC wrote to her advising her that the panel was unable to understand her submission. She was urged to submit a clear and concise defence within two weeks and warned that otherwise the JDC would have to decide the case without understanding her submission. The Applicant subsequently claimed not to have received the letter of 2 July for almost two months, but a fax confirmation report indicates it was sent to her in a timely fashion. On 10 September, the Coordinator of the Panel of Counsel advised the JDC that the Applicant had contacted her office for assistance and asked whether she had been given an opportunity to respond to the allegations against her, and given reasonable time to identify counsel and prepare her defence. The Chairperson of the JDC panel responded that the Applicant had been informed of her right to counsel as early as 6 February and that the panel felt she had had ample time to arrange her defence with the assistance of counsel. The Applicant was then advised that the panel had decided to finalize her case on the basis of the documents submitted.

The right to defend oneself is, of course, a fundamental right of due process. However, neither Chapter X of the Staff Rules nor ST/AI/371 of 2 August 1991, "Revised Disciplinary Measures and Procedures", permit an Applicant to stall the disciplinary process indefinitely. The Tribunal agrees with the JDC that the Applicant had reasonable time to either prepare her defence or secure counsel to do the same. She was repeatedly advised of her right to counsel, and the JDC was lenient in enforcing time limits against her. Accordingly, the Tribunal has identified no violation of her legal rights.

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

(*Signatures*)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Omer Youssif **Bireedo**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary