



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1190

Case No. 1285: SIROIS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Brigitte Stern, Vice-President;
Mr. Spyridon Flogaitis;

Whereas, on 22 December 2000, André Sirois, a staff member of the United Nations, filed an Application requesting the Tribunal, inter alia, to find that the Administration had erred in not renewing his fixed-term contract; in not paying certain allowances and entitlements; and, in retaining detrimental material in its files without providing the Applicant with copies thereof. In respect of this Application, the Tribunal rendered Judgement No. 1135 (2003), finding that the decision not to renew the Applicant's contract was null and void; awarding him compensation of two years' salary, allowances and other entitlements, payment of specified amounts relating to work completed and entitlements not paid, and compensation of US\$ 5,000 for the insertion of a defamatory document in his file; and, ordering that all defamatory and forged documents in the Applicant's personnel file be withdrawn and that all favourable items that had been removed from the file be returned thereto.

Whereas, on 15 February 2003, the Applicant filed an Application containing pleas which read, in part, as follows:

“Section II: PLEAS

...

8. On the merits, the Applicant respectfully requests the Administrative Tribunal TO FIND:

- (a) that the decision of the Secretary-General ... is ill-founded in facts and in law;
- (b) that the report and recommendations of the [Joint Appeals Board (JAB)] ... are ill-founded in facts and in law;
- (c) ... the JAB repeatedly denied the Applicant the application of due process of law ...;
- (d) ... the JAB repeatedly violated the rights of the Applicant ...
- (e) that the facts ... clearly show repeated violations of a number of rights deriving from the terms of appointment of the Applicant and these violations warrant compensation, under relevant [United Nations] rules, for the resulting damages;

...

9. Wherefore the Applicant most respectfully requests the Administrative Tribunal TO ORDER:

- (a) That the decision taken by the Secretary-General regarding the Report and recommendations ... of the JAB be rescinded;
- (b) That the conclusions submitted by the Appellant be maintained, as amended;
- (c) And that the Applicant be granted an amount of higher indemnity provided for in article 9 of the Statute of the Administrative Tribunal.”

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 30 June 2003 and periodically thereafter until 30 November 2003;

Whereas the Respondent filed his Answer on 17 November 2003;

Whereas on 10 January 2004, the Applicant filed Written Observations in which he amended his pleas as follows:

“16. The Applicant [draws the Tribunal’s attention to the fact that Secretariat staff having French as their working language are discriminated against and] respectfully requests the Administrative Tribunal to hear ... witnesses in this connection ... [and] ... to give him a hearing on this subject.
...

17. The Applicant further requests the Administrative Tribunal:

- (a) To order the Respondent to take all necessary measures to ensure implementation of all the General Assembly resolutions concerning the

working languages of the Secretariat and all the relevant recommendations by the Joint Inspection Unit;

(b) Specifically, to order the Respondent to take the necessary measures to ensure that Secretariat staff having French as their working language can exercise all their rights and file any appeals ... directly in French, without being penalized by undue delays or other reprisals;

(c) To order the Secretary-General, inter alia, to appoint to the [JAB] and the Joint Disciplinary Committee [(JDC)] chairpersons and panel members who can meet and deliberate in French, and to do likewise with regard to rebuttal panels;

(d) To order the [JAB], inter alia, to have its rules translated into French and to recruit French-language staff and secretaries for its panels;

(e) To order the Administration to provide the Administrative Tribunal with the necessary resources to launch and keep up to date a web site containing all the Tribunal's judgements in English and French, in a usable form.

...

21. The Applicant respectfully requests the Administrative Tribunal:

(a) To rule ... that there were irregularities in the constitution of the [JAB] Panel considering the Applicant's case ...;

(b) To rule that ... panels composed of permanent members who are always the same and meet on a full-time basis are irregular, as they are constituted in breach of the rules of the [JAB];

(c) To order the [JAB] to comply with its own rules, with specific reference to the required rotation of panel members;

(d) To order the [JAB] to appoint panel members through a public drawing of lots once every three months, in order to ensure an impartial rotation in such appointments;

(e) To order the abolition of the system of "permanent" panel members, as it constitutes a breach of the rules of the [JAB];

(f) In more general terms, to order the Secretary-General to convene an international panel of independent jurists specializing in administrative law, to examine the so-called 'system of internal justice' of the United Nations ...

...

25. The Applicant respectfully requests the Administrative Tribunal:

...

(b) To order the Respondent to revoke immediately [a named person's] appointment to the Panel of the [JAB].

...

42. For all these reasons, the Applicant requests the Tribunal to uphold all his pleas and:

...

(n) To award the Applicant the maximum damages authorized, together with interest ...”

Whereas the Applicant filed “Other observations” on 1 June 2004;

Whereas, on 20 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case, additional to the facts outlined in Judgement No. 1135, are as follows:

On 17 July 1996, the Director of Investigations, International Criminal Tribunal for Rwanda (ICTR), completed the Applicant’s performance evaluation report (PER) for the period 28 September 1995 through 27 September 1996, giving the Applicant 8 “B” and 3 “C” ratings, on a scale from “A” to “E” with “A” being the highest. The Director of Investigations also signed the PER as the Applicant’s second reporting officer, giving him an overall rating of “a very good performance”. The Deputy Prosecutor then signed the PER on 29 July, commenting that he “agree[d] with the evaluation ... except for ... the categories Competence and Quality of Work Performed; which [he] would both rate “A” instead of “B”. On 19 September, the Applicant signed his PER, indicating that he intended to rebut it and, on 20 September, he filed a rebuttal.

On 5 September 1997, the Applicant requested administrative review of the Administration’s failure to commence the PER rebuttal procedure.

On 12 November 1997, ICTR sent the Applicant a list of five staff members from which to choose his PER rebuttal panel. On 25 February 1999, the Applicant requested that his PER rebuttal hearing be moved to New York.

On 24 June 1999, the Applicant lodged an appeal with the JAB in New York.

On 28 June 1999, the Office of Human Resources Management (OHRM) advised the Applicant that his request to have his rebuttal hearing moved to New York had been approved “on an exceptional basis”, “in order to avoid a long-drawn out process and in view of the fact that the combined efforts to expedite the rebuttal [had thus] far resulted in no positive solution”. On 19 July, OHRM sent the Applicant a list of five staff members at Headquarters for his consideration as potential members of the rebuttal panel. On 20 September, the Applicant asked for confirmation that the five staff members had French as their working language, or a fluent working knowledge of French. OHRM confirmed on 30 September that two of the staff members met this

requirement, added a third staff member who also met the language requirement, and asked if they were acceptable to the Applicant. The Applicant replied on 6 October, asking for a list of five staff members in accordance with the provisions of ST/AI/240/Rev.2 of 28 November 1984, "Performance evaluation report system". OHRM responded on 26 October with the names of five staff members all of whom had "an excellent knowledge of French" and, on 12 November, the Applicant indicated his selection. Thereafter, a Rebuttal Panel consisting of the three staff members the Applicant had selected was constituted.

On 4 January 2001, the Rebuttal Panel issued its report on the Applicant's case. It concluded, *inter alia*, that ICTR had disregarded ST/AI/240 in accepting a PER prepared by someone other than the Applicant's supervisor, and in failing to respect the time limits provided for hearing a rebuttal. The Panel recommended that the "B" ratings the Applicant had received in three categories be raised to "A", and noted that "no staff member should be treated unfairly ... and ... no Rebuttal Panel should be made to decide on a case without being able to hear ... the staff member's supervisor". On 11 April 2002, the newly-appointed Registrar, ICTR, transmitted a copy of the report to the Applicant and informed him that he supported the conclusions of the Panel and "sincerely regret[ted] the protracted delay".

On 12 September 2002, the JAB met to consider the appeal lodged by the Applicant. On 25 September, the Applicant requested disqualification of all three members of the JAB. The Secretary of the JAB replied on 4 October, noting that the Applicant had not provided reasons to support his request. The Applicant responded on 9 October, noting, *inter alia*, that the first panel member was Treasurer of the United Nations and thus had "a clear conflict of interest" in any case involving a claim for damages; that the second panel member had previously sat in a panel which rejected one of the Applicant's claims and the Applicant had "negative impressions of [the panel member's] interventions"; and, that recommendations from panels in which the second and third panel members sat together were legally flawed, showed disregard for the rights of staff members and were biased in favour of the Administration. The Applicant concluded that he could not expect a fair hearing from the three members. On 21 October, the Secretary of the JAB informed the Applicant that the Presiding Officer had not found his reasoning persuasive.

The JAB adopted its report on 4 November 2002. Its conclusions and recommendations read, in part, as follows:

“Conclusions and recommendations

36. In light of the foregoing, the Panel *unanimously agrees* that the Administration failed to discharge its statutory responsibility to effectively monitor the operation of the PER rebuttal in the Appellant’s case, causing an inordinate delay in the completion of the process.

37. Nonetheless, it also *unanimously agrees* that the absence of [a] PER under rebuttal from the Appellant’s [Official Status file] prior to 11 April 2002 did not cause prejudice or damage to his career, for he was gainfully employed within the [United Nations] system for varying periods of time from December 1996 through 1999, and he was selected on 4 January 2000 against a core P-3 post of French Translator. Consequently, award of monetary compensation is not warranted in the present case.

38. The Panel further *unanimously agrees* that it has neither the power nor the intention to disturb the outcome of the PER rebuttal process, which was completed on 11 April 2002.”

On 16 December 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to take no further action on his appeal.

On 15 February 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent acted in bad faith throughout the rebuttal process.
2. The Applicant suffered harm as a result of the delays in the rebuttal process.
3. The Applicant’s rights of due process were violated by the Respondent and by the JAB.

Whereas the Respondent’s principal contentions are:

1. There was no bad faith on the part of the Administration and the Applicant has failed to prove prejudice or other improper motivation.
2. The JAB was not mistaken in fact when it found that the Applicant had been “gainfully employed in the [United Nations] system for periods of time from December 1996 through 1999”.
3. The JAB was not mistaken in law when it found that there had been no prejudice or damage to the Applicant’s career.

4. There were a number of reasons why the delay in the rebuttal process was excusable and the Administration expressed regret for the delay.

The Tribunal, having deliberated from 2 to 23 July 2004, now pronounces the following Judgement:

I. The Tribunal calls attention to a number of facts already mentioned in Judgement No. 1135 of 20 September 2003, rendered in response to other claims by the same Applicant. The Applicant was recruited in September 1995 on a one-year fixed-term appointment at the P-4 level as a Legal Translator/Interpreter, ICTR. At the request of the Deputy Prosecutor, on 17 July 1996 the Director of Investigations prepared the Applicant's performance evaluation report (PER) and gave him an evaluation consisting of eight "B" ratings and three "C" ratings on a scale of "A" to "E", "A" being the highest. The Director of Investigations also signed the PER in the capacity of second reporting officer, giving an overall rating of "a very good performance". The Deputy Prosecutor subsequently signed the report on 29 July 1996, saying that he agreed with the performance evaluation except for the categories "Competence" and "Quality of work performed", which he would both rate "A". On 19 September 1996, the Applicant signed his performance evaluation report, indicating that he intended to file a rebuttal, which he did on 20 September 1996. On 1 October 1996, the Applicant was informed that the Chief Administrative Officer had been instructed to prepare a new PER, on which the Chief of Language Services and the Deputy Prosecutor would be the first and second reporting officers. On 5 September 1997, the Applicant asked for a review of the fact that the Administration had not followed up on the rebuttal he had filed on the PER and had maintained its decision not to extend his fixed-term appointment. On 8 January 1998, the Applicant appealed to the JAB concerning this entire matter. On 22 December 2000, the Applicant filed an application with the Tribunal. On 16 June 2003, the Applicant submitted an additional statement amending his pleas as follows:

"III. Finally, I would like to AMEND my statement in order to strike any PLEA or part of PLEA, having to do with:

- a) the rebuttal to the PER;
- b) the insertion in my personal file of detrimental documents ...

These have taken a life of their own and are resolved in part."

In other words, that portion of his claims was withdrawn from the first Application submitted to this Tribunal giving rise to Judgement No. 1135, which therefore only considered the issue of the non-renewal of the Applicant's contract.

II. On 4 January 2001, the Rebuttal Panel submitted its report. It concluded that ICTR had disregarded ST/AI/240, paragraph 2, first, in accepting a PER prepared by someone other than the staff member's supervisor and, second, in failing to respect the time limit provided for hearing a rebuttal to such a report. Third, the Rebuttal Panel recommended that the "B" ratings given to the Applicant in three categories should be raised to "A" ratings. Fourth, it noted "no staff member should be treated unfairly ... and ... no Rebuttal Panel should be made to decide on a case without being able to hear ... the staff member's supervisor". On 11 April 2002, the newly-appointed Registrar sent the Applicant a copy of this report and informed him that he supported the conclusions of the Panel and "sincerely regret[ted] the protracted resolution" of the matter, further noting that a copy of the report had been placed in the Applicant's Official Status file. Without going into detail about all the Applicant's tribulations in connection with the rebuttal procedure, the Tribunal simply notes that the procedure to rebut the Applicant's PER took more than five and a half years, which the Tribunal does not consider a reasonable period.

III. In the meantime, having obtained no resolution of the rebuttal procedure, the Applicant appealed to the JAB, which finally met on 12 September 2002. He amended his pleas following the decision communicated to him by the Administration on 11 April 2002, based on the report of the Rebuttal Panel, which did not offer any compensation for the delay in the rebuttal procedure, while expressing regrets. The JAB upheld the decision of the Administration; while acknowledging that there had been an inordinate delay, the JAB declared:

"33. The Panel therefore concluded that the Administration had failed to discharge its responsibility to effectively monitor and timely complete the PER rebuttal in the Appellant's case. However, it also concluded that the delay in the completion of the PER rebuttal and the absence of a PER under rebuttal from the Appellant's [Official Status file] caused no discernible prejudice or damage to his career, because they did not prevent him from being gainfully employed within the [United Nations] system for varying periods of time from December 1996 through 1999, or being selected against a core P-3 post of French Translator.

...

Conclusions and recommendations

36. In the light of the foregoing, the Panel *unanimously agrees* that the Administration failed to discharge its statutory responsibility to effectively monitor the operation of the PER rebuttal in the Appellant's case, causing an inordinate delay in the completion of the process.

37. Nonetheless, it also *unanimously agrees* that the absence of a PER under rebuttal from the Appellant's [Official Status file] prior to 11 April 2002 did not cause prejudice or damage to his career, for he was gainfully employed within the [United Nations] system for varying periods of time from December 1996 through 1999, and he was selected on 4 January 2000 against a core P-3 post of French Translator. Consequently, aware of monetary compensation is not warranted in the present case."

IV. The Tribunal cannot find it acceptable that the Administration took more than five and a half years to complete a procedure that should take six weeks, according to administrative instruction ST/AI/240/Rev.2, and it cannot agree with the Respondent's argument that it has not been shown that the delay was injurious to the Applicant. Such a delay is injurious *in itself*, as the Tribunal has affirmed on many occasions. In Judgement No. 917, *Ali* (1999), the Tribunal states:

"The Tribunal has held that undue delay in taking an administrative decision is a procedural irregularity which adversely affects the administration of justice (cf. Judgements No. 310, *Estabial* (1983), No. 353, *El-Bolkany* (1985), and No. 784, *Knowles* (1996)). ... The violation of the Applicant's procedural rights is in itself adequate moral injury which warrants compensation (cf. Judgements No. 702, *Beg* (1995), and No. 774, *Stepczynski* (1996))."

The same position was recently taken by the Tribunal in Judgement No. 1159, *Lacoste* (2004), which involved a fact pattern similar to that in the present case:

"The Tribunal points out that a significant delay is in itself damaging to the conditions of service of United Nations staff members [Judgement No. 880, *Macmillan-Nihlén* (1998)], a delay which is all the more disputable in that it relates to a rebuttal procedure, which should be speedy or it will be meaningless. By reason of these serious violations of the Applicant's rights, the Tribunal considers that the mere insertion of the report of JAB in the Applicant's file is not sufficient and that the Applicant merits fair compensation for the wrongs suffered". (Para. XVIII.)

In the view of the Tribunal, it is indisputable that a case that drags on so long creates anxiety and dissatisfaction in the Applicant, who cannot obtain a final answer to his questions, regardless of whether the outcome is in his favour or not. A German

proverb expresses the idea perfectly: “Besser eine Ende mit Schrecken, als ein Schrecken ohne Ende” (Better a dreadful end than dread without end).

The Tribunal therefore agrees with the JAB that there was an inordinate delay in completing the rebuttal procedure but, unlike the JAB, it considers that the delay merits compensation.

V. The Applicant also considers that his due process rights were violated during the proceedings before the JAB. It appears to the Tribunal that those proceedings were also not beyond reproach. The Applicant considers that he was deprived of the right to request disqualification of members of the JAB panel prior to its meeting, because the Administration did not wait the requisite five working days. According to the Applicant, “[t]his sudden urgency to convene a [JAB] Panel, in violation of the time-limits and of the rights of the Applicant, is all the more surprising [in] that, by then, this case had already been going on for 6 years”. The Tribunal is not convinced that the Applicant had valid reasons for seeking to disqualify the various members of the JAB panel. Without analysing the matter in detail, the fact that an individual is the Treasurer of the United Nations does not appear in itself to be sufficient grounds for disqualification. The Applicant’s argument is that such a person “cannot at the same [time] protect and defend the funds of the United Nations and easily consider to give them away to Appellants whatever their claims”. This reasoning does not convince the Tribunal. On the other hand, what the Tribunal regards as dubious procedure is that the Applicant was asked to give his grounds for wishing to disqualify members of the JAB panel when the Respondent knew quite well that the JAB panel had already met and that the statement of grounds for disqualification, when brought to the attention of the panel members, could only predispose them against the Applicant. Even if it is not proved that this odd way of proceeding harmed the Applicant, it is indisputable that it is not in keeping with what one would expect of good administration of international administrative justice. In Judgement No. 874, *Abbas* (1998), the Tribunal clearly restated its position that “[i]t is a clearly established principle that the JAB should make every effort to avoid even the appearance of bias or partiality” (para. VIII). The Tribunal concludes that the JAB proceedings are not exempt from criticism.

VI. There is one last point that the Tribunal should address. On the basis of a comment made by the Tribunal as *obiter dictum* in the *Lacoste* case, the Applicant submitted observations and additional pleas in French, whereas his statement of appeal

and previous observations had been written in English. The Tribunal's above-mentioned comment was the following:

“The Tribunal wishes to make a preliminary comment, *obiter dictum*, pointing out that it has been traditional, since the United Nations Administrative Tribunal was established, for its judgements to be drafted in French or English. It is surprising therefore - given that linguistic diversity is one of the strengths of the Organization - that a French Applicant should submit her Application in English, thus making it more arduous for the Tribunal to draft a judgement in French on the basis of the documents submitted to it.” (*Ibid.*, para. I.)

The Applicant explains that the reason he did not submit his statement of appeal and his other submissions in French was because of the problems entailed in bringing informal or formal appeals before the various administrative bodies in a language other than English. According to the Applicant, the information on how to formulate a statement of appeal are offered only in English on the United Nations website; the panels of the JAB and the JDC essentially function in English; the rules of procedure of the JAB in New York exist only in English and, although very similar, are not absolutely identical, as the Tribunal has verified, to those of the JAB in Geneva, which do exist in French; there is not a single French-speaker included on the list of prospective members of rebuttal panels to review the performance of French-language translators and interpreters; and so on. These facts are indirectly corroborated by the Respondent, who states in his Answer, by way of excuse for the delay in the rebuttal procedure, that the Applicant had asked for his case to be heard by French-speakers. According to the Respondent,

“There were a number of reasons why the delay in the rebuttal process of the Applicant's [PER] was excusable and the Administration expressed regret for the delay ... The second reason [...] that it took time to constitute a rebuttal panel was that when a rebuttal panel was constituted in New York, the Applicant rejected it and requested that the panel only comprise [...] staff members ‘who had French as their working language or had a fluent working knowledge of French’”.

Based on these facts, the Applicant has made a new plea based on an allegation of discrimination, requesting the Tribunal to hold an oral hearing to consider these issues. Specifically, the Applicant makes the following requests:

“The Applicant respectfully requests the Administrative Tribunal to hear the following witnesses in this connection: (a) [...], Deputy Secretary-General,

with responsibility for United Nations reform; (b) [...], Coordinator for Multilingualism; (c) [...], member of the Joint Inspection Unit; and (d) [...], President of the International Francophone Cultural Association for Multilingualism in International Organizations. The Applicant also requests the Administrative Tribunal to give him a hearing on this subject. He is prepared to travel to Geneva at his own expense, if necessary.

The Applicant further requests the Administrative Tribunal:

(a) To order the Respondent to take all necessary measures to ensure implementation of all the General Assembly resolutions concerning the working languages of the Secretariat and all the relevant recommendations by the Joint Inspection Unit;

(b) Specifically, to order the Respondent to take the necessary measures to ensure that Secretariat staff having French as their working language can exercise all their rights and file any appeals, for example with the [JAB] and the [JDC], directly in French, without being penalized by undue delays or other reprisals;

(c) To order the Secretary-General, inter alia, to appoint to the [JAB] and the [JDC] chairpersons and panel members who can meet and deliberate in French, and to do likewise with regard to rebuttal panels;

(d) To order the [JAB], inter alia, to have its rules translated into French and to recruit French-language staff and secretaries for its panels;

(e) To order the Administration to provide the Administrative Tribunal with the necessary resources to launch and keep up to date a web site containing all the Tribunal's judgements in English and French, in a usable form."

These complaints of discrimination against French-speaking staff members in general and the Applicant in particular were not raised prior to their submission to the Tribunal. The Applicant did not address a letter to the Secretary-General or voice his grievances before the JAB. The Tribunal therefore notes that the procedures specified in staff rule 111.2 were not followed and that these new requests are not receivable *ratione materiae*. It recalls Judgement No. 571, *Noble* (1992), in which it stated that "the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision communicated to her ... renders any further consideration of that decision by the Tribunal beyond its competence". The Tribunal is therefore not the proper body to consider this matter, even though it has also experienced some of the difficulties mentioned by the Applicant in obtaining access to documents in French. For example, during its session in the summer of 2004, the Tribunal was unable to obtain the French version of the verbatim records of General Assembly plenary meetings held in May 2004. The Tribunal can only express its concern, again as *obiter dictum*, about the status of French and multilingualism in general within the Organization.

VII. For the foregoing reasons the Tribunal:

1. Considers that there was an unacceptable delay in the rebuttal procedure concerning the Applicant's PER and that there were incidents in the handling of the proceedings before the JAB which constitute a violation of the Applicant's rights of due process and that the violation merits compensation;

2. Decides that compensation of US\$ 5,000 should be awarded for all the procedural irregularities that this Judgement has found in the handling of the Applicant's case;

3. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Brigitte Stern
Vice-President

Spyridon Flogaitis
Member

Geneva, 23 July 2004

Maritza Struyvenberg
Secretary