



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1196

Case No. 1291: MAIA-SAMPAIO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas, on 2 April 2003, Leonor Maria Maia-Sampaio, a former staff member of the United Nations, filed an Application containing pleas which read as follows:

“II. Pleas

A. The Applicant alleges repeated violations of her rights as a staff member to be given fair consideration for promotion which violation deprived her of the possibility of such promotion.

B. The Applicant alleges that she was deprived of her rights under the Staff Regulations and Rules to seek redress for the wrongs to which she was subjected by the impediments raised by the Respondent and the unconscionable delays which the Respondent permitted or contrived to occur.

C. The compensation claimed by the Applicant is:

1. the difference in net base pay between what she received at the P-4 level and that to which she would have been entitled had she been promoted to the P-5 level in 1994, from that date until the date of her retirement.

2. the difference in her pension payments between what she presently receives and that to which she would have been entitled had she been promoted to the P-5 level in 1994, calculated from the time of her retirement through her expected life span.

3. monetary damages in compensation for the violation of her rights and the unconscionable delay in the processes by which she sought redress in an amount which the Tribunal feels is commensurate with her injury.”

Whereas on 4 August 2003, the Applicant filed a document entitled “Additional Explanatory Information”;

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 29 August 2003 and twice thereafter until 31 December 2003;

Whereas the Respondent filed his Answer on 29 December 2003;

Whereas the Applicant filed Written Observations on 19 April 2004;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 28 January 1970 on a three-month fixed-term appointment as an Associate Librarian at the P-2 level. Her fixed-term appointment was subsequently extended and she was promoted. At the time of the events that gave rise to this Application, the Applicant had a permanent appointment and held the P-4 level position of Evaluation Officer, Office of Internal Oversight Services (OIOS).

On 26 March 1997, the Applicant received a copy of her performance evaluation report (PER), for the period 1 June 1992 to 11 June 1994. On 4 April, she submitted a rebuttal of her PER, wherein she challenged the rating she had received for item 7, “Effectiveness in maintaining harmonious working relations”, and requested the deletion of the comments on item 3, “Quantity of work accomplished”, as well as item 7. In addition, she requested the removal of “Explanatory remarks” which had been appended by her former supervisor and asked that the comments of the Under-Secretary-General for Internal Oversight Services be withdrawn.

On 10 November 1997, the Rebuttal Panel issued its report on the Applicant’s PER, concluding, *inter alia*,

“(i) The rating ‘C’ against item 3 of the PER should be maintained, since the Panel was convinced that the performance of the [staff member] had not been up to par during the reporting period.

(ii) The rating ‘F’ against item 7 ... should be changed to ‘D’, as a fair assessment as a result of the problems encountered in the immediate work environment with the [staff member’s] immediate supervisor. An upgrading of this rating is deemed justified on the grounds that the lack of cooperation of the [staff member] seemed to stem purely from a breakdown of working relations with the immediate supervisor and not necessarily with the other staff assigned to the Unit, or with other entities with whom the [staff member] would liaise in the performance of her work. No

evidence regarding deterioration in such working relationships was provided to the Rebuttal Panel.

(iii) ... the 'Explanatory remarks' in its present form, should be withdrawn. The immediate supervisor may wish to reformulate his comments in light of the observations made herein before.

(iv) Finally, the Panel concluded that the comments contained under Section V of the PER, as prepared by [the Under-Secretary-General for Internal Oversight Services], should be retained in its present form."

On 6 July 1998, the Under-Secretary-General for Internal Oversight Services wrote a "Note to the File", which he stated was in lieu of a PER for the Applicant for 1997 and 1998. On 4 August, the Applicant objected to the content and the purpose of this "Note" and requested that it be withdrawn by 30 August.

On 9 November 1998, the Under-Secretary-General for Internal Oversight Services advised the Office of Human Resources Management (OHRM) that he concurred with the conclusions of the Rebuttal Panel and upheld its recommendations. He agreed to change the rating in item 7 from "F" to "D" and revised the "Explanatory remarks" to read as follows:

"During the period under review, [the Applicant] wanted a promotion to the P-5 level. The fact that there had never been a P-5 post vacant in the Unit during her tenure and that there was no prospect of any vacant post at that level, seemed to have no impact on her view that I had wronged her as she stated in her rebuttal statement dated 4 April 1997."

On 12 November 1998, the Applicant wrote to the Secretary-General requesting administrative review of the report of the Rebuttal Panel.

On 2 February 1999, the Applicant lodged an appeal with the Joint Appeals Board (JAB) on the issue of her performance evaluation (first appeal).

Also on 2 February 1999, the Applicant wrote to the Secretary-General requesting permission to submit the above-referenced case directly to the Administrative Tribunal but, on 5 March, her request was denied.

On 30 March 1999, a vacancy announcement was circulated for the P-5 level post of Senior Programme Evaluation Officer, Central Evaluation Unit (CEU), OIOS. The vacancy announcement indicated that short-listed candidates would be required to take a one-hour written examination. The Applicant applied for the position.

On 9 June 1999, the Applicant's former supervisor, in his capacity as Chairperson of the selection panel, informed the Applicant that she had been short-listed for the post, and invited her to sit the written examination, the results of which would determine which candidates would be invited for interview. The Applicant responded on 10 June, contesting

the introduction of written examinations and objecting to her former supervisor being Chairperson of the selection panel, in view of his “demonstrated ... hostility” to her.

On 28 June 1999, the Applicant requested the Secretary-General to review the administrative decision to request short-listed candidates to sit an examination. Also on 28 June, the Applicant submitted an appeal to the JAB requesting suspension of the administrative action requiring candidates to take a written test. In its report of 16 July, the JAB noted that holding such written examinations for the purposes of appointment or promotion was not proscribed by staff regulation 4.2 and that the Applicant could not sustain her claim of irreparable injury. It recommended that the request for suspension of action be denied, but observed that “special arrangements” should be made for the Applicant to sit the examination in light of her medical condition, and that,

“given the record of the case, and the repeated allegations by the Appellant that her supervisor has been prejudiced against her, the assessment of the examination papers should be entrusted to an official outside the New York Office so as to ensure fairness and impartiality in the selection process”.

On 19 July 1999, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had accepted the JAB’s recommendation and had “taken note of the Board’s [observations] and [would] draw the attention of the Under-Secretary-General [for Internal Oversight Services] to those suggestions”.

On 10 November 1999, the Applicant was informed that another candidate had been selected for the post of Senior Programme Evaluation Officer.

On 15 November 1999, the Applicant separated from service on health grounds.

On 10 December 1999, the Applicant requested the Secretary-General to review the administrative decision to fill the post through a written evaluation.

On 24 March 2000, the Applicant lodged an appeal with the JAB on this issue (second appeal).

The JAB adopted its report on the first appeal on 28 January 2003. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

21. The Panel first considered the issue of receivability of the appeal raised by the Respondent. The latter contended that the second part of the appeal identified by the Appellant as Case B, and related to matters connected to the ‘Note to the File’ dated 8 July 1998 ... should not be considered by the Panel. The reason invoked by the Respondent was that the Appellant did not comply with the requirement of Staff Rule 111.2 (a) ...

22. The Panel reviewed the file and found that in the Appellant's request for Administrative review dated 12 November 1998, only 'Case A', which refers to the PER rebuttal process was mentioned and no reference was made to [the] 'Note to file' ...

24. ... [T]he Panel decided that the only matter properly before it and deemed to be considered, was the decision conveyed in [the] memorandum of 9 November 1998 on the Rebuttal Panel's report ...

...

Conclusion and Recommendation

33. In light of the foregoing, the Panel *unanimously agreed* that the process of the PER had been conducted in accordance with ST/AI/240/Rev.2, ['Performance Evaluation Report System', of 28 November 1984].

34. Nonetheless, the Panel *unanimously agreed* that the PER Rebuttal Panel's recommendations, although endorsed by the head of the department, did not translate into the review of the Appellant's overall performance for the period at issue. The Panel therefore, unanimously recommends an upgrading of the overall PER rating so as to be consistent with the recommendations of the PER Rebuttal Panel and the individual ratings, and that a copy of the upgrade be inserted in the Appellant's file.

..."

The JAB adopted its report in the second appeal on 5 February 2003. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

22. ... The Panel felt that the appeal had complied with the time limits set forth in Staff Rule 111.2(a).

...

24. The Panel then entered into the substance of the case. The issue before the Panel was to determine whether the selection process at issue was tainted by any extraneous factor thereby deprived the Appellant of a promotion to the P-5 level.

25. The Panel first examined the Appellant's allegations of her [former] supervisor's ... hostility toward her, and of his involvement in the decision making as a member of the OIOS Appointment and Promotion [Panel (APP)] had adversely affected her chances for promotion. The Panel ... made a request for clarification on the matter. [The] Under-Secretary-General for [Internal Oversight Services], in his reply to the Panel's inquiry stated that [the former supervisor] was not a member of the ... APP meeting ... that deliberated on [the] vacancy announcement [at issue]. ... The Panel felt that the Appellant failed to meet her burden of proof ...

...

27. The Panel took a look at [the] vacancy announcement ... and observed that under competencies and skills, it was clearly stated that short-listed candidates would be required to take a one-hour written examination. The Panel inferred that the Appellant when applying for the post was aware that she would be asked to take a written test if she was short-listed. ...

...

Conclusions and Recommendation

30. In light of the foregoing, the Panel unanimously concluded that the Appellant has failed to prove that her non-selection for the post at issue violated any of her rights or that the promotion exercise was tainted by prejudice or other extraneous factors.

31. The Panel unanimously agreed that the case had no merit. ...”

On 2 April 2003, the Applicant, having not received any decision from the Secretary-General regarding her appeals to the JAB, filed the above-referenced Application with the Tribunal.

On 28 July 2003, the Under-Secretary-General for Management transmitted a copy of the report in the second appeal to the Applicant and informed her that the Secretary-General accepted the JAB’s conclusions and had decided to take no further action on the appeal.

On 5 August 2003, the Under Secretary-General for Managementt transmitted a copy of the JAB report in the first appeal to the Applicant and informed him that the Secretary-General had decided to accept the conclusions and recommendation of the Board, and to upgrade the overall rating of her 1992-94 PER to “C” and insert a copy of the amended PER into her file.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s rights to fair consideration for promotion were violated.
2. The Respondent’s actions were improper, unfair, subjective and biased.
3. The Applicant’s appeals to the JAB were stymied by mismanagement, incompetence or negligence, and subjected to unreasonable delays. In addition, the JAB erred in the first appeal by refusing to consider “Case B” on the merits, and in the second appeal by finding that the issue of the written examination was *res judicata*.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s claim relating to the filling of the P-5 post in 1994 is clearly time-barred, having been filed more than eight years after the contested decision was taken. The Applicant has cited no extraordinary circumstances that would warrant a waiver of the time-limits.
2. The Applicant had no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by the decision not to select and promote her.

3. The contested decision was not improperly motivated or founded on extraneous factors.

The Tribunal, having deliberated from 4 to 23 July 2004, now pronounces the following Judgement:

I. The Applicant has presented her case in a rather confusing manner. Her Application before the Tribunal covers one rebuttal procedure, one promotion exercise, three requests for administrative review, one suspension of action case, and two appeals before the JAB. Accordingly, the Tribunal must first establish what issues are properly before it by evaluating the Applicant's requests for administrative review. The Applicant filed three such requests:

- a) on 12 November 1998, she requested administrative review of the report of the Rebuttal Panel in her case;
- b) on 28 June 1999, she requested administrative review of the decision to request short-listed candidates in a promotion exercise to sit an examination; and,
- c) on 10 December 1999, she requested administrative review of the decision to fill the vacancy in question through a written examination.

The Tribunal shall consider the circumstances surrounding those requests for administrative review as well as the results thereof.

II. Whilst it is not evident whether the Applicant intended to bring the rebuttal case before the Tribunal, the Tribunal will give the Applicant the benefit of the doubt and address the matter. Insofar as the review of the Rebuttal Panel's decision is concerned, the Tribunal agrees entirely with the analysis made by the JAB in its report on the first appeal. The only irregularity in the procedure of the Rebuttal Panel was that, after certain of the Applicant's ratings were upgraded and the "Explanatory remarks" of her supervisor revised, her overall performance appraisal was not upgraded accordingly. The JAB viewed this as an "oversight" on the part of the Rebuttal Panel and unanimously recommended that the Applicant's overall rating be upgraded. The Respondent accepted this recommendation and the Applicant's PER was upgraded accordingly. The Tribunal finds that any defects there could have been regarding the rebuttal episode were thus cured.

In the same appeal to the JAB, styled as "Case B", the Applicant purported to appeal the decision by the Under-Secretary-General for Internal Oversight Services to write a "Note to the File" in lieu of a PER for the period 1997-1998. The JAB rejected this matter as not properly before it, as it had not formed part of the Applicant's request for administrative

review. The Tribunal agrees with the JAB that as this matter did not form part of the initial request for administrative review, as required by staff rule 111.2 (a), it was not properly before the Board. In Judgement No. 878, *Orfali* (1998), the Tribunal held that “the JAB does not have the power to waive non-compliance with the requirement of requesting administrative review”. In addition, the Tribunal recalls Judgement No. 571, *Noble* (1992), wherein it held that “the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision ... renders any further consideration of that decision by the Tribunal beyond its competence”. Accordingly, the issue of the “Note to the File” is rejected as non-receivable, *ratione materiae*.

Equally non-receivable is the delay in production of the Applicant’s PER. The Applicant makes reference to such a delay in violation of the provisions of ST/AI/240/Rev.2, but this matter was subject neither to administrative review nor appeal to the JAB. For all of the reasons set out above, the delay in production of the PER is also non-receivable, *ratione materiae*.

III. The Tribunal must now turn its attention to the impugned administrative decision which formed the basis of the JAB report in the second appeal. The Applicant applied for the P-5 level post of Senior Programme Evaluation Officer, CEU, OIOS, knowing from the vacancy announcement that short-listed candidates would be required to take a one-hour written examination. After she was advised that she had been short-listed and was invited to sit the examination, the Applicant sought both administrative review of the decision to request short-listed candidates to sit an examination, and suspension of the action requiring candidates to take such an examination. The JAB recommended that the request for suspension of action be denied but observed that “special arrangements” should be made for the Applicant to sit the examination. The Secretary-General accepted these recommendations. It appears from the file that the Applicant did not pursue her objection to the examinations in principle but waited until the post had been filled and then filed yet another request for administrative review of the decision to fill the post via such an examination.

Despite the outcome of her suspension of action case, the Applicant refused to submit herself to a written test. She now challenges the validity of the promotion process.

“The Tribunal’s jurisprudence emphasizes that it is not the Tribunal’s role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General’s duty to give each candidate full and fair consideration has been reasonably fulfilled”. (Judgement No. 828, *Shamapande* (1997).)

In this case, the Applicant's refusal to sit the test rendered it impossible for the Respondent to give her any further consideration.

The Tribunal is satisfied that written examinations for the purpose of appointments or promotions are not prohibited by staff regulation 4.2, and it stands to reason that the Administration may set out the modalities of examinations in order to best decide on the selection of candidates. Setting such conditions on the promotion exercise did not violate the conditions of employment of the Applicant; accordingly, the Applicant's refusal to sit the examination is fatal to her case. The examination was a general measure for all short-listed candidates; it was not directed against her. The requirement was made public in the vacancy announcement. The Applicant applied for the position and was successful in being short-listed without objecting to the requirement. Even if discrimination existed in the requirement, and the Applicant does seem to believe it did, by refusing to sit the examination she did not give the alleged discriminators a chance to discriminate against her!

IV. The Applicant alleges that her supervisor's hostility towards her and his involvement in the decision-making process as a member of the APP adversely affected her chances for promotion. Whilst her supervisor was involved in the promotion exercise and was Chairperson of the selection panel, arrangements were to be made for the assessment of the Applicant's examination to be performed away from Headquarters. The Tribunal finds, therefore, that as such arrangements would have been made for the Applicant and as she had already been short-listed, she cannot substantiate her allegation that the promotion was denied to her for extraneous motivations.

In view of the above, the Tribunal is satisfied that the discretion of the Secretary-General in the impugned promotion exercise was not vitiated by bias. It has consistently held that the *onus probandi* is on the Applicant where such allegations of bias or extraneous motivation 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, the Tribunal finds that the Applicant has not discharged her burden of proof.

V. Finally, the Tribunal wishes to note that the Applicant in this case purported to rely substantively upon her submissions to the JAB, which she annexed to her brief Application and "deemed part" thereof, rather than submitting a complete Application to the Tribunal. This is a practice the Tribunal finds troubling and unhelpful.

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

(Signatures)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary