United Nations AT/DEC/1213

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1213

Case No. 1302: WYSS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Brigitte Stern, Vice-President; Mr. Dayendra Sena Wijewardane**;**

Whereas at the request of Elisabetta Wyss, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 January 2003 and twice thereafter until 31 July 2003;

Whereas, on 11 July 2003, the Applicant filed an Application containing pleas which read, in part, as follows:

"**I. Pleas**

…

1. The Applicant respectfully requests the Tribunal to order the … Administration to produce …documents …

…

2. The Applicant hereby requests an oral hearing, …

B. ***Redress Sought***

3. The Applicant respectfully seeks:

   a. An order declaring the present new policy rules invalid and that the former policy rules will remain in effect until replaced with legally valid rules;

   b. In the alternative, an order permanently annulling that portion of the new policy rules which provide for the automatic conversion of fixed-term appointments into indefinite appointments, and that portion of the new policy rules equating rights of those staff members within [the United Nations High Commissioner for Refugees (UNHCR)] who were granted 'new' indefinite appointments with those staff members possessing 'old' indefinite appointments;

   c. An award of legal fees and costs incurred in the amount of USD 7,500;

   d. An award of moral damages in the amount equal to two years of [the] Applicant's net annual salary;

   e. Such other relief which the Tribunal feels is equitable, necessary and justified, including but not limited to any relief which the [Tribunal] can fashion to put the Applicant back in the same position vis-à-vis the job security she possessed before the attempted implementation of the new policy rules".

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 7 November 2003 and periodically thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 30 April 2004;

Whereas the Applicant filed Written Observations on 30 July 2004;

Whereas, on 23 November 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"***[Applicant's] Professional Record***

… The [Applicant] entered the service of … UNHCR, Geneva, on 9 September 1974, as a clerk/typist, at the GS-2 level. Her short-term contract was extended several times until 1 June 1975, when she was granted a one-year fixed-term appointment as a bilingual typist/clerk … at the G-3 level … This appointment was [subsequently] renewed …

… As of 1 January 1978, [the Applicant] holds an 'indefinite appointment'. She is currently assigned to the Bureau for Central Asia, South West Asia,

North Africa and Middle East (CASWANAME), at the GS-7 level, on a post of secretary.

…

Summary of Facts

…

… On 2 July 1999, through an Inter-Office Memorandum/Field Office Memorandum (IOM/FOM) N° 65/1999, the High Commissioner informed all staff members at Headquarters and in the field about a new policy in human resources management on contracts, postings and promotions, to become effective on 1 January 2000.

… By another IOM/FOM N°82/1999 dated 23 August 1999, the Director, Division of Resource Management, UNHCR, Geneva, … provided all staff members at Headquarters and in the field with … further information about the new … policy …

… On 20 December 1999, the [Applicant] wrote to the Secretary-General requesting him to review 'the decisions taken by [UNHCR] beginning on 2 July 1999, purporting to institute a "New Policy Framework for Postings, Promotions and Contracts" at UNHCR'.

… The same day, the [Applicant] also submitted a request to the … JAB [in Geneva]for suspension of action of the implementation of the policy.

…

… In its report dated 30 December 1999, the JAB Panel entrusted with the consideration of the request for suspension of action recommended that the request be rejected on the basis that it found no evidence … to prove that 'this new policy would directly or irreparably injure the [Applicant's] rights as staff member', and that it found that 'the said policy does not affect the [Applicant's] terms of employment …'.

… [On] 4 January 2000, … the Secretary-General [advised the Applicant that he had accepted] the Panel's recommendation.

… On 24 March 2000, the [Applicant lodged an appeal on the merits with the JAB.]

…"

The JAB adopted its report on 27 May 2002. Its conclusions and recommendations read, in part, as follows:

"***Conclusions and Recommendations***

52. For the foregoing reasons, the Panel concludes that the appeal is **not admissibl**e for the reason that it is time-barred and subsidiarily for the reason that the constitutive element for an appeal to be receivable is lacking: there is no administrative decision that the Appellant could have contested.

53. In view of its conclusion, the Panel finds that there is no valid basis for entering further into the merits of the case.

54. Consequently, the Panel unanimously recommends to the Secretary-General to reject the present appeal."

On 31 October 2002, the High Commissioner informed all UNHCR staff members of the decision to freeze the issuance of indefinite contracts to newly recruited staff members, effective 1 November 2002.

On 2 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General had decided to accept the JAB's unanimous recommendation and to take no further action on her appeal.

On 11 July 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in determining that the Applicant's appeal was time-barred and in not identifying an "administrative decision". The Applicant appeals the implementation of the new policy rules, which became effective as of 1 January 2000. The Applicant requested administrative review on 20 December 1999, well within the time limits for initiating the appeal process.

2. The increased number of staff members entitled to "indefinite" appointments constitutes a threat to the acquired rights and job security of many staff members, including the Applicant.

3. The promulgation of the new policy rules was *ultra vires* and procedurally flawed.

4. The new policy rules violate the Applicant's rights under the principle of equal treatment by putting her at risk of termination while other United Nations general service staff holding the same type of appointment will retain the benefit of owning an indefinite appointment without similar risk of separation in the event of a staff reduction.

Whereas the Respondent's principal contention is:

The JAB properly concluded that the Applicant's request for administrative review by the Secretary-General of the contested decisions was time-barred and therefore not receivable.

The Tribunal, having deliberated from 1 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant challenged before the JAB the implementation of new policy rules promulgated by UNHCR, which became effective as of 1 January 2000. Having considered the case, the JAB determined that it was irreceivable and the Secretary-General accepted the JAB's recommendation to reject it. It is this decision that the Applicant appeals.

II. The Tribunal must first make a determination on the issue of receivability. A finding that the case is not receivable would negate the need to enter into its merits.

The essential element of an appeal is that there is a contested "administrative decision". The Applicant contends that the contested decision is a set of new rules which entered into force in 2000 and which, according to the Applicant, could potentially cause her injury if a Reduction in Force (RIF) exercise was to take place some time in the future. The Applicant claims that under the former rules, her status as the holder of an indefinite appointment provided her with employment security, which the new rules impinge upon. The Tribunal has recently addressed the issue of what constitutes an administrative decision in its Judgement No. 1157, *Andronov* (2003) as follows:

> "There is no dispute as to what an 'administrative decision' is. It is acceptable by all administrative law systems that an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions."

III. Following its ruling in *Andronov* (*ibid.*), the Tribunal finds that in this case there is no appealable administrative decision, as the new rules cannot be considered as such and, therefore, the case is irreceivable *ratione materiae*.

The Tribunal notes that in support of her Application, the Applicant refers, inter alia, to ILOAT Judgement No. 1852, *in re Macchino Farías* (1999), in which the ILOAT was seized with a similar matter. Whilst the Applicant chose to only partially cite that decision, the ILOAT complete ruling was as follows:

> "1. … [I]t is clear … from the … submissions … that [the complainant's] aim was to prevent the repeal of the former Combined Rules and Local Staff Regulations by the new Local Staff Regulations as of 1 January 1998.
>
> 2. The complainant does not identify any … decision which affects him directly. He seeks only to prevent the enforcement of the new Regulations, apparently from fear that their application might affect his acquired rights.
>
> 3. Manifestly, the complaint is irreceivable. The Tribunal's case law is consistent to the effect that a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to him. This is a general attack which is not tied to any particular application of the impugned rules to the complainant. It will not therefore be considered by the Tribunal."

It is thus evident that the ILOAT's ruling does not support the Applicant, as it is consistent with the approach adopted by this Tribunal as concerns what is to be accepted as an appealable decision.

Moreover, following the logic of the quoted ILOAT judgement and the jurisprudence of this Tribunal, an appealing staff member must demonstrate that he/she suffered some injury as a consequence of the violation of his/her terms of employment, manifested through the contested decision. (See Judgement No. 1220, *Araim* (rendered during this session).) In the present case, the Applicant has not convincingly argued the existence of any specific and concrete damage to her rights or terms of employment. She maintains that, formerly, the reduction of personnel would start with those staff members serving on fixed-term contracts, and that now she was effectively placed in the same category as them. It seems to the Tribunal that the Applicant only had a false sense of security, because when the Administration decides on reduction of personnel, additional criteria are involved, such as the performance record of the personnel concerned and the length of service with the Organization. In any event, the Applicant does not claim to have been the object of any RIF, and what she refers to as damage, at worst, is actually only a risk. Risk is not equivalent to damage and cannot be substituted for it. Had the Administration carried out an RIF exercise and had the Applicant's appointment been terminated as a result thereof, she could then have brought her case, arguing that she was selected for termination because of the new rules and the resulting large number of holders of new indefinite appointments had

caused her to be selected for termination. She would still have had to overcome the burden of proving that the new rules violated her rights, but that is not the issue at hand. Unless the Applicant can demonstrate injury caused to her as a result of a specific decision, her case remains one of seeking an "advisory opinion" which is outside of the Tribunal's jurisdiction.

IV. The Applicant contends that she had a right to have her case decided on its substantive merits and that rejecting her case on a procedural aspect violated her rights. The Tribunal is puzzled by this assertion. Procedural aspects of the law and the obligation upon parties to comply with them have been recognized by all legal systems, and this Tribunal is no exception, as stated in its Judgement No. 1106, *Iqbal* (2003):

> "The Tribunal reiterates the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization."

The requirement that an appeal be receivable, and the Tribunal's insistence thereon, cannot be considered as being in violation of a staff member's rights. Rules of procedure have the same legal value as substantive rules and should, therefore, be respected and not be dismissed or undermined for being "only" procedural. Many cases have been adjudicated by many different courts following many different legal systems on the basis of procedure. Substance in those cases would have been deemed to have given way to form. The present case is another such case and the Applicant's contention in this regard is rejected.

V. Lastly, the Tribunal notes that in its report, the JAB concluded that the case was irreceivable based on two grounds: *ratione temporis* and *ratione materiae*. The Tribunal assumes that the JAB's intention was to state that, had the case not been irreceivable *ratione materiae*, and had there in fact been an appealable administrative decision, it would have still found the case to be irreceivable *ratione temporis*. Otherwise, the JAB's reasoning would have an internal contradiction, since it would simultaneously include a finding that the appeal was invalid because there is no decision and because the appeal process was initiated without the two-month period from the date of the (non-existent) decision, in violation of staff rule 111.2(a).

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

(Signatures)

Julio **Barboza**
President

Brigitte **Stern**
Vice-President

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary