

**Administrative Tribunal**

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1220

Case No. 1312: ARAIM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas, on 18 October 1990; on 2 March 1992; on 28 August 1992; on 10 May 1993; and, on 17 August 1993, Amer Araim, a former staff member of the United Nations, filed Applications requesting the Tribunal, inter alia, to find that the Administration had failed to give his candidature to a number of D-1 posts meaningful consideration, and alleging discrimination. In respect of the above Applications, the Tribunal rendered the following Judgements: No. 533 (1991), No. 622 (1993), and No. 657 (1994), awarding the Applicant a total of \$9,000 for injuries sustained when the Administration failed to give his candidature to the D-1 posts meaningful consideration but rejecting all pleas relating to discrimination; No. 658 (1994) rejecting the Application in its entirety; and, No. 675 (1994) remanding the case to the JAB for correction of procedure.

Whereas at the request of the Applicant, 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 1996 and periodically thereafter until 30 June 2003;

Whereas, on 18 June 2003, the Applicant filed an Application containing pleas which read, in part, as follows:

“II. PLEAS

...

8. On the merits, the Applicant respectfully requests the Tribunal *to endorse* the ... conclusion[s] of the [Joint Appeals Board (JAB)] ...

...

11. The Tribunal is further requested, in view of ... the repeated violations of the Applicant's rights ... to award him an exemplary compensation equal to two years' base salary.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 10 February 2004 and twice thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 30 April 2004;

Whereas the Applicant filed Written Observations on 22 October 2004;

Whereas the facts in the case, additional to the facts outlined in Judgements No. 533, No. 622, No. 657, No. 658 and No. 675, are as follows:

On 7 March 1994, the Applicant lodged an appeal with the JAB in New York contesting the decision of the Appointment and Promotion Board (APB) not to include his name on the D-1 promotion register.

On 11 November 1994, the JAB issued its report. Its conclusions and recommendations read, in part, as follows:

“Conclusions

63. ... [T]he Panel unanimously concluded that the Appellant was not treated properly on several occasions.

64. The Panel was not convinced that the Appellant's candidature ... was given ‘special consideration’ [in accordance with Judgement No. 533 (1991)]

...

...

Recommendations

67. The Panel unanimously recommends

- that a candid and honest explanation be given to the Appellant regarding his performance and career prospects;
- that the Appellant be assigned to an appropriate post within the Secretariat in case his current post is abolished through the restructuring exercise; and

- that the Administration abides by the rulings of the Administrative Tribunal especially in cases concerning the consideration of candidates for promotions.”

On 23 July 1995, 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 endorse the JAB's recommendations and to inform the Office of Human Resources Management (OHRM) and the APB to give fair and special consideration to his candidature for new posts.

On 19 January 1999, the Applicant was separated from service.

On 18 June 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Administration failed to act on the JAB's recommendations despite the fact that they were endorsed by the Secretary-General.
2. The Administration acted in an illegal and retaliatory manner by intentionally frustrating the Applicant's opportunity to have full and fair consideration of his candidature for promotion to any D-1 post. The APB acted in an illegal manner by endorsing the decision to exclude the Applicant's candidature from being fully and fairly considered for such promotion.
3. The Administration violated its commitments to implement the relevant provisions of the Tribunal in Judgements No. 533, *Araim* (1991); No. 622, *Araim* (1993); and, No. 657, *Araim* (1994).

Whereas the Respondent's principal contentions are:

1. While the Applicant seeks to re-argue in this case issues already addressed in his previous Tribunal cases, the present case relates only to the establishment of the 1992 D-1 promotion register and to the Applicant's assertion that his name should have been included in that promotion register.
2. No staff member has the right to be promoted or to be selected for any particular post. The Applicant had the right to be fully considered for promotion.
3. The 1992 D-1 promotion register was properly established. The Applicant was duly considered by the relevant promotion bodies.

The Tribunal, having deliberated from 29 October to 24 November 2004, now pronounces the following Judgement:

I. This is not the first time that the Applicant has requested the Tribunal to re-examine the Administration's attitude towards him, particularly as concerns his attempts to be promoted to any of the seven D-1 posts for which he had applied during the first half of the 1990s. In fact, the Applicant's prior appeals led to quite extensive case law by this jurisdiction. As in the Applicant's previous cases, the contested decision presently before the Tribunal is, once again, related to and stems from procedures that followed the Administration's decisions, taken between 1990 and 1992, not to promote the Applicant to a D-1 post, which led to the Tribunal's Judgments No. 533, *Araim* (1991); No. 622, *Araim* (1993); No. 657, *Araim* (1994); No. 658, *Araim* (1994); and, No. 1158, *Araim* (2004). The underlying contention brought by the Applicant in the present case appears to yet again involve his allegations of discrimination and mistreatment.

Following the Applicant's appeal to the JAB, in which he alleged that he was discriminated against due to his national origin; that he was not afforded full and fair consideration to any of the D-1 posts for which he had applied; and, that his rights had been violated when his name was not included in the D-1 1992 promotion register, on 11 November 1994, the JAB unanimously recommended as follows:

- “- that a candid and honest explanation be given to the Appellant regarding his performance and career prospects;
- that the Appellant be assigned to an appropriate post within the Secretariat in case his current post is abolished through the restructuring exercise; and
- that the Administration abides by the rulings of the Administrative Tribunal especially in cases concerning the consideration of candidates for promotions.”

On 23 January 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and advised him as follows:

“The Secretary-General has re-examined your case in the light of the Board's and has taken note of its conclusions and recommendations. The Secretary-General endorses the Board's recommendations and will inform OHRM and APB to give fair and special consideration to your candidature for new posts”.

It is against the alleged non-implementation of this decision that the Applicant appeals.

II. The Tribunal notes that the present Application stems from a decision taken in January 1995. The Applicant was separated from service in 1999. During this four-year period, between the date of the contested decision and his separation from service, and even beyond it, the Applicant chose to request extensions of the time-limit to file his Application with the Tribunal. Given the Applicant's unwavering desire and determination to be promoted to any D-1 post, as appears from the file of this as well as of his other cases, the Tribunal is puzzled by the fact that the Applicant allowed the time to elapse without filing his Application, effectively extinguishing his claim for promotion. In so doing, the Applicant, in fact, transformed his claim from a claim for promotion into one for compensation. The Tribunal has serious concerns about this dilatory approach, which could be interpreted as amounting to an abuse of procedure or *détournement de procédure*. As a matter of principle, it would be against the public interest to allow the use of these procedures in order to obtain monetary compensation when the material redress of the alleged injustice is not sought in a *timely* manner.

III. The Tribunal now turns its attention to the nature of the decision of the Secretary-General, the alleged non-implementation of which prompted these proceedings. The Tribunal notes that, by endorsing the recommendations of the JAB and deciding to inform the relevant offices to give "fair and special consideration to [the Applicant's] candidature for new posts", the Secretary-General effectively undertook a commitment in respect of the Applicant's employment, which could only have its manifestation in future behaviour, i.e., in ensuring that in the future, special attention would be given to the Applicant's candidature. It therefore follows that this part of the Secretary-General's decision could not be appealable in the present proceedings, as it could only be challenged in the context of any future promotion exercise which would fail to accord the Applicant the promised "special consideration". Only at such time could the Applicant initiate proceedings against specific decisions involving non-observance by the Administration of the Secretary-General's promise, as contained in the decision now under consideration. The Applicant's claim in this regard is therefore not against an appealable administrative decision.

IV. The Tribunal in the present case will follow its findings in Judgment No. 1158, *ibid*, as they also apply in the present case. In that Judgement, the Tribunal considered, inter alia, the Applicant's contention that he had not been given full and fair consideration in the promotion procedures. This was also the subject of a further

appeal brought by him before another JAB Panel, which found and recommended in the Applicant's favour (JAB report dated 26 February 1996) as follows:

"Findings and Recommendations

56. The present Panel unanimously *found* that:
- (a) the Respondent had not proven that the candidature of the Appellant had been fully and fairly considered for any of the seven D-1 posts in the 1992 Promotion review as the Administration failed to produce 'underlying and supporting documentation, such as minutes, notes and other records of APB ...' as mentioned in the Administrative Tribunal's Judgement No. 675;
 - (b) the decision of the Secretary-General, as transmitted by [the Under-Secretary-General for Administration and Management] in her letter of 23 June 1993 to the Appellant, rested on partly erroneous basis as the report of the Ad Hoc Investigation Panel on which it was based was itself tainted by errors[;]
 - (c) the Administration had not been candid and transparent in its dealing with the Appellant;
 - (d) the Appellant was entitled to compensation for the injury he had suffered.
57. Therefore, the present Panel unanimously *recommends* that:
- (a) the Appellant be granted compensation amounting to two months' net base salary[;]
 - (b) a candid and honest explanation be given to the Appellant regarding his career prospects."

The above recommendations were accepted in their entirety by the Secretary-General and the Applicant never appealed that decision. The Applicant cannot now indirectly re-open that case before the Tribunal. The Respondent claims that the damages awarded to the Applicant have been paid to him and that he was provided with the explanation as recommended by the JAB. The Applicant did not present any evidence to contradict this. Moreover, the Applicant accepted the benefits of that decision and never questioned it before the Tribunal by way of appealing it. The Tribunal has already considered this issue and has determined in Judgment No. 1158 *ibid.* that

"it is an established principle in administrative law that no one can revive procedures when a case is time-barred, that no one has a legally protected interest to bring up proceedings against decisions that he has accepted and not questioned in time, and finally that no one can be compensated for the same reason more than once".

Since the findings contained in the above-mentioned unchallenged JAB report essentially pertain also to the issues raised by the Applicant in his present Application, the Tribunal finds that the Applicant is barred from re-litigating them now, in accordance with the principles as stipulated in the above-cited Judgement.

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

(Signatures)

Julio Barboza
President

Spyridon Flogaitis
Member

Jacqueline R. Scott
Member

New York, 24 November 2004

Maritza Struyvenberg
Executive Secretary