

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1221

Case No. 1317: SHARMA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, First Vice-President; Ms. Brigitte Stern, Second Vice-President;

Whereas at the request of Puran Sharma, a 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 periodically thereafter until 31 October 2003;

Whereas, on 31 October 2003, the Applicant filed an Application requesting the Tribunal:

“8. ... [T]o find:

(a) The Applicant’s rights to a fair evaluation of his performance, pursuant to staff rules 112.6 and 101.3, administrative instructions ST/AI/411 [of 18 September 1995] and ST/AI/1997/5 [of 14 October 1997, both entitled “Performance Appraisal System”,] have been denied;

(b) The Applicant was further denied his rights to have the matter properly reviewed because of the non-existence of a rebuttal panel to which he could have appealed;

...

(d) The Secretary-General’s decision to consider the matter non-receivable further exacerbated the harm done to the Applicant, and the callous and perfunctory manner in which his case was dismissed justifies compensation.

9. Therefore, ... *to order*:
- (a) that the Applicant's Performance Appraisal System [report] (PAS) for the period 1 April 1997 through 31 March 1998 be nullified;
 - (b) that a statement from the Administrative Tribunal be placed in the Applicant's Official Status file in lieu of the PAS for that period. This statement should declare the PAS evaluation invalid and should contain a description of his duties performed during that period;
 - (c) the payment of compensation, for abuse of authority, denial of due process rights, for the violation of the Applicant's contractual rights and for the moral suffering and professional prejudice inflicted on him."

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 28 February 2004;

Whereas the Respondent filed his Answer on 27 February 2004;

Whereas, on 7 July 2004 the Applicant filed Written Observations amending his pleas as follows;

"The Applicant respectfully requests that the Tribunal find that:

...

- (b) the Rules and Regulations of the United Nations and its Administrative Instructions apply to the Applicant who holds a United Nations contract;
- (c) pursuant to the admission of the Respondent, the [United Nations Joint Staff Pension Fund ('UNJSPF' or 'the Fund')] cannot arbitrarily limit the Rules and Regulations applied to [United Nations] staff members working at the ... Fund;
- (d) the Applicant was denied due process when an essential part of his contract, i.e. the preparation and completion of his performance evaluation, was not done in accordance with the procedures set out by the Respondent and upon which the Applicant was entitled to rely. ...;

..."

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

"Employment History

... The [Applicant] joined the Organization on 24 March 1969 as a Messenger at the G-1 level on a three-month fixed-term appointment which was extended through 23 December 1969. [At the time of the events which gave rise to this Application, the Applicant had a permanent appointment and had been transferred to the UNJSPF, where he held the G-6 position of Computer Programming Assistant.]

Summary of the Facts

... In a Memorandum dated 5 November 1998, ... the Chief Executive Officer (CEO) of the UNJSPF informed ... [the Office of Human Resources Management (OHRM)], about the exceptional procedures implemented in the ... Fund for the first PAS exercise, from April 1997 through March 1998.

... According to [the CEO], the ... Fund decided, after discussing the issue with the staff, that no mid-year reviews would be conducted and that only comprehensive overall appraisals (Item F: First Appraisal Officer's overall annual performance appraisal rating and comments) would be conducted rather than specific evaluations for Items A (Year-end Appraisal of the work plan), B (Year-end appraisal of performance dimensions), C (Year-end appraisal of gender and cross-cultural responsiveness), D (Year-end appraisal of progress on job-related development plan), [and] E (First Appraising Officer's assessment of the staff member's PAS compliance).

[According to the Applicant, the CEO made it clear that, while the grading system ranged from "1" to "5", with "1" being the highest possible grade, no ratings of "1" would be given.]

... In a memorandum dated 12 March 1999, [the CEO] informed [the] Assistant Secretary-General for Human Resources Management, that

'Bearing in mind that the ... Fund is a small office that is not under the administrative authority of the Secretary-General and has a large number of general service staff, a formal JMC [Joint Monitoring Committee] was not constituted during this first round of PAS implementation. However, my senior management staff and I have had extensive discussions/negotiations with supervisors and staff representatives during the entire process.'

[On 9 February 1999, the Applicant's First Appraising Officer gave him an overall rating of 'Fully Meets Performance Expectations' under section F of his PAS and added a number of comments.]

...

... On 28 April 1999, [the Applicant] submitted detailed observations on [these] comments; he objected to both the content and the form of the appraisal, as well as to an alleged absence of 'feedback' about his work from his supervisor.

... [The] Chief, Operations, UNJSPF, signed [the Applicant's PAS] on 7 May 1999 as Second Appraising Officer, endorsing [the First Appraising Officer's] appraisal."

On 4 June 1999, the Applicant requested the Secretary-General to review the administrative decision compelling him to sign his PAS "because the ... Fund failed to follow [ST/AI/1997/8], thereby denying me of administrative due process".

On 29 July 1999, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 25 April 2002. Its considerations and decision read as follows:

“Considerations

16. The members of the Panel studied the entire content of the appeal file, including the Appellant’s contention that he had suffered harm from the manner and preparation of his PAS and his allegations of harassment and discrimination. The Panel agreed with the Respondent’s contention that his appeal is not receivable on two grounds. [The receivability arguments contended by the Respondent were as follows: the proper avenue for the Appellant to challenge his performance appraisal was through the rebuttal procedure; and, the decision by the UNJSPF to gradually implement the PAS did not violate his terms of employment.]

Decision

17. The Panel decided that the appeal was not receivable.”

On 26 August 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB’s conclusions and had decided to accept its unanimous recommendation and to take no further action on his appeal.

On 31 October 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Applicant is a staff member of the United Nations and his employment is governed by the Staff Regulations and Rules.
2. The Applicant’s PAS for the period 1 April 1997 to 31 March 1998 was invalid, as the UNJSPF violated the provisions of the “Memorandum of Understanding with respect to United Nations Personnel Procedures applicable to the United Nations Joint Staff Pension Fund” as well as ST/AI/1997/8, “Performance Appraisal System”, of 9 December 1997.
3. The JAB erred in finding the case non-receivable. Further, no rebuttal procedure was open to the Applicant.
4. The decision of the UNJSPF not to grant any “1” ratings for the PAS period in question was discriminatory.

Whereas the Respondent’s principal contentions are:

1. The decision by the UNJSPF to implement ST/AI/1997/8 gradually was legal, and the Applicant’s right to have his performance appraised was not breached.

2. The correct recourse for complaints regarding PAS was the rebuttal procedure; the Applicant chose not to exercise this right.

3. The Applicant has shown no reason why the Tribunal should substitute a statement detailing his functions for his PAS.

4. The Applicant has shown neither harm nor prejudice and is, therefore, not entitled to compensation.

The Tribunal, having deliberated from 3 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant was at all material times a Computer Programming Assistant employed in the UNJSPF at the G-6 level. In these proceedings, he seeks a declaration that his PAS for the period 1 April 1997 until 31 March 1998 be declared null and void on the grounds that it was prepared other than in accordance with staff rules 112.6 and 101.3 as well as certain Administrative Instructions. The Applicant contends that the application of such rules and instructions was mandatory and could not have been lawfully departed from or modified. He also claims that he was denied the right to have his PAS properly reviewed, claiming that there was no rebuttal panel to which he could have appealed. The Applicant seeks compensation for the alleged violation of his rights and for what he claims was the erroneous ruling of the Respondent that his case was not receivable.

II. Whilst the First Appraising Officer gave the Applicant an overall rating of “fully meets Performance Expectations”, the Applicant takes exception to certain remarks made by her under the heading “First Appraising Officer’s Overall Comments”. On 28 April 1999, the Applicant submitted detailed observations on the said comments, objecting both to the form and to the content of the appraisal as well as to the alleged absence of “feedback” about his work from his supervisor. On 7 May 1999, the Second Appraising Officer endorsed the First Appraising Officer’s appraisal of the Applicant.

Having been instructed on 14 May 1999 to sign his PAS, on 4 June the Applicant requested administrative review of this request, asserting that the Fund had failed to follow administrative instruction ST/AI/1997/8. The Applicant alleged that this denied him administrative due process and claimed that the PAS should be declared null and void. In the absence of a reply, on 29 July 1999, the Applicant submitted his appeal to the JAB.

The Applicant's principal contentions to the JAB were that the UNJSPF had not complied with the procedures stipulated by ST/AI/1997/8 in the preparation of his PAS; that the PAS contained factual inaccuracies; and, that the alleged "violations" of his rights were part of a campaign of harassment and discrimination against him. The Respondent's principal contentions were as follows: if the Applicant wished to challenge his PAS, the appropriate way to do so was through the rebuttal process; the decision to gradually implement ST/AI/1997/8 was a legitimate exercise of the Fund's discretionary managerial powers; the matters complained of by the Applicant were not violations of his rights or of his terms of employment; and, he had not been treated unequally as the very same PAS procedures applied equally to all UNJSPF staff members in a like position to that occupied by the Applicant. The Respondent further asserted that there was no evidence to substantiate the Applicant's claims of harassment or discrimination.

The JAB expressed its agreement "with the Respondent's contentions that [the Applicant's] appeal was not receivable on two grounds". The Applicant complains that the JAB report did not identify those grounds but it is clear to the Tribunal that the JAB accepted the grounds contended by the Respondent, which it had outlined fully in its report when it laid out the contentions of the parties. According to paragraph 12 (a) therein, the Respondent had contended as follows:

"The appeal is not receivable as 'the proper avenue for Appellant to challenge his performance appraisal is through the rebuttal procedure ...' Moreover, the decision by the UNJSPF to gradually implement the PAS - a decision which falls within the discretionary powers of the Administration - does not violate Appellant's terms of employment."

The Secretary-General, in his letter to the Applicant of 26 August 2002, clarified any possible doubts which may have existed as he set out his agreement with the Board's conclusion that

"your appeal is not receivable because the proper avenue for challenging your performance appraisal is through the rebuttal procedure, and also because the UNJSPF's decision to gradually implement the performance appraisal system in the UNJSPF is not an administrative decision that violates your terms of employment".

III. Subject to what is stated in paragraph VI hereunder, in the opinion of the Tribunal the Respondent's decision was reasonable and legitimate. The structure and system of management of the Organization and of its various units must, to some

degree, be considered to be organic or dynamic and must allow for some flexibility. Whilst semi-autonomous units such as the UNJSPF are obligated to vindicate a staff member's rights and entitlements as codified in the Staff Regulations and Rules, other administrative issuances may, of necessity, require some modification in their implementation and application, depending on the requirements, resources and capabilities of individual units. Management must, by definition, involve the exercise of some discretion and initiative and cannot always be achieved by the application of intransigent and sterile formulae. The record supports the findings of the JAB that the PAS had been discussed between management and supervisors and staff representatives within the UNJSPF and that the manner in which it was to be implemented had, in large measure, been agreed. What is important is that administrative issuances should be acknowledged and that the manner in which they are implemented should be even-handed and fair, so that a particular sector cannot complain that it has been subjected to invidious discrimination or to unfairness when compared with persons in like position.

As stated by the Tribunal in Judgement 268, *Mendez* (1981), equality of treatment is that "those in like situation should be treated alike". In the opinion of the Tribunal, the Applicant has singularly failed to show that the manner in which the UNJSPF implemented the Administrative Instruction at the material time failed to vindicate his rights to equality of treatment as against colleagues within the Fund. His complaints that there was inequality of treatment because the regime under which his PAS was prepared was different from that in place for staff members outside the UNJSPF, and that there was a difference between staff members of the UNJSPF depending upon whether they were assigned to the Investment Management Section or to the New York staff, are rejected for the reasons stated. The Tribunal accepts that the differences of approach or the differences in regime as between different units - or even different sections in one unit - are acceptable and permissible provided that they are fair and that they do not result in unacceptable discrimination or arbitrary disadvantage and no such case has been made out by the Applicant here. In this regard, the Tribunal recalls its consistent jurisprudence that "the *onus probandi*, or burden of proof, is on the Applicant where allegations of extraneous motivation are made" (Judgement No. 1069, *Madarshahi* (2002)), and finds that the Applicant has failed to discharge that burden.

IV. In the course of their pleadings, both parties rely upon a "Memorandum of Understanding with respect to United Nations Personnel Procedures applicable to the United Nations Joint Staff Pension Fund". Whilst the Memorandum of Understanding,

which was concluded between the UNJSPF and OHRM, post-dates the events central to these proceedings, the Tribunal is satisfied that it accurately sets out what the position actually was between the two offices at all material times, and that it accurately reflects the position between them. Paragraph 3 of the said Memorandum of Understanding confirms that the UNJSPF enjoyed some autonomy in relation to the application or implementation of administrative procedures and directives. It provides that, whilst UNJSPF staff hold United Nations appointments, enjoy United Nations benefits and entitlements, and are subject to the Staff Regulations and Rules, “the [United Nations’] administrative procedures and directives are not automatically applicable to the Fund staff, since the requirements of the Board take precedence”.

The essential features arising from the Staff Rules relied upon by the Applicant are that a performance report was to be prepared annually by a staff member’s supervisor and form part of the staff member’s cumulative record. Staff members were to be evaluated for their efficiency, competence and integrity through a performance appraisal mechanism to assess compliance with the standards set out in the Staff Regulations and Rules for the purposes of accountability. In the opinion of the Tribunal, the system which had been implemented by the UNJSPF for the period in issue fully honoured the spirit of the said rules *in their essence* and did not infringe the Applicant’s rights in any way. The appraisal system which was then adopted had been set up in agreement with the Assistant Secretary-General for Human Resources Management and was, in the opinion of the Tribunal, within the limits of discretion recognized by the afore-mentioned Memorandum of Understanding. In all of the circumstances of the case, the Tribunal is satisfied that the manner in which the UNJSPF sought and intended to implement ST/AI/1997/8 was legitimate and permissible, even with the modifications which management saw fit to make thereto, so that the Applicant’s claim that his PAS should be declared null and void is hereby rejected.

V. The Applicant complains that there was no rebuttal procedure open to him to which he could have brought his complaints regarding his PAS for the period under review. There is absolutely no evidence available to support this contention. The Tribunal rejects this as it is satisfied that, had the Applicant sought to avail himself of his rights of rebuttal instead of adopting the course chosen by him, a Rebuttal Panel would have been readily provided and made available. The Applicant’s letter to the Respondent of 4 June 1999 would appear to acknowledge that the rebuttal route was open to him had he chosen to pursue it, as he stated:

“The administrative instruction on PAS outlines the steps to be followed when the staff member wishes to submit a rebuttal ... The process described in the administrative instruction refers to the disagreement of the staff member with the performance rating and does not cover the event when the Department does not comply with the procedures set out by the Organization itself”.

Whilst the letter then goes on to express the Applicant’s belief that the UNJSPF had not established the Management Review Committee or the Joint Monitoring Committee, the Applicant did not seek to make the point that no Rebuttal Panel was available. Rather, he expressed the view that he would not wish to pursue that route as he wanted his case to stand or fall on his argument that the PAS was invalid for non-compliance with what he alleged were mandatory procedures. The Tribunal is satisfied that his letter clearly indicates that he never believed that the rebuttal route was unavailable to him but rather that he chose not to travel it. He was entitled to seek what was, in effect, an “all or nothing” remedy but, having done so and having failed to invoke the rebuttal procedure, he cannot expect the JAB or the Tribunal to do the very work which had been designated by the United Nations to be done through the rebuttal system. Where the Organization’s system provides for a specific mechanism to deal with a specific type of issue, it is not open to a staff member to choose to ignore it and to seek to have this very issue dealt with elsewhere instead. A staff member must, in the first instance, invoke the procedure designed and made available to deal with that very type of issue and, having done so, if he feels that his rights were violated or he has other substantive complaint, he may thereafter seek to invoke the JAB and/or the Tribunal as the case may be.

VI. The Applicant makes further submissions regarding the Fund’s decision to modify the regular provisions of the PAS. One of these causes concern to the Tribunal, being the decision that the highest available grade, grade “1”, would not be given to any staff member of the Fund. It is clear that throughout the Organization evaluation was to be upon a grading system which would range from “1” through to “5”. The Tribunal can identify no justification for a decision which would have removed grade “1” from the scoring system. This could have resulted in the violation of rights of such persons as would have been objectively entitled to have been so graded. However, this has no relevance to the Applicant’s case, so it does not in any way violate his rights or give rise to any entitlements on his part to compensation.

VII. It is, in a sense, a misnomer to have described the Applicant's appeal to the JAB or his decision thereafter to invoke the jurisdiction of the Tribunal as being Applications which were *not receivable*. They were receivable as proceedings in which he sought to have his PAS for the period declared null and void. They were not, however, receivable as proceedings in which he could establish the unfairness of the First Appraising Officer's comments or to have them changed. The proper body to receive an application to have had those comments erased or changed would have been the Rebuttal Panel. What the Tribunal finds is that the decision of the UNJSPF to implement ST/AI/1997/8 on a phased basis, with some modification, was not an abuse of authority; that it did not violate any procedural or employment right of the Applicant; and, that it provided no grounds upon which the said PAS should be declared null or void. It is not for the Tribunal to concern itself with matters which might have been of interest to the Rebuttal Panel as the Applicant chose not to travel this route, although in the opinion of the Tribunal it was clearly available to him.

VIII. In view of the foregoing, all claims of the Applicant are hereby rejected.

(Signatures)

Julio Barboza
President

Kevin Haugh
First Vice-President

Brigitte Stern
Second Vice-President

New York, 24 November 2004

Maritza Struyvenberg
Executive Secretary